

IN THE HIGH COURT OF FIJI AT LABASA

CASE NO: HAC. 44 of 2020
[CRIMINAL JURISDICTION]

STATE

V

PRASHANT NISCHAL DASS

Counsel : Ms. S. Swastika for the State
Mr. A. Kohli with Ms. S. Naidu for the Accused

Hearing on : 15 - 18 March 2021

Judgment on : 19 March 2021

JUDGMENT

The charges

1. The Director of Public Prosecutions has charged the accused for the following offence as per the Information dated 22/09/20;

Statement of Offence

Rape: contrary to Section 207 (1) and 2 (b) of the Crimes Act, 2009.

Particulars of Offence

PRASHANT NISCHAL DASS on 3 December 2019, at Seaqaqa in the Northern Division, penetrated the vagina of **APIKALI WAQAVONOVONO**, with his fingers, without her consent.

The burden and the standard of proof

2. Section 57 of the Crimes Act 2009 (“Crimes Act”) provides thus;

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

3. Therefore, the prosecution has a legal burden not only of proving every element of each offence, the prosecution also has a legal burden of disproving any matter in relation to which the accused had discharged an evidential burden of proof imposed on the accused.

4. In Blackstone's Criminal Practice 2007, the legal burden is described in the following terms;

"The legal burden is sometimes referred to as the persuasive burden or the risk of non-persuasion, phrases which indicate that a party bearing the legal burden on a fact in issue will lose on that issue if the burden is not discharged to the required standard of proof."

5. Section 58 of the Crimes Act provides that a legal burden on the prosecution must be discharged beyond reasonable doubt. In terms of section 59(7) of the Crimes Act, an evidential burden in relation to a matter means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Admitted facts

6. The following facts are admitted in this case;

- 1) ***THAT*** complainant in this matter is ***APIKALI WAQAVONOVONO*** aged 25 years.
- 2) ***THAT PRASHANT NISCHAL DASS*** is charged with one count of Rape contrary to section 207 (1) and 2 (b) of the Crimes Act 2009.
- 3) ***THAT PRASHANT NISCHAL DASS*** was 23 years old in 2019.
- 4) ***THAT*** the alleged offence happened on the 3rd December 2019 at Naqumu Nursing Station.

- 5) *THAT PRASHANT NISCHAL DASS was an intern-nurse at the time of the alleged offence at Naqumu Nursing Station.*
- 6) *THAT at the time of the alleged incident APIKALI WAQAVONOVONO was 7 months pregnant, i.e. 28 weeks.*
- 7) *THAT on the date of the alleged incident APIKALI WAQAVONOVONO had gone to Naqumu Nursing Station for her ante-natal check-up.*
- 8) *THAT on the date of the alleged incident during the complainant's ante-natal check-up PRASHANT NISCHAL DASS had inserted his fingers inside the complainant's vagina.*

Cases for the prosecution and the defence

7. The prosecution case is that, on 03/12/19, the accused penetrated PW1's vagina with his fingers without her consent. The prosecution submits that the accused had made false and fraudulent representation about the nature or the purpose of inserting his fingers inside PW1's vagina who was 7 months pregnant at the material time and the accused had penetrated PW1's vagina without PW1's consent that was freely and voluntarily given.
8. The accused admits that he did insert his fingers inside PW1's vagina on 03/12/19. However he says that he did it with PW1's consent, after he explained PW1 of the reason why he had to insert his fingers and he said in his evidence that what he did was, being the relieving nurse at the material time at Naqumu Nursing Station he simply performed a vaginal examination to determine whether the baby is in the correct position and two other factors because he could not feel the fetus completely during his external examination.

Summary of the evidence adduced

9. The prosecution called three witnesses and the accused gave evidence in his defence and called one witness.
10. PW1 said in her evidence that, on 03/12/19, she went to the antenatal clinic at Naqumu. At that time she was six months pregnant. She said that the accused who was a nurse told her to go inside the examination room to check her

stomach and he also told her that he will be touching her inside to check on the baby. She went inside the examination room and lay on the bed. The accused then used the machine on her stomach to listen to the heartbeat after requesting her to lift her t-shirt. After that the accused told her that it is his job to touch her and he requested her to remove her undergarments. She had faith in the accused as he was a nurse and she trusted him. After she removed her undergarments, the accused got hold of 'the cream and he used the gloves and touched' her with two fingers. She said that the accused inserted the full length of his fingers inside her vagina for about 20 minutes. She said that the accused was twisting his fingers inside her vagina and he asked her whether it was paining. She told him that it was painful. The accused told her that he will do it slowly until he finishes what he is doing. While he was inserting his fingers, she asked the accused about the progress of the examination and the accused told her that he managed to touch the baby's head and that the baby said 'bula' to her. The accused stopped when the phone in the office rang and he went to answer the phone. She put on her panty and waited for him. The accused came back and told her that the examination is over and told her to get the next clinic date.

11. She said that during the previous clinic, only the heartbeat was checked and there was no touching in the manner she described earlier. After she returned home she was still having doubts on the examination that was performed on her. That is because it was the first time for a nurse to insert the fingers inside her vagina during a clinic. She told her husband about what happened. Finally, it was decided to check with the nurse by the name of Prem (PW2) whether that procedure is normal or not, and to report to police if it is not. She met PW2 at the next clinic date. PW2 asked her husband if they can go inside the room to check the heartbeat of the baby. They went inside and then she was told by PW2 to raise her shirt. PW2 then checked the baby's heartbeat and thereafter told her that that was it. She then asked PW2 whether a nurse is supposed to touch her and PW2 told her that a nurse is not supposed to touch unless there is bleeding or some discharge. Then they informed PW2 about what happened on

the previous occasion and PW2 told them that a nurse is not supposed to do that and that kind of an examination is done only by a doctor at the divisional hospital and not at a nursing station. Then PW2 advised her to write a statement. She then wrote a statement and PW2 handed it over to the Labasa Hospital.

12. During cross-examination, she said that the accused shut the door and closed the curtains in the examination room before she lay on the bed. Being shown the statement she made to police, she admitted that she told the police that the accused took her weight and height and she said that this was done at the accused's office. She was questioned on her not mentioning about the accused checking her height and weight when she was asked about the examinations done inside the accused's office previously. She said that she did mention about the accused checking her clinic card and the height and the weight were recorded whilst checking that clinic card. She said, even though this incident was bothering her, she waited from 03/12/19 to 09/01/20 because she wanted to seek advice from the health centre at Naqumu first and if she would still have doubts then to further inquire from the hospital. She said that PW2 told her to write a statement when she asked him what she should do to make a complaint.
13. When she was asked what she did from 09/01/20 till 06/07/20 as her statement was recorded by the police on 06/07/20, she said that she handed her statement over to PW2 and PW2 told her that he would take it up. She said that during her first pregnancy, a vaginal examination was done only when she was at the labour ward just about to give birth. She said that no vaginal examination was done prior to 03/12/19 in relation to the pregnancy relevant to this case and it was done when she was about to give birth. She agreed that the accused was the only nurse at the health centre at that time. She also said that on 03/12/19 she went to the clinic with her aunt. When it was pointed out that there is no mention about closing the door or curtains in her police statement, she said that she did mention that to the police officers.

14. The second prosecution witness was Prem Pranish Dutt ("PW2"). He said that he is qualified as a 'nurse practitioner' where he had obtained a post graduate diploma in that discipline, but pending his posting he is currently practicing as a registered nurse. He said that the position of nurse practitioner is similar to that of medical officer. He said that he has been in the service as a registered nurse for twelve years. He had also obtained a diploma in nursing from Sangam School of Nursing and thereafter he had undergone various training. In 2019, he was attached to Naqumu Nursing Station as a District Nurse. His responsibilities included carrying out various clinics including antenatal clinic. In 2019, the accused was posted to the same nursing station. He said that he was on leave from 15/11/19 to 15/12/19 and during that period the accused was in-charge of the nursing station.

15. On 09/01/20, he conducted an antenatal mother's clinic. He said that during this clinic, first he has to seek consent from the patients for examination as he is a male nurse. With the consent of the patient, he would then proceed with the clinic where he would take the measurement of blood pressure and weight, testing urine, calculating the age of gestation and performing abdominal palpation. Abdominal palpation is where the mother is requested to lie down and the fetus is examined externally by touching. He would also listen to the fetal heart. The findings are recorded on the antenatal folder. He said that he examined PW1 on 09/01/20. The entries of the clinics in the antenatal case record of PW1 where he had recorded his findings was tendered as PE1. He explained the entries he had made on the last page in the relevant columns under the heading 'progress of pregnancy'. He said the word 'Prespart' found as the heading of one of the columns refers to 'presenting part' and that means the part of the fetus facing downwards. When he checked, PW1's presenting part was the head which is the normal presentation and this is recorded as 'cep' which is the short form for the word 'cephalic'. The next column, 'Station' indicates how far the patient is away from delivery. The next column 'F.H.' stands for 'Fetal Heart' and 'FHH' which is written under that column means

that 'Fetal Heart Heard'. 'FMF' in the 'comments' column stands for 'Fetal Movement Felt' and this information is obtained from the patient.

16. After the examination, when PW1 was informed that the examination is completed, she asked him whether he is supposed to perform a vaginal examination on her. He said 'no' and asked her as to who performed such examination and why. Then PW1 told him that the accused performed a vaginal examination on her on 03/12/19 and that she was advised that she needs to undergo a vaginal examination as a routine for the antenatal clinic. He then informed her that the accused should not have performed a vaginal examination on her. Being asked from him what to do, he advised her to write an explanation and to hand it over to him so that he could handover same to his supervisors. He said that PW1 told him that the accused performed this vaginal examination for 20 to 30 minutes. He said that a vaginal examination is performed when a mother starts to experience labour pains or contractions. At the nursing station a vaginal examination is performed during labour, in consultation with a medical officer.
17. He said that because there was a delay in the response from his supervisors after he handed over his explanation and the explanation by PW1 to them, he reported the matter to the assistant minister of health. Thereafter a team was sent to investigate the incident. Looking at the progress as noted on PE1, he said that no abnormality was deducted in relation to the pregnancy. He also read the examination notes recorded in PE1 by the accused in relation to 03/12/19. He pointed out a number of issues in relation to those entries.
18. During cross-examination he admitted that while he has a diploma in nursing, the accused has a bachelor's degree in nursing. He said that the accused was posted at the Naqumu Nursing Station from 03/11/19 for his public health attachment and stayed with him until he went on leave on 15/11/19. He said that he called the accused on the land phone to discuss about the complaint made by PW1 on 09/01/20. By this time the accused was at the Labasa Health

Centre. He said that the accused told him that he (accused) performed a vaginal examination on PW1, and when asked why, the accused told him that the objective was to check the 'station'. He explained that 'station' means how far it is for the delivery. When it was suggested to him that vaginal examination is one of the procedures to find the 'station', he said that it is the correct procedure only when the mother is in labour and it is not a correct procedure during routine antenatal clinics. When he was asked how to find out the position of the baby 'whether the 'head is down or the legs are down' he said that an abdominal palpation is performed for that purpose during the routine antenatal clinics. He said that if they cannot find out by palpating, they consult the medical officer and if need be the patient would be referred to the divisional hospital for examination such as an ultrasound scan and to be reviewed by an obstetrician. When he was questioned whether the position of the fetus could be detected by inserting the finger inside the vagina whether it is the correct procedure or not, he said that it is possible to detect that by doing that only if the mother has contractions and not during routine antenatal clinics. He clearly said that therefore they would do a vaginal examination only if the mother has contractions. He was questioned about writing to the assistant minister of health regarding this matter bypassing other superior officers in the department and finally it was suggested to him that he wanted to get rid of the accused. In response he said that he did not have any personal grudges with the accused and he did what he did to advocate for PW1.

19. During re-examination he said that during the two weeks the accused and him stayed together before he went on leave, he taught the accused the roles and the responsibilities and the various clinics to be conducted, the days for the clinics to be conducted and how they should be conducted.
20. When asked by the court the reason for vaginal examinations to be done only during contractions, he said that it is to determine the progress of labour. He said he has not done a vaginal examination on a six month pregnant mother when he was asked what deductions can be made by inserting two fingers

inside the vagina when someone is six months pregnant. Following were the subsequent questions;

Q: You examined Apikali on 09/01/20. In your opinion would someone be able to feel the head of the baby by inserting two fingers inside her vagina by 03/12/19?

A: No.

Q: Why?

A: Because the baby is still high and it has not descended.

21. During the questions posed by the defence counsel as questions arising from the questions put to PW2 by court, he agreed that the fetus would move around in the mother's womb and he said that to his knowledge the head could be detected during a vaginal examination, from the 37th week of pregnancy. Answering the question posed by the prosecution, he said that 'baby is still high' means that the baby is still in the uterus and has not descended in the birth canal.

22. The third witness for the prosecution ("PW3") was Mere R. Tikoibua. She said that she is the sub-divisional nurse manager. She is a qualified midwife since 2007 and she has a bachelor's degree in nursing. She said that she started her practice in 1988. As a midwife, one of her roles was to have antenatal clinics. She said that she would perform vaginal examinations when mothers are in labour, in order to assess the progress of labour. She explained how a vaginal examination is done and she said first the consent of the mother should be obtained. She said that it would take 2 - 3 minutes to perform this examination. She did not mention about having to twist the fingers during a vaginal examination. But she said that the fingers are inserted gently. She said that a vaginal examination could be done by a registered nurse especially out in the nursing stations or health centres but when the mother is coming into labour and not otherwise. She said that the protocol or scope of practice on vaginal examinations was given to her before her graduation. She said that in January 2020 she received a call from PW2 informing her that during an antenatal clinic the accused had performed a vaginal examination on a 24 weeks pregnant mother. She was shocked because she is a midwife and she would not have

done any vaginal examination on a pregnant mother at that gestational age. She got really scared when she was told that the duration of this examination had been 20 – 30 minutes. She said that she informed PW2 that the allegation is very serious and she also told PW2 to write a written statement and that she also needs the patient to put it in writing. After she received the documents, she called PW2 and the accused to her office and questioned the accused. The only response of the accused was that he apologized for what he had done.

23. During cross-examination she said that the accused told her that he wanted to know the presentation of the baby by doing the vaginal examination. She said that she told the accused that he had destroyed the trust of the patient. Answering the question posed by the court as to whether it is possible to feel the head of the baby if two fingers are inserted from the vagina when the gestational age is 24 weeks, she said 'not at that age'. Following this question the counsel for the defence asked PW3 *"Are you saying, at that age, no female . . . would a person be able to feel the head?"* and the answer was *"Yes. At that time the uterus will be at the abdominal area. As pregnancy progresses to their late months, it will slowly descend into the pelvic area"*.
24. After the conclusion of the prosecution case, being explained his rights in terms of section 231(2) of Criminal Procedure Act, the accused opted to give evidence and call one witness.
25. The accused said in his evidence that he graduated from Sangam Nursing College in November 2018 and he has a bachelor's degree in nursing. He started his internship at the Labasa Hospital in May, 2019 and then he was posted at Naqumu Health Centre on 03/11/19. He was told to go there because that was his public health attachment. He said that he had not worked in the obstetrics and gynaecology department. He worked together with PW2 until PW2 went on leave and for one month till 16/12/19 he was on his own. From 16/12/19 he worked with PW2 till 03/01/20. One day, when he was working at the Labasa Health Centre, PW3 called him and questioned him in front of

PW2 about him performing a vaginal examination on PW1. He admitted doing a vaginal examination and then he was told that he had breached the code of conduct and was asked to write a statement and to seek an apology in that statement. After submitting his statement, PW3 counseled him saying that a vaginal examination should only be done in the presence of a female nurse. Thereafter he resumed work. The police came to him in July 2020 and then he was charged.

26. He said that he did insert his fingers in PW1's vagina and prior to that he told her that he is going to insert his finger inside her vagina. He told her the reason. Then he said that, first, he did an abdominal palpation, and because he could not feel the fetus, he asked her permission and she said 'yes'. He said that he told her that he is going to do a vaginal examination to check whether the baby is in the correct position or there is any breach or there is a code presenting. He told her this and PW1 consented. Then he did the vaginal examination for five minutes. He said that there was no breach, no code presenting and he also felt the head of the baby. He said that from the time he greeted her at the clinic to the time she put on her clothes and left, PW1 was there for about 20 - 30 minutes. Then he said that he told PW1 that he is going to do a vaginal examination when he could not feel the fetus completely. He said, he went to answer the phone but he was not on the phone for 10 minutes and it was 5 - 6 minutes. He said, when he was doing the vaginal examination on PW1 the door of the room was ajar. He said that he did not receive any call from PW2 regarding this matter.
27. During cross-examination he said that on 03/12/19, PW1 was 7 months pregnant and not 6 months. He agreed that he could feel something though he could not feel the fetus completely. He agreed that he told PW1 that he wants to check the baby's head. When it was suggested that, at 07 months pregnancy the fetus is situated at the upper abdomen, he said "*No, since 7 months is 28 weeks 7 months prematurely deliver*". He later agreed that PW1 was not in premature labour when he examined. When he was questioned on not recording his

finding during the vaginal examination, he said that the call he received when he was examining PW1 was about their monthly report and after that call he came back, took off his glove, threw it in the bin and then told PW1 to dress up and thereafter he was busy with the monthly report and that is the reason he could not record the findings.

28. The second witness for the defence was Dr. Ami Chandra (“DW2”). He said that he graduated in 1984 from the Fiji School of Medicine. He had worked in the government service for 25 years and he had held the positions (among others) of Divisional Medical Officer Northern, Medical Superintendent Labasa Hospital and Director Northern Health Services. He said that he will be shocked if an intern nurse was posted to a rural area without supervision. He said that it is important to conduct a vaginal examination on a patient who had presented herself to a clinic for the first time and there are seven good reasons. But he said that this is normally done by a doctor or a midwife. He said that in this case where the patient had presented to the clinic on 03/12/19 where the gestation is 7 months, a vaginal examination would add no value and it would be irrelevant. According to him, a vaginal examination adds no value and would be irrelevant before 34 weeks of gestation. DW2 said that if the fetus was not completely felt when gestation is 28 weeks, there should be an ultrasound scan done. What is important to note is that, he did not say that vaginal examination was an option if this was the case. He said that, at 7 months pregnancy the accused definitely would not be able to feel the head of the baby by performing a vaginal examination. However, he said that the accused may have felt the lower harder part of the uterus rather than the fetus.

The elements of the offence

29. Section 207 Crimes Act, 2009 (“Crimes Act”) reads thus;

(1) *Any person who rapes another person commits an indictable offence.*

Penalty – Imprisonment for life.

(2) *A person rapes another person if –*

(a) the person has carnal knowledge with or of the other person without the other person’s consent; or

- (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent;*
- (c) . . .*

30. The elements of the offence of rape under section 207(b) of the Crimes Act are as follows;

- a) the accused;
- b) penetrated PW1's vagina with his finger;
- c) without the consent of PW1; and
- d) the accused knew or believed that PW1 was not consenting; or the accused was reckless as to whether or not she was consenting.

31. The first element is concerned with the identity of the accused. This element is not in dispute.

32. The second element involves penetration. This element is not in dispute. It is an admitted fact that the accused inserted his fingers inside PW1's vagina.

33. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated PW1's vagina without her consent.

34. Subsections (1) and (2) of section 206 of the Crimes Act reads thus;

- (1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.*
- (2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained;*
- (3) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained;*
 - a) by force; or*
 - b) by threat or intimidation; or*
 - c) by fear of bodily harm; or*
 - d) by exercise of authority; or*
 - e) by false and fraudulent representations about the nature or purpose of the act; or*

f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

35. In this case the prosecution submits that PW1 did not give her consent freely and voluntarily for the accused to penetrate her vagina due to the fact that the accused made false and fraudulent representation about the purpose of the act.
36. Apart from proving that PW1 did not freely and voluntarily gave her consent for the accused to insert his finger inside her vagina, the prosecution should also prove that, either the accused knew or believed that PW1 was not consenting; or the accused was reckless as to whether or not PW1 was consenting. This is the fourth element of the offence of rape. If the prosecution is able to establish that the accused made false and fraudulent representations about the purpose of his act of penetrating PW1's vagina, then it could be inferred that the accused either knew or believed that PW1 would not consent for his act if not for his false and fraudulent representation and therefore he either knew or believed that PW1 did not give her consent freely and voluntarily for him to penetrate her vagina.

Discussion

37. Given the above discussion, in this case, in order to bring home the charge the prosecution should prove beyond reasonable doubt that;
- a) The accused made a false and fraudulent representation to PW1 about the nature or purpose of penetrating the vagina with his fingers; and
 - b) PW1 did not consent for the accused to insert his fingers inside her vagina or she gave her consent because of the said misrepresentation and therefore her consent was not freely and voluntarily given.

Credibility and the reliability of the prosecution witnesses

38. It was manifestly clear that PW1 did not have any agenda against the accused. After the accused penetrated her vagina, she felt that something was not right. This was her second pregnancy. According to her, during the first pregnancy a

vaginal examination was done only when she was about to give birth. She did not rush into make a complaint against the accused. She waited to have the issue clarified before taking the step to make that complaint. Having clarified with PW2 and then after she complained to PW2 who was in charge of the Naqumu Nursing Station, she waited for PW2 to take necessary steps. It was revealed that there was a delay in dealing with that complaint where PW2 had to ultimately write to the assistant minister of health. That delay would serve as an explanation for the incident to take place on 03/12/19, for PW1 to make her first statement on 09/01/20 and for her police statement to be recorded on 06/07/20. This delay was beyond PW1's control and the said delay does not cast any doubt on the credibility of PW1 as a witness.

39. There was a suggestion that she made this complaint only because PW2 told her that the accused was not supposed to do what he did. In response to this suggestion she said that if PW2 had told her that it was part of the correct procedure, still she would have made some further inquiries. I believe her when she said that she informed her husband on the same day, though the husband was not called as a recent complaint witness. That would be one reason for the husband to accompany PW1 during the next clinic which was on 09/01/20. She was clearly disturbed from what took place on 03/12/19 irrespective of PW2 informing her that it was not proper for the accused to have inserted his fingers inside her vagina during the previous clinic. In my judgment, PW1 did not exaggerate when she gave evidence and she gave clear and truthful answers. There was an instance during her examination in chief where she cried when she recalled the accused telling her that he managed to touch the baby's head and that the baby said 'bula' to her. She said during cross-examination when she was questioned about the above statements made by the accused that, though she was happy at that time and trusted the accused, when she went home and thought about it, she was confused. Therefore, in my assessment her crying during examination in chief as alluded to above was in fact suggestive of the fact that she realized in hindsight that she was misled by the accused during that examination and her crying was involuntary and not a

deliberate act to exaggerate or gain sympathy. It was unfortunate that the learned defence counsel had to unreasonably question her regarding the death of her father simply for him to know how long did she cry over her father's death in the pretense of attacking her credibility. This type of questioning especially of witnesses in sexual offence cases cannot be appreciated.

40. There were also certain questions put to her regarding her memory. Especially when she said during her cross examination that the accused shut the door and closed the curtains, when she was asked whether the accused did any examination when she entered the room and before she lay on the bed. She was questioned whether her memory would be better now or around 06/07/20 which was closer to the incident. This was because, according to the learned defence counsel in her statement recorded by police on 06/07/20, there was no mention about shutting the door or closing the curtains. PW1 however said that she did inform this to the police. This popular assertion that everything should be clear in the mind as soon as the particular incident take place or closer to the incident and every detail about the particular incident should be mentioned in the police statement is in fact not realistic. Firstly, experience shows that it is possible for someone to recall certain details which that person could not recall soon after the incident, when trying to recall the event at a later stage. Secondly, experience also shows that when a police statement is recorded, for so many reasons, it is highly unlikely that all the details a witness would have in his/her memory while the statement is being recorded are captured as it is in the relevant police statement, even if the witness had read back the statement.
41. Therefore, just because a witness comes up with certain details that are not included in the relevant police statement, it would not be appropriate to rush into the conclusion that the witness is lying or making up a story.
42. The other inconsistency that was highlighted by the defence during cross-examination was PW1 not mentioning the fact that her height and weight were recorded by the accused when she was asked about the examinations done

inside the accused's office when she was cross-examined where this was mentioned in her police statement. PW1 did clarify that her height and weight were recorded while checking her clinic card and she did mention about the accused checking her clinic card. So in addition to the fact that there was an explanation for PW1's failure to mention that her height and weight were recorded by the accused, this was not a material inconsistency that would call PW1's credibility into question.

43. All in all, I have found PW1 to be a credible and a reliable witness. Having considered all the evidence adduced in this case including the defence evidence, I accept her account on what took place on 03/12/19 at the Naqumu Nursing Station.
44. PW2 was the Nurse who was in charge of the Naqumu Nursing Station. The accused did not make any allegation against PW2 when he gave evidence. However, suggestions were made by the learned defence counsel during cross-examination to the effect that this charge is brought against the accused because of PW2's instigation and PW2 wanted to get rid of the accused. These suggestions were denied by the relevant prosecution witnesses and therefore, there is no evidence to the effect that PW2 had worked against the accused with any ulterior motive. On the contrary, PW2 clearly explained why he thought it appropriate to take proper steps in relation to the complaint made by PW1 and I find that it was his duty as the nurse in charge of the station where the alleged incident giving rise to the relevant complaint took place, to take necessary steps to see that the said complaint was properly investigated. I found PW2's evidence on the facts to be credible and reliable. His evidence also included opinions based on his experience as a registered nurse for 12 years. In my view, he was competent to provide the said opinion evidence.
45. In my assessment, PW3 was also a credible and a reliable witness. Her testimony also included evidence on facts and opinion evidence. She had started her practice as a nurse in 1988 after obtaining a bachelor's degree in

nursing and she is a qualified midwife since 2007. I found her competent to provide the relevant opinion evidence. It was PW3's decision to assign the accused to be the relieving nurse to cover the period PW2 was on leave. The learned counsel for the defence raised issues during cross-examination regarding this decision to allow the accused to work at the Naqumu Nursing Station without any supervision and also through the evidence of DW2. This issue regarding the decision of PW3 was not a matter that needed adjudication in this criminal trial. However, on the face of it, PW3 provided an acceptable explanation for her decision. Even though DW2 said that he will be shocked if an intern nurse was posted to a rural area without supervision, he was not informed particularly about the circumstances in this case under which the said decision was made, where the accused was supposed to work with PW2 who was a qualified nurse for about two weeks before the accused was allowed to step in as the relieving nurse and that this decision had to be taken due to shortage of staff. Therefore, I find that the relevant evidence of DW2 is not capable of impeaching the credibility of PW3.

46. The learned defence counsel also sought to challenge the reliability of the evidence given by PW3 and also PW2 to the effect that usually vaginal examinations are not performed in antenatal clinics conducted at nursing stations based on the evidence of DW2. However, what DW2 said in his evidence was that it is important to conduct a vaginal examination on a patient who had presented herself at a clinic for the first time for seven good reasons. DW2 did not say that this was a mandatory procedure. DW2 also said that this vaginal examination referred to by him is usually done by a doctor or a midwife. This evidence of DW2 is not inconsistent with the evidence of PW2 and PW3. Thus, I find that the credibility or the reliability of PW2 and PW3 were not disturbed given the evidence of DW2.
47. I also noted that, during cross-examination of PW3, the answer she gave when she was questioned about PW2 raising issues with her on allowing the accused to work unsupervised, appeared as if she was denying the fact that PW2 raised

such concerns. However, when PW3 was questioned further by the learned defence counsel in this same line, it was clear that in fact there was no material inconsistency between the evidence given by PW2 and by PW3 in that regard.

48. All in all, I find PW3 to be a credible and a reliable witness.

Assessment of the defence case

49. First I would comment on DW2. DW2 was a medical doctor with vast experience who had been in public service for 25 years and is engaged in private practice since 2009. However, he said he was a general practitioner and it was noted that he was not specialized in the discipline of obstetrics and gynaecology. Nevertheless, he presented himself as a credible and a reliable witness. What is important to note is that he clearly said the accused could not have touched the baby's head by inserting his fingers inside PW1's vagina whereas, up to that point, the position of the defence was that the accused did touch the baby's head as it was noted from the line of questioning during cross-examination, and as claimed by the accused in his evidence.

50. With regard to the accused's evidence, the account given by the accused was not consistent with the accounts of the prosecution witnesses as it was expected to be. According to the evidence given by the accused, the sequence of the relevant events were as follows;

- a) The accused performed an abdominal palpation on PW1;
- b) He could not feel the fetus completely;
- c) He told PW1 that he is going to do a vaginal examination to check whether the baby is in the correct position or there is any breach or there is a code presenting and he asked her permission;
- d) PW1 consented;
- e) He did the vaginal examination for 5 minutes;
- f) He concluded that there was no breach, no code presenting and he also felt the head of the baby;
- g) He left the examination room to answer a phone call;
- h) He was on the phone for about 5 – 6 minutes;
- i) He came back, removed and threw his glove in the bin;

j) He told PW1 to dress up and he went to the nurses' cleaning room.

51. The sequence of events according to the defence at the time when PW1 was cross-examined are revealed from the following questions and answers;

Q: Then you yourself went and lay on the bed and you lifted your round neck t-shirt?

A: He told me to lie down and lift up my t-shirt.

Q: On previous occasions you have been to clinics you were made to lie down on the bed?

A: Yes.

Q: This time too, he wanted to check if the heartbeat was okay, that is what he told you?

A: Yes.

Q: He then used that machine, and examined your stomach for 2 – 3 minutes?

A: Yes.

Q: After doing that, he asked you to remove your panty for him to . . . as he needs to touch the baby?

A: Yes. He told me that and also he stated that that is part of his responsibility as a nurse.

Q: You removed your Sulu, basketball shorts and then you removed your panty?

A: Yes.

Q: Then you saw him that he is wearing a glove on his right hand and he was putting white cream on the glove?

A: Yes.

Q: Then you saw him using his two fingers and he said he was going to insert and feel the baby, correct?

A: Yes.

Q: He said to tell him if it was paining?

A: Yes.

...

52. The above line of questioning doesn't suggest that the accused explained to PW1 the reason for him to insert his fingers inside PW1's vagina and that PW1's express consent was obtained to insert his fingers inside her vagina. This line of questioning is in fact consistent with the PW1's version and not the accused's version.

53. More importantly, according to the accused he had proceeded to insert the fingers soon as the fetal heartbeat was checked using the machine. No suggestion was made to PW1 that the accused had to insert his fingers inside the vagina because he could not feel the fetus completely as the accused said in

his evidence. Not only to PW1, this suggestion was not clearly put to PW2 or PW3 who could have explained whether it was required or for that matter whether it is possible, to feel the complete fetus upon an external examination by abdominal palpation. When PW2 was cross-examined, he said that when he spoke to the accused on the phone to question about the incident in question the accused told him that he performed a vaginal examination to check the 'station'. The accused in his evidence denied having a conversation with PW2 on the phone regarding this matter. Later PW2 was questioned on whether performing a vaginal examination is the correct procedure to find out the 'station'. However, when PW3 was cross-examined it was suggested for the first time that the accused had told her that the reason the accused wanted to perform a vaginal examination was because when he was doing the external examination on the stomach he could not 'feel properly'. Still, it was not put to PW3 about the accused not being able to feel the 'fetus completely'. But PW3 said that the reason the accused gave her was that he wanted to find out whether it was the head that was presenting.

54. Therefore, the defence clearly did not afford the prosecution witnesses an opportunity to comment on the accused's evidence to the effect that the accused could not feel the fetus completely and that is why he performed the vaginal examination on PW1. Though this may amount to a breach of the popular rule that was established in the case of *Browne v Dunn* (1894) 6 R. 67, H.L, this being a criminal trial, the said evidence of the accused would not be excluded, but, this failure would be relevant in determining the weight to be given to this evidence introduced by the accused in his testimony, for the first time [see *Gaunavinaka v State* [2017] FJHC 425; HAA 07 of 2017 (13 June 2017)].
55. Now I would turn to PE1. According to the accused, he had to perform the vaginal examination because he could not feel the fetus completely. This evidence suggests that PW1 had presented herself with an anomaly requiring the accused to conduct this special and invasive examination. But there is no mention in PE1 by the accused regarding this anomaly he noted. One of his

reasons to carry out this vaginal examination was to check whether the baby was in the correct position. He had written '*Cep*' in PE1 though not in the right column, indicating that the head was in the correct position. If he arrived at this conclusion by doing the vaginal examination as claimed by him, can his version that he totally overlooked to record the fact that he carried out a vaginal examination because he was busy with the monthly report be accepted as true? If he could write down the entry on the position of the head, why couldn't he also mention the fact that he conducted a vaginal examination?

56. He further said that he also wanted to find out whether there is a breach or there is a code presenting. But in PE1 he had only written '*Cep*' to indicate that the head was in the right position. If he found the time to write the entry regarding the position of the head, how come he did not have time to write down the other two conclusions? Was he telling the truth that the reason he failed to mention in PE1 about the vaginal examination was because he was caught up with the monthly report?
57. It was manifestly clear that the accused during his evidence wanted this court to believe that he in fact touched the baby's head during what he referred to as his vaginal examination. But DW2 said that the accused may have touched the harder part of the uterus and definitely not the head of PW1's baby who was 7 months pregnant at the time. PW2 and PW3 also gave evidence to the effect that it would not have been possible to touch the head of the baby by inserting fingers inside PW1's vagina on 03/12/19 when the gestation was 24 weeks. The fact that it would be possible to touch the head of a fetus by inserting fingers inside the vagina even when the mother is 07 months pregnant appears to be a basic fact that is ought to be known by nurses or midwives who are dealing with pregnant mothers.
58. The accused has a bachelor's degree in nursing. It is pertinent to note that the accused continued to work even after this incident and after he was questioned

by PW3 on the incident. Even with some difficulty if it is accepted that the accused was ignorant of the fact that the head of the fetus would not descend to the birth canal of a 7 months pregnant mother who is not undergoing premature labour to make it possible for the head of the fetus to be felt by inserting two fingers inside the vagina even after the accused obtaining a bachelor's degree in nursing from Sangam Nursing College, it is difficult to accept that the accused did not come to know of this fact by the time he gave evidence in this case. Yet, when giving evidence, the accused very confidently and firmly said that he touched the head of the baby. This conduct of the accused tend to call into question the credibility of the accused as a witness.

59. Next question that is worth deliberating on is, why did the accused leave PW1 with her panty removed and without telling her that the examination is complete to answer the phone call? It is clear that according to the accused, he had not completed the examination by the time he left to answer this phone call. This is because, firstly, he did not inform PW1 that the examination was completed before he leave and secondly, he himself said during cross-examination that his glove was still on even when he came back after answering the phone call. So then how can the accused say that he came to the conclusions he mentioned during his evidence by performing the vaginal examination? If he had come to those conclusions (which were the ones he was expected to reach through his examination) by the time he left to answer the phone call, he would have informed PW1 that the examination is over and she can get dressed and above all, he would have removed his glove before leaving the examination room. He did not do that. Therefore, the reasonable inference given his evidence is that he had not arrived at those conclusions by the time he left the examination room to answer the phone. After he came back, he did not do any further examination. If that is the case, when did he arrive at those conclusions or how did he arrive at those conclusions without completing his examination?

60. This conduct of the accused of leaving PW1 in the middle of what he calls a vaginal examination in fact suggests that the accused did not take that examination seriously and he knew that conducting a vaginal examination added no value and was irrelevant as DW2 said in his evidence. If he honestly believed at that time that he was doing an examination which was necessary and important, it cannot be expected of him to leave the room suddenly in the middle of that examination and then for him not to record the fact that he had to perform a vaginal examination because of the anomaly he noted (according to him) during his external examination.
61. It is pertinent to note that, according to PW1's evidence, the accused told her that he will touch her inside to check the baby and that she should remove her panty before she went inside the examination room. This evidence which was not challenged during cross-examination clearly suggests that the accused decided to conduct what he was referring to as a vaginal examination well before PW1 entered the examination room and this evidence also contradicts his version that the decision to conduct this particular examination was taken while PW1 was inside the examination room and after he could not feel the complete fetus.
62. In view of the foregoing discussion and the fact that I have found PW1 to be a credible and a reliable witness where the accused's version is not consistent with the version of PW1, I find that the evidence given by the accused in relation to the facts in issue in this case was not credible and reliable.

Was there a false and fraudulent representation about the nature or purpose of the act and did PW1 give her consent?

63. According to the evidence of PW1 which I consider as truthful and reliable, the accused simply informed her that he will touch her inside and she should remove her panty, before going in to the examination room and then at the examination room after listening to the heartbeat by using the machine on her

stomach, the accused requested her to remove her undergarments after telling her that it is his job as a nurse to touch her. After she removed her undergarments, he then inserted two fingers inside her vagina. This evidence does not indicate that the accused at any time obtain the consent of the PW1 to insert his fingers inside her vagina. He had just informed PW1 what he would be doing and PW1 had trusted the accused and she had complied. Simply allowing her vagina to be penetrated by the accused does not constitute consent on the part of PW1 for that penetration.

64. On the other hand, PW1 allowed the accused to penetrate her because the accused told her and made her believe that it was his job as a nurse to touch her. PW2 and PW3 clearly explained that being a nurse in itself does not give the right to perform procedures on patients and nurses need to obtain consent of patients before conducting such invasive procedures. Therefore, this was a false representation by the accused about the purpose of the act of penetration and because it was intended by this representation to deceive PW1 into allowing her vagina to be penetrated by the accused's fingers, this representation was also fraudulent. Moreover, in view of all the evidence presented in this case and the previous discussions, I find that the accused very well knew that he would not be able to touch the baby's head by inserting two of his fingers inside PW1's vagina and he knew that he did not touch the head when he performed the penetration. Yet, when PW1 asked about the progress, he told her that he managed to touch the baby's head and that the baby said 'bula'. This conduct of the accused further reinforces the fact that the accused had the intention to deceive PW1. Because of this false and fraudulent representation, PW1 allowed her vagina to be penetrated by the accused with two fingers. Thus, PW1 has not freely and voluntarily consented to the act of penetration.
65. PW1 said that the accused penetrated her vagina for 20 minutes. This evidence does not necessarily mean that the duration of the penetration was exactly 20 minutes. A lay person cannot be expected to give the exact duration of an

incident. It was clear from the evidence led that the duration of the penetration was definitely more than the expected duration of a proper vaginal examination.

66. The learned defence counsel argued that the relevant act was not done for the purpose of sexual desire or for sexual gratification and therefore the offence of rape is not established by the facts of this case. In relation to this argument, first, it should be noted that there is no burden on the prosecution to prove that the accused performed the penetration in question for the purpose of sexual desire or sexual gratification to bring home a rape charge. There can be cases where there would be no indication that the accused committed the offence of rape or performed the act of penetration with a sexual desire or with the objective of sexual gratification, but as an expression of his ego and power over the victim or simply to humiliate the victim.

67. However, the offence of rape is listed in the Crimes Act under sexual offences, and it is in fact the first offence so listed. Therefore the offence of rape in my view should have a sexual connotation. In fact when the definition provided for the offence of rape is taken into account, and given the different acts that would fall within that definition, it is noted that in every such act, one of the organs that is involved in the penetration, either of the victim or of the accused, should be a sexual organ for the offence of rape to be constituted. That is, either the organ that was penetrated or the organ that is used to perform the act of penetration should necessarily be a sexual organ. Certainly, the accused should be conscious of the involvement of the relevant sexual organ in the act of penetration in question. For example, though penetrating the mouth of a person with a finger does not amount to rape, penetrating the mouth with the penis does amount to rape. Mouth is not considered a sexual organ and therefore, when it is penetrated by a finger which is not a sexual organ, that act does not constitute rape. But when the mouth is penetrated with the penis which is considered a sexual organ, that act constitutes rape. There is a sexual connotation in the act of penetrating the mouth with the penis because a penis


is a sexual organ and there is no sexual connotation in penetrating the mouth with a finger because there is no sexual organ involved. In this case, the organ that was penetrated with the fingers is the vagina of PW1 which is a sexual organ and there is a sexual connotation in this act notwithstanding the desire or the objective the accused.

68. In the circumstances I am satisfied beyond reasonable doubt that the penetration of PW1's vagina was performed by the accused without PW1's consent and I find that the prosecution has established the offence of rape as charged beyond reasonable doubt.

Conclusion

69. In view of the foregoing, I find the accused guilty of the offence of rape contrary to section 207 of the Crimes Act as charged.
70. Thus, the accused is hereby convicted of the offence of rape as charged.




Vincent S. Perera
JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State
Kohli & Singh for the Accused