

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 27 OF 2016**

**BETWEEN:**           **THE STATE**

**AND:**                   **DANIEL BHURRAH**

**Counsel:**       **Ms A Vavadakua for the State**  
                  **Mr V Tuicolo and Ms M Singh for the Accused**

**Date of Hearings:**    **21 – 23 and 26 February 2018**

**Date of Summing Up:** **28 February 2018**

**Date of Judgment:**  **01 March 2018**

**JUDGMENT**

[1]    The Accused is charged with the following offences:

Count 1 -    Indecent assault contrary to section 212 (1) of the  
Crimes Act 2009.

Count 2 -    Sexual assault contrary to section 210 (1) (a) of the  
Crimes Act 2009.

Count 3 -    Rape contrary to section 207 (1) and 2 (a) of the  
Crimes Act 2009.

Alternative Count – Rape contrary to section 207 (1) and 2 (b) of the Crimes Act 2009.

- [2] The offences were allegedly committed on 14 May 2016 at Wainunu, Bua. The same complainant is the subject of all four charges. The only difference between count three and the alternative charge is the mode of penetration. Count three alleges penile penetration. The alternative count alleges digital penetration. The Accused pleaded not guilty to the charges. The trial commenced on 21 February 2018 before three assessors. On 23 February 2018, the evidence was concluded. The Accused did not give evidence. That was his right. He carries no burden to prove anything. The prosecution carries the burden to establish the Accused's guilt beyond a reasonable doubt. On 26 February 2018, both counsel made their closing addresses. On 28 February 2018, the summing up was delivered. After deliberating for one hour, all three assessors expressed unanimous opinions of guilty on counts one, two and three.
- [3] I adjourned overnight to consider my judgment. Under our criminal justice system, the verdict is of the trial judge and not of the assessors. The assessors role is to assist the trial judge to arrive at the verdict of the court by expressing opinions.
- [4] I direct myself in accordance with my summing up. The physical elements of the offences charged are not in dispute. It is not in dispute that on 14 May 2016, the Accused kissed the complainant on the lips, touched her vagina and penetrated her vagina. His defence is that all the sexual acts were consensual. The main issue is whether the complainant freely and voluntarily consented to the undisputed sexual acts and with the mental capacity to consent.
- [5] The complainant is an elderly woman. She was either 70 or 71 years old in 2016. She suffered from stroke about seven years ago and at the time when the sexual acts were committed on her by the Accused, she had not recovered from stroke. She was in a full time care of her daughter when the sexual acts were committed. It is not in dispute that the Accused is her nephew. He calls her 'Aunty'. He lived in the same settlement as her and was a frequent visitor to her home. The day the sexual acts were committed the complainant was alone at home. Her family members had gone to church. The act of kissing was witnessed by the complainant's grand-daughter when

she returned home early from the church. The witness saw the Accused pull the complainant back when she tried to get inside the house after he had kissed her on the lips.

- [6] The complainant gave evidence that she did not consent to any of the sexual acts committed on her by the Accused. She said she did not want the Accused do any of the sexual acts because the Accused was her nephew. During her evidence, she got confused when she was asked whether she liked the sexual acts. At times she said yes and at times she said no.
- [7] Expert evidence was led from Dr Koroivuki who is a qualified government psychiatrist. According to Dr Koroivuki the complainant is likely to be suffering from dementia, a neurological condition, possibly caused by the stroke. Dr Koroivuki said the left side of the complainant's brain is not functioning, which has affected her reasoning process and judgment. She said the complainant did not have the mental capacity to give a free and voluntary consent to the sexual acts committed on her by the Accused.
- [8] I accept Dr Koroivuki's expert opinion that the complainant understood that the sexual acts that occurred were wrong but her ability to reason out what had been done to her was impaired by her mental condition at the time of the incidents.
- [9] I accept the complainant told the truth when she said that she did not consent to the sexual acts, including sexual intercourse. The Accused knew that the complainant's mind was unstable due to her medical condition. He was a relative and lived next to her home. He had been visiting her home and had been talking to her. I am satisfied that the prosecution has proved beyond a reasonable doubt that the complainant had not consented to the sexual acts and that the Accused either knew that the complainant had not consented or was reckless, that is, he realised there was a risk that she was not consenting and carried on anyway when in the circumstances known to him it was unreasonable to do so. I feel sure of the Accused's guilt on counts one, two and three.

[10] Accordingly, the Accused is convicted of counts one, two and three as charged.



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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for State

Office of the Director of Legal Aid Commission for Accused

