

IN THE MAGISTRATES' COURT
AT BA
CRIMINAL JURISDICTION

Criminal Case No. 543/2020

BETWEEN: **STATE**

PROSECUTION

AND: **APIMELEKI NAKARAWA**

ACCUSED

Counsel: WCPL 4897 Venu Singh & PC 5647 Pranil Nair for Police
 Prosecution
 Mr. R. Filipe for the Accused.

Date of Trial: 11 September 2024
Date of Judgment: 18 December 2024

JUDGMENT

Introduction

1. Mr. Apimeleki Nakarawa ("the Accused") was charged and produced in Court on 29 September 2020 for 1 count of Indecent Assault contrary to section 212 of the Crimes Act 2009. The particulars of the offence are:

Statement of Offence

Indecent Assault: *Contrary to Section 212(1) of the Crimes Act 2009.*

Particulars of Offence

Apimeleki Nakarawa on the 21st day of May, 2020 at Navatu, Ba in the Western Division unlawfully and indecently assaulted Theresa Ranitu by touching her breast.

2. On 10 November 2020, in the presence of his counsel, the Accused pleaded Not Guilty to the above charge. After subsequent adjournments, the matter was set for Trial.
3. On 11 September 2024, the date of Trial, Prosecution called 3 witnesses and thereafter closed its case. The Court found that there was a case made out against the Accused sufficiently requiring him to make a defence. The procedure under section 179 of the Criminal Procedure Act was explained to the Accused. It was also explained to the Accused that he had a right to remain silent. The Accused chose to give evidence and not call any witnesses.
4. The Accused then gave evidence and thereafter, Defence closed its case. Both Defence and Prosecution presented verbal closing submissions on 19 September 2024.
5. Having considered the evidence of Prosecution and Defence as well as the submissions, I now pronounce my Judgment.

Burden of Proof

6. It is imperative to highlight that as a matter of law, the onus or burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no burden on

an accused to prove his or her innocence as an accused is presumed to be innocent until proven guilty.

7. It is for the prosecution to prove the accused's guilt beyond a reasonable doubt. If there is doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in the court's mind on any of the ingredients or on the evidence led by prosecution, the accused must be found not guilty of the charges and accordingly acquitted.

Summary of Evidence

8. It is expected that to arrive at a proper conclusion, the matter ought to be considered in its logical progression with formulated reasons for the ultimate conclusion with the general rule being that a judgment should set out the relevant events and the material evidence in the correct sequence in narrative form with the identifying number of each pertinent witness being incorporated at the appropriate places – vide *Pal v R* [1974] 20 FLR 1 (17 January 1974) as referred to in *Wang v State* Criminal Petition No. CAV 0013 of 2021 (26 October 2023) and *State v Wang* Criminal Appeal No. HAA 30 of 2019 (19 February 2021).
9. On 21 May 2020 at about 10pm at Navatu, Ba the Complainant was asleep in her room at home when the Accused, who is the her step-father had entered her room, switched on the light and asked her where she had kept his drinks. The Complainant responded for the Accused to ask her mother. The Accused left the Complainant's room and after a while returned to her room to charge his phone. The Accused sat on the Complainant's bed and then lay on her bed. The Accused then touched the Complainant's left breast by rubbing his hand on top of her breast. The Complainant was shocked so she stood up from her bed and went to her neighbour's – Akeneta's house.
10. Akeneta Kamica ('Ms. Kamica'), who was Prosecution's second witness confirmed that the Complainant called her on 21 May 2020 and informed her that she – the Complainant had had a fight with her mother and she wanted to sleep at Ms. Kamica's home. Ms. Kamica stated that she allowed the Complainant to come to her home and when the Complainant came over, she had been in tears and that she had only told Ms. Kamica that she and her mother had had a fight. Ms. Kamica stated that the next morning, the Complainant was nowhere to be seen in her home.
11. Prosecution also relied on the Accused's Caution Interview dated 20 August 2020. The itaukei version of the Caution Interview was tendered as 'PEX1A' whilst the translated version of the Caution Interview was tendered as 'PEX1B'. They led the evidence of former PC Saimoni, who was the interviewing officer. PC Saimoni explained that he had conducted the interview of the Accused and that PC Malakai was also present at the time. He explained that the Accused gave his statement on his own free will and that the Accused signed to confirm this.
12. The Accused strongly denies that he had touched the Complainant's breast. The Accused says that he had entered the Complainant's room to ask her about his drinks. He switched on the light and went to wake her up. He touched her 'vatuvatu' or her shoulder. The Accused stated that the Complainant had been lying on her side and her back was towards him as he was sitting on her bed.
13. The Accused further explained that when he was interviewed that he had been telling the Police Officer in itaukei that he touched the Complainant's shoulder but the Police Officer wrote breast.

Evaluation of Evidence

14. For a proper analysis of the evidence for the offence of Indecent Assault, it is imperative for the Court to turn its mind to the elements of the offending, which are:
 - i. the accused
 - ii. unlawfully and indecently
 - iii. assaulted the Complainant by touching her breast
15. From the outset there is no issue with the identification of the Accused as there is evidence and it had been agreed to by the Accused that on 21 May 2020, he had gone into the Complainant's room whilst she was sleeping.
16. The dispute that arises is what transpired when the Accused entered the Complainant's room. Thus, the Court will need to ascertain whether the Accused had unlawfully and indecently assaulted the Complainant by touching her breast when he entered her room on 21 May 2020.
17. The Accused states that he had merely sat on the Complainant's bed and reached over and touched her shoulder whilst the Complainant maintains that he lay down beside her and then touched her breast.
18. In **State v Prasad** Criminal Case No. HAC 72 of 2021 (20 June 2024) His Lordship Justice Rajasinghe referred to the *Liberato* principle as expounded in **Liberato and Others v The Queen** [1985] HCA 66; 159 CLR 507 at 515 where Brennan J held that:

"When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification."

19. **Prasad** [supra] also made reference to the case of **Naidu v State** [2022] FJCA 166; AAU0158/2016 (24 November 2022) where His Lordship Prematilaka highlighted the importance of modifying the *Liberato* principle and held:

[29] On the other hand Liberato has not uttered the final word on this issue. In Johnson v Western Australia [2008] WASCA 164; (2008) 186 A Crim R 531 at 535 [14]- [15] Wheeler JA identified one possible shortcoming in using Brennan J's statement in Liberato as a template for the direction: a jury may completely reject the accused's evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a 'reasonable doubt' on that issue.

*[30] For that reason, it was usefully held in Anderson [2001] NSWCCA 488; (2001) 127 A Crim R 116 at 121 [26] that **it is preferable that a Liberato direction be framed along the following lines (i) if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must***

acquit; (ii) if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and (iii) if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

20. His Lordship Justice Rajasinghe in *Prasad* [supra] further stated "if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. Even if the Court rejects the Accused version, that does not automatically imply that the Prosecution has established that the Accused is guilty of the crime. The Prosecution must satisfy that it has established, on the evidence accepted by the Court, beyond a reasonable doubt, that the Accused committed these offences as charged in the information".
21. Thus, the Court will need to evaluate the evidence by Prosecution whilst keeping in mind the evidence presented by the Accused insofar as they relate to the issue it is considering. The evidence presented by the parties will be evaluated to determine the testimonial trustworthiness of the evidence which will be done by evaluating the credibility – the correctness or veracity of the evidence and the reliability of evidence – the accuracy of the evidence - vide *State v Prasad* Criminal Case No. HAC 72 of 2021 (20 June 2024). In doing this, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide *State v Moroci* Criminal Case No. HAC 161 of 2023 (26 April 2024)).
22. I will consider Prosecution's case whilst bearing in mind the Accused's evidence. The Complainant in her evidence stated that on 21 May 2020, whilst she was sleeping, the Accused had entered her room twice. The first time was to ask her where his drinks were and the second time when he came into her room to charge his phone and then lay down next to her and touched her breast. The Complainant stated that as soon as the Accused touched her breast, she was shocked so she stood up and left her house to go to her neighbour's house.
23. Prosecution's second witness, Ms. Kamica confirmed that on 21 May 2020 the Complainant had called her and asked her if she could sleep at her home. Ms. Kamica testified that the Complainant had informed her that she had got into a fight with her mother. Ms. Kamica further testified that when the Complainant had come to her house, she had been in tears and only stated that she had fought with her mother.
24. The evidence of the Complainant and Ms. Kamica is only consistent with respect to the Complainant going to Ms. Kamica's home. Ms. Kamica's evidence is that the Complainant had informed her that she had fought with her mother, however, when Prosecution led the evidence of the Complainant, no evidence was led in regard to what the Complainant had told her neighbour when she had gone over. Rather, it was in cross examination that the Complainant stated that she had told Ms. Kamica that she had been sleeping when the Accused entered her room and told Ms. Kamica what the Accused had done.
25. The Court finds that the evidence of the complaint made by the Complainant to her neighbour as stated by the Complainant is inconsistent to the evidence of Ms. Kamica, who was an independent witness in this matter and as such the Complainant's evidence regarding informing Ms. Kamica what the Accused had done is not credible and is therefore, unreliable.

26. On the issue of the alleged indecent assault perpetrated by the Accused, the Court will now turn its mind to the Complainant's evidence.
27. The Complainant's evidence is that the second time the Accused entered her room, he placed his phone on the charger and then lay down and touched her left breast. The Court finds that Prosecution never elicited from the Complainant whether at the time of the Accused allegedly touching her breast, if the Complainant was still lying on her side especially which side she was lying or whether she was lying on her back.
28. Further, Prosecution never elicited any evidence from the Complainant about when the Accused allegedly lay on her bed and touched her breast, whether the Complainant and the Accused had been facing each other or whether the Complainant had her back to the Accused.
29. Regarding the admissions made by the Accused in his Caution Interview, former PC Saimoni in his evidence that was led by Prosecution stated that the Accused had given the answers on his own free will and that he had signed his interview to confirm the same.
30. However, when cross-examined that the Accused had been saying that he touched the left side of the Complainant's shoulder, PC Saimoni stated that the Accused was saying shoulder but was touching the breast. PC Saimoni even demonstrated how the Accused had shown him he had touched the Complainant's shoulder. The demonstration showed that it was above or on top of the chest area.
31. PC Saimoni went on to further state that he explained the difference between shoulder and breast to the Accused and he even demonstrated this as well by touching on top of his shoulder as well as by touching his breast. He explained that he did this as he was confused by what the Accused was saying.
32. Upon perusing the Accused's Caution Interview, from Question and Answer 34-40, the Accused explained how he had gone into the Complainant's room, switched on the lights, asked her about his drinks, put his phone on the charger in her room and sat on her bed. From Question and Answer 41 is when the Accused states in his Caution Interview that he had touched her breast to wake her up.
33. There is nothing in the Accused's Caution Interview that the Accused had been saying shoulder but was touching his breast when he gave his answer. Further, there is nothing to reflect that PC Saimoni had explained and demonstrated to the Accused to clarify the difference between shoulder and breast and that it was only after this explanation and demonstration that the Accused started saying breast.
34. Even when the Accused gave evidence, he had explained that he had been saying shoulder but the Police Officer did not take word for word what he had been saying.
35. Moreover, when questioned by the Court as to what the Accused had been saying in itaukei, PC Saimoni had stated that the Accused had been saying 'dela na sucuna' meaning 'top of her breast'.
36. Considering the evidence of PC Saimoni in conjunction with the Accused's Caution Interview, there is some doubt in the Court's mind regarding the truthfulness of the admissions in the Accused's Caution Interview especially as PC Saimoni had acknowledged that the Accused had been saying he had touched the shoulder of the Complainant.

37. Considering the above in totality, the Court finds that Prosecution has failed to prove beyond a reasonable doubt that the Accused had unlawfully and indecently assaulted the Complainant by touching her breast on 21 May 2020.

Determination

38. I find that Prosecution has failed to discharge its burden in proving all the elements of Indecent Assault beyond reasonable doubt.

39. I, therefore, find the Accused, Apimeleki Nakarawa, not guilty as charged for the offence of Indecent Assault and acquit him forthwith.

40. Any party aggrieved with this decision has 28 days to appeal to the High Court.



N. Mishra
Resident Magistrate

