

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 143 of 2017**

**STATE**

**V**

**MOTUISELA TAWAKE**

**Counsel** : Ms. P. Lata for the State.  
: Ms. L. Volau for the Accused.

**Dates of Hearing** : 18, 19 and 20 November, 2020

**Closing Speeches** : 23 November, 2020

**Date of Summing Up** : 23 November, 2020

**Date of Judgment** : 27 November, 2020

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**JUDGMENT**

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*(The name of the complainant is suppressed he will be referred to as "PS")*

1. The Director of Public Prosecutions charged the accused by filing the following information:

**COUNT ONE**

***Statement of Offence***

**ASSAULT WITH INTENT TO COMMIT RAPE:** Contrary to section 209 of the Crimes Act 2009.

***Particulars of Offence***

**MOTUISELA TAWAKE** on the 10<sup>th</sup> of July, 2017 at Nadi in the Western Division assaulted “PS” with intent to rape the said “PS”.

**COUNT TWO**

**(Representative Count)**

***Statement of Offence***

**SEXUAL ASSAULT**: Contrary to section 210 (1) (a) and (2) of the Crimes Act 2009.

***Particulars of Offence***

**MOTUISELA TAWAKE** on the 10<sup>th</sup> of July, 2017 at Nadi in the Western Division, unlawfully and indecently assaulted “PS”.

**COUNT THREE**

***Statement of Offence***

**RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

***Particulars of Offence***

**MOTUISELA TAWAKE** on the 10<sup>th</sup> of July, 2017 at Nadi in the Western Division penetrated the anus of “PS” with his penis without his consent.

2. After the prosecution closed its case, this court ruled that the accused had a case to answer in respect of count one assault with intent to commit rape and count three rape. In respect of count two this court had ruled that the accused had no case to answer in respect of the offence of sexual assault but had a case to answer in respect of the lesser offence of indecent assault.
3. The three assessors returned with a majority decision by two is to one that the accused was guilty of one count of assault with intent to commit rape, lesser count of indecent assault and one count of rape.

4. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
5. The prosecution called two witnesses and the defence called the accused. The complainant informed the court that on 9<sup>th</sup> July, 2017 he made plans to go and drink grog at Namotomoto village with some of his friends. At about 11pm the grog finished. The complainant was with Sai, her husband, the accused and some others. Sai is the complainant's distant relative who is also known as Sainiana. It was at Sai's house the complainant had come to know the accused.
6. Thereafter, all of them decided to go and drink alcohol beside Carpenters Hardware shop at Namotomoto. They drank 3 bottles of red wine and a carton of Woodstock beer. From there, the group went to a night club where they drank till 5am then they went to a short cut to Denarau then to Sitikuru Village.
7. By this time, the complainant was left with the accused and two others, when all the drinks finished they started walking back because the accused had told the complainant that he was taking the complainant to where Sai and the others were drinking. After a while the complainant realized that he was alone with the accused, after crossing a drain they were approaching a cassava patch it was here the accused told the complainant to have anal intercourse with him.
8. The complainant refused, the accused then threatened the complainant and punched him three times on his face this made the complainant fall. When the complainant fell down the accused lifted his legs and put it on his shoulders and then after removing the complainant's underwear inserted his penis into the complainant's anus.

9. The accused did this repeatedly, the complainant felt pain he wanted to shout but the accused was biting his lip and had threatened him if he shouted he will kill the complainant. The accused stopped when he ejaculated, the accused and the complainant were in the cassava patch for about 10 minutes. On this day the complainant was wearing a t-shirt and a sulu.
10. The complainant also stated that when the accused was penetrating his penis into his anus he felt pain, was injured and also his stools came out. The accused then left, the complainant was frightened he walked from the cassava patch to Namotomoto Village where Sai lived. He told Sai the accused had raped him, he did not tell her the details.
11. The matter was reported to the police and the complainant was medically examined at the Nadi Hospital.
13. The final prosecution witness Dr. Dharan informed the court on 10<sup>th</sup> July, 2017 she had examined the complainant at the Nadi hospital. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.
14. In this case the doctor had seen a superficial laceration on the anal area of the complainant. The professional opinion of the doctor was that the patient was forced into the sexual act. The doctor stated when there is a sexual intercourse the body is receptive towards it. A laceration will occur if the body is not expecting and a person is forced into the act.
15. Furthermore, the doctor had also observed brutal bite marks on the patient's body, by brutal bite marks she meant teeth marks which was not nice but something bad to see. The doctor had illustrated her findings at appendix 1 of the medical report.

16. On the other hand the accused denied all the allegations raised by the complainant he did what he did with the consent of the complainant. Both had discussed what was to be done, the complainant was taller and bigger than him. The accused does not know why the complainant made those allegations. He did not punch the complainant as alleged.
17. The accused agreed he had made bite marks on the body of the complainant but disagreed those were brutal bite marks. He also denied the injuries and blood noted on the complainant's anus was due to force applied by him. The accused explained at first the complainant had said he had never had anal sex before, however, when he started penetrating both were enjoying it and that is when he fully inserted his penis into the anus of the complainant.
18. When it was suggested that since the complainant had told the accused he had never had anal intercourse before, the accused said he only proceeded to insert his penis since they had discussed about it and that is why the third person who was with them had left.
19. The accused denied committing the offences as alleged by the complainant, the complainant had consented to what he had done that day. The accused agreed when the complainant was flirting with him he assumed the complainant wanted to have sex with him but the complainant did not say that he wanted to have sex.
20. According to the accused he was persuading and asking the complainant to have anal sex with him the complainant eventually agreed, the accused denied he had lied to the complainant that he was taking the complainant to where Sainimere was.
21. Taking into consideration the evidence adduced by the prosecution and the defence I accept the evidence of the complainant as truthful and reliable. He gave a coherent account of what the accused had done to him. Although the complainant was referred to some inconsistencies between his police


statement and his evidence in court I am of the view that the inconsistencies were not significant to adversely affect the reliability of the complainant's evidence.

22. Due to passage of time one cannot be expected to recall and repeat everything he or she had told the police at the time the police statement was recorded. In this case the inconsistencies did not shake the basic version of the complainant's evidence. I have no doubt in my mind that the complainant told the truth in court. The complainant was also able to withstand vigorous cross examination and he was not discredited.
23. The doctor who had examined the complainant within hours of the incidents had explained her medical findings in court. I also accept the professional opinion of the doctor as credible.
24. On the other hand the accused did not tell the truth in court his demeanour was not consistent with his honesty. The accused was taking time to answer questions it was obvious to me that he was taking a cautious approach when questioned by counsel.
25. I accept that the accused had punched the complainant three times, although there were no visible injuries on the face of the complainant from the evidence before this court the absence of any injuries does not mean the complainant was not assaulted by the accused.
26. I also reject the defence assertion that the complainant should have shouted or pushed the accused the circumstances of the complainant was that he was assaulted which led to his fall on the ground and then after his underwear was removed his legs and hands were locked by the accused and that by this time he was feeling weak to resist what was done to him by the accused. I also accept the accused had threatened the complainant not to shout otherwise he will kill the complainant.

27. Moreover, the fact that the accused was persuading the complainant to have anal intercourse showed that the complainant from the very outset was refusing to have intercourse with the accused. If the complainant was a willing partner there was no need for any persuasion by the accused. The accused in his evidence also stated that the complainant did not say that he wanted to have sex.
28. The aggression of the accused on the complainant is supported by the complainant's medical report which was as a result of what the accused had done to the complainant and nothing else. I accept the complainant's evidence that he did not consent to what the accused had done to him that early morning. On the totality of the evidence the accused evidence is not believable.
29. This court is satisfied beyond reasonable doubt that the accused had assaulted the complainant with intent to commit rape on 10<sup>th</sup> July, 2017. The fact that the complainant had stated that the injuries he had suffered on the left side of his face was like a black eye which was not reflected in the medical examination of the complainant does not affect his evidence in this regard. Any slight use of unlawful force on the complainant is tantamount to assault.
30. In respect of the bite marks I accept that the accused had made the brutal bite marks on the body of the complainant. The teeth marks seen by the doctor were not love bites but brutal bite marks on the neck, lower lip and the chest of the complainant which I accept were contrary to decency. This court is satisfied beyond reasonable doubt that the accused had unlawfully and indecently assaulted the complainant by biting his neck, lower lip and chest on 10<sup>th</sup> July, 2017.

31. This court is also satisfied beyond reasonable doubt that the accused had penetrated the anus of the complainant with his penis without the complainant's consent on 10<sup>th</sup> July, 2017. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if he was not consenting at the time.
32. The defence has not been able to create a reasonable doubt in the prosecution case.
33. In view of the above, I accept the majority opinion of the assessors that the accused is guilty of one count of assault with intent to commit rape, one count of indecent assault and one count of rape.
34. I find the accused guilty as mentioned above and I convict him accordingly. As for the second count of sexual assault the accused is acquitted of this offence.
35. This is the judgment of the court.



  
**Sunil Sharma**  
Judge

**At Lautoka**

27 November, 2020

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**