

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 211 of 2019

STATE

V

PARBIND CHAND

Counsel : Ms. Prenika Lata for the State
Ms. Salote Veitokiyaki with Ms. Manisha Devi for the Accused

Dates of Trial : 19, 21, 22, 25 & 26 April 2022

Closing Submissions : 28 April 2022

Judgment : 9 May 2022

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "PPK".

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused above-named is charged with the following offences:

COUNT 1

Statement of Offence (a)

COMMON ASSAULT: Contrary to Section 274 (1) of the Crimes Act.

Particulars of Offence (b)

PARBIND CHAND, on the 7th day of April 2017, at Nadi, in the Western Division, unlawfully assaulted **PPK** by slapping her.

COUNT 2

Statement of Offence (a)

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act.

Particulars of Offence (b)

PARBIND CHAND, on the 7th day of April 2017, at Nadi, in the Western Division, unlawfully and indecently assaulted **PPK** by kissing her on her lips and sucking her breast.

COUNT 3

Statement of Offence (a)

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act.

Particulars of Offence (b)

PARBIND CHAND, on the 8th day of April 2017, at Nadi, in the Western Division, unlawfully and indecently assaulted **PPK** by kissing her and sucking her breast.

COUNT 4

Statement of Offence (a)

RAPE: Contrary to Section 207 (1) & (2) (b) of the Crimes Act.

Particulars of Offence (b)

PARBIND CHAND, on the 8th day of April 2017, at Nadi, in the Western Division, penetrated the vagina of **PPK**, with his fingers without her consent.

- [2] The accused pleaded not guilty to the four charges and the ensuing trial was held over 5 days. Thereafter, the Learned Counsel for the Defence and State made their closing submissions.

The Burden of Proof and the Standard of Proof

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(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) In this Decree (Act)—

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

Legal Provisions and the Elements of the Offences

- [5] As could be observed the accused is charged with one count of Common Assault, contrary to Section 274 of the Crimes Act; two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act; and one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act.
- [6] In terms of Section 274 of the Crimes Act "A person commits a summary offence if he or she unlawfully assaults another person."
- [7] In order to prove the offence of Common Assault, the prosecution must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this instance the 7 April 2017);
 - (iii) At Nadi, in the Western Division;
 - (iv) Unlawfully assaulted PPK, the complainant, by slapping her.
- [8] To further elaborate upon these elements. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [9] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[10] The fourth element relates to the actual assault. The word “unlawfully” simply means without lawful excuse. The prosecution should prove beyond any reasonable doubt that the accused unlawfully assaulted the complainant by slapping her.

[11] The second and third counts against the accused are charges of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The offence of Sexual Assault is defined in Section 210 (1) of the Crimes Act as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person; or

(b)

[12] Therefore, in order to prove the second count of Sexual Assault, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance 7 April 2017);
- (iii) At Nadi, in the Western Division;
- (iv) Unlawfully and indecently assaulted PPK, the complainant, by kissing her on her lips and sucking her breast.

[13] Similarly, in order to prove the third count of Sexual Assault, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance 8 April 2017);
- (iii) At Nadi, in the Western Division;
- (iv) Unlawfully and indecently assaulted PPK, the complainant, by kissing her and sucking her breast.

[14] To further elaborate upon these elements in relation to counts 2 and 3. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[15] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[16] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for Court to consider and decide whether the kissing the complainant on her lips and sucking her breast (In Count 2) and kissing the complainant and sucking her breast (In Count 3) by the accused, is an indecent act and thereby amounts to Sexual Assault.

[17] The fourth count against the accused is a charge of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act.

[18] Section 207(1) of the Crimes Act reads as follows:

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

[19] Section 207(2) of the Crimes Act is reproduced below:

(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; or

(c) the person penetrates the mouth of the other person to any extent with the person’s penis without the other person’s consent.

[20] Section 207 (2) (b) makes reference to a person penetrating 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. In the instant case, the accused has been charged in count 4, for penetrating the vagina of the complainant with his fingers.

[21] Therefore, in order to prove the fourth count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

(i) The accused;

- (ii) On the specified day (in this instance the 8 April 2017);
- (iii) At Nadi, in the Western Division;
- (iv) Penetrated the vagina of the complainant PPK, with his fingers;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[22] To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offence.

[23] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[24] The fourth element involves the penetration of the complainant's vagina, with the accused's fingers. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his fingers to any extent.

[25] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his fingers, without her consent.

[26] It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

- (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.

[27] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his fingers, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[28] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 17 years at the time of the alleged incident, and therefore, she had the mental capacity to give consent. [Her date of birth being 22 February 2000].

The Agreed Facts

[29] Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), deals with "Admission of facts". The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

[30] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts”:

1. The complainant is PPK, unemployed of Saweni, Lautoka. She was 17 years old at the time of alleged offence.
2. The accused is Parbind Chand, bus driver of Natova, Sabeto. He was 49 years old at the time of the alleged offence.
3. The complainant is the niece of the accused.
4. The complainant’s father namely Pradeep Kumar made arrangements with the accused for the complainant to stay at his place and attend Nadi Technical College in January 2017.
5. The complainant used to sleep in the sitting room of the accused.
6. On the 7th of April 2017, at around 11.00 p.m. the accused was drinking beer in the sitting room and the complainant was also in the sitting room.

[31] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

Case for the Prosecution

[32] The prosecution, in support of their case, called the complainant (PPK), and her mother, Lalini Nita Chand.

[33] Evidence of the complainant PPK

- (i) *The complainant’s evidence was recorded over a period of 2 days. Her evidence was recorded in a ‘closed court’ and a screen was placed so that the complainant could not see the accused. Court also permitted a Counsellor from the Fiji Women’s Crisis Centre (FWCC) to sit beside the complainant as a ‘support person’, during the time her evidence was recorded.*
- (ii) *The complainant testified that she is currently 22 years old. She said that her date of birth is 22 February 2000. She is residing at Veiseisei Bypass, Lautoka with her mother, brother and grandmother. Her mother’s name is Lalini Nita Chand. Her brother’s name is Prenal Pretesh Kumar.*
- (iii) *The witness testified that in January 2017, she was staying in Sabeto, in the house of her aunty and uncle. She named her aunty as Reena Kumari and uncle*

as Parbind Chand, the accused in this case. Her uncle Parbind Chand is her father's sister's husband. The others staying in the house were her cousin brother (uncle's son), cousin brother's wife and their 2 kids.

- (iv) The complainant said that she was staying in Sabeto since her father had wanted her to go to Technical College, Nadi Campus, from there. At the time, her father (Pradeep Kumar) was staying in Sigatoka in his own house.
- (v) She went on to describe the layout of the house in Sabeto and also drew a diagram of the house for the benefit of Court.
- (vi) The witness testified that she used to sleep in the sitting room – she was sleeping on a mattress on the floor. Her uncle and aunty used to sleep in their bedroom, while her cousin brother, sister-in-law and kids used to sleep in the second room – Bhabhi's room.
- (vii) The witness said that she stayed in the house of her uncle and aunty from January to April 2017. She said: "After April 2017, I went back to Veiseisei Bypass in Lautoka. I went back because this incident happened."
- (viii) When asked to explain which incident and what happened, the witness said: "On 7 April 2017 (which was a Friday)... My uncle was drinking beer. He was sitting on the chair. Then my aunty went to have a bath. My uncle he came and he sit beside me down below. I was sleeping. He woke me up. Then he offered me a drink. He asked me you and I drink – drink beer. I said no. Then he just grabbed both my hands and made me stand up and forcefully wanted to kiss me but I pushed him away. Then he just slapped me on my left cheek. I just fell on the ground – on the mattress. I started crying. He tried to make me stop crying and he said if you want anything such as a recharge card I will get it for you.....I was still crying and then my aunt went to the room from the bathroom. She didn't see what was happening she just went past. She went to her room. She went and slept."
- (ix) When asked as to what time in the day this happened she said it was 11.00 in the night.
- (x) When asked what happened after that the complainant further testified: "Aunty went to sleep. Again uncle came and woke me up and then forcefully he twisted my hand at the back and kissed me on my lips. He was holding my hand so I couldn't do anything. After that he opened my zip of the dress, which had the opening in front on the side. Like you pull it down in front. He pulled my dress, pulled my bra – with one hand he was holding my hand and the other one he covered my mouth. Then he told me not to shout. He pulled my bra and started sucking my breast. I was still crying but I couldn't do anything."
- (xi) The complainant said that all this happened in the sitting room. At the time her aunt was sleeping in her room, while her cousin-brother and his wife were in their room sleeping. After her uncle had sucked her breast he left. He had gone to his room.
- (xii) The witness said that the whole night she remained awake. She went to the washroom and was still crying.

- (xiii) Thereafter, the witness testified to the incidents which took place on 8 April 2017 (which was a Saturday). She said that her aunty wanted to send her to the market with her uncle. She had told her aunty she didn't want to go. However, her aunty had told her that there is a lot of stuff to get from the market to just go and get it. Then she had gone with her uncle.
- (xiv) After marketing her uncle had bought her sausage and chips. Then they were returning home in her uncle's car. She was seated at the back (seat) in the middle, while her uncle was driving. They were travelling on the Nadi back road. Near a white building and a tree her uncle had stopped the car. He had told her to eat the food and not to tell her aunty because she will ask for her share. She had eaten the food. She had offered her uncle but he had said no he won't eat.
- (xv) The following questions were then asked from the witness and she answered as follows:

Q. So what happened when you finished eating?

A. Then he asked me 'can I touch you'?

Q. What was your response?

A. No.

Q. And then what did your uncle do?

A. He told me 'girls don't get ashamed so you don't.'

Q. And what did you do when your uncle said that to you?

A. I didn't say anything.

Q. And what was he saying don't be shy of what?

A. Like I want to touch you, don't feel shy. All girls do that.

.....

Q. So what happened next can you tell?

A. After that uncle he pulled his seat back and put it down. I don't know why he did that.

Q. What happened when he put his seat down at the back?

A. He said why you not listening to me you talk a lot.

Q. What happened next?

A. Then he pulled me in front, he pulled both my hands. The way it was last time again he forcefully kissed me. I couldn't do much – after that he opened my zip. I was wearing a black dress. The vehicles were going past but he told me if I shout 'I will hang myself'.....Then he opened my zip at

the back (the witness demonstrated how this happened). Then he pulled the dress. Again he pulled the bra and sucked my breast.

Q. What did you do when he was doing this?

A. I couldn't do anything, with one hand he was holding my hands and with the other he was opening the zip. After sucking my breast, he put his hand in my panty. He put his middle finger inside my vagina.....inside my panty in my vagina.

Q. And what was your reaction?

A. I told him it's painful but he still kept on doing it.

Q. For how long did he do that?

A. It was like 4 to 6 minutes.

(xvi) The complainant said that her aunty had called and her uncle's phone started ringing. When he pulled out his finger – the middle finger had blood on it. Her aunty had asked where they were and why it is taking so long. Her uncle had said we are just on our way to home.

(xvii) The witness testified that this incident happened around 8.30 to 8.45 in the morning. They had left home around 8.00 in the morning, and shopping had taken about 20 minutes. They had reached back home around 10.00 a.m.

(xviii) When asked how long they were (stopped) in the car at the Nadi back road, the witness said that altogether it was about half an hour, including the time she was eating which was about 10 minutes. Later the witness clarified that the incident would have taken place between 8.45 and 9.15 in the morning.

(xix) After reaching Sabeto the witness said that she took out the vegetables from the car and started cleaning them. After cleaning the vegetables she had told her aunty: "I am feeling sleepy can I sleep for a while? – Because I couldn't face anyone".

(xx) The witness said that she had then called her mother but does not recall when that was. She had told her mother that she wants to come home, but her father was not allowing. She explained that her father did not want her to go back home to her mum because once she goes home she wouldn't want to come back.

(xxi) When asked as to whether she told anyone at Sabeto as to what had happened to her, the complainant said that on Saturday morning she had told her bhabhi (her sister-in-law). Her sister-in-law had told her to inform her mum.

(xxii) The witness testified that whilst staying at her uncle's place she did not have any issues with any of the family members. She said it was a good relationship with the family members. Everybody used to like her and when going somewhere they will be taking her with them.

- (xxiii) *The complainant said that when she went home on 17 April 2017, she had told her mum about what had happened. Her mum had said to report to the police. When asked to explain what she had told her mum: "I told mum on Friday uncle came sat down, he pulled my zip, pulled my dress, my bra. He did same thing I mentioned kissed and sucked my breast. And then on Saturday we went to town. When we were coming back he kissed, he sucked my breast and put in his finger".*
- (xxiv) *The witness said that thereafter, her mother had taken her to the police station to report the matter. After reporting the matter she had been taken for medical examination.*
- (xxv) *The complainant identified her uncle as the accused in the dock.*
- (xxvi) *The witness said that at the time of this incident, she was 17 years of age. She testified that her father had passed away about two years ago.*
- (xxvii) *The complainant explained as to how exactly the incident in the car had taken place and how her uncle, who was in the driving seat, had reached her. The witness had been seated in the middle of the back seat. Her uncle had pulled his seat to the back and pulled the seat down/tilted the seat backwards. He had been leaning on the seat. She said: "He almost came near me". The witness demonstrated in Court as to how this took place.*
- (xxviii) *When asked as to how the accused had reached out to her, the witness said: "I am sitting facing forward. When he held my hand he pulled me in front. When he pulled my hand then I went in front a bit and then he kissed me."*
- (xxix) *The following further questions were then asked from the witness and she answered as follows:*
- Q. *How did he reach to your zip?*
- A. *He turned upside down on the seat facing towards me. So both of us were facing each other.*
- Q. *So how did he reach to your dress?*
- A. *He came closer to me, as his seat, after he tilted it, it almost landed on my seat.*
- Q. *How did he reach out to your zip?*
- A. *With his hand he opened my zip. He leaned towards me. He pulled my dress. He opened my dress sideways. He opened the zip and pulled the dress sideways.*
- Q. *Then?*
- A. *Then he removed my bra from one side and then sucked my breast.*
- Q. *All this time he was leaning towards you and doing all this?*
- A. *Yes*

Q. *And he was able to reach you from the position he was sitting?*

A. *Yes.*

Q. *How did he reach out to you when he inserted his finger into your vagina?*

A. *I didn't close the zip of my dress. I just put it on the other side-like through it. And then he put his finger from the bottom of the dress.*

Q. *How close was his body to your body?*

A. *It was this close (the witness demonstrated how close the accused was at the time). As he was almost sleeping on the driver's seat.*

Q. *You were still sitting in the middle at the back seat?*

A. *Yes.*

Q. *He was able to reach out to you using his hands from where you were seated?*

A. *Yes.*

(xxx) *The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant, totally denying that any of the incidents took place on 7 April 2017 or 8 April 2017 as testified to by her.*

(xxxi) *It was suggested to the witness that during the time she was staying at the accused's house in 2017, her aunt was always sleeping with her in the sitting room. The witness denied this suggestion and said: "I was always sleeping in the sitting room, but I was sleeping alone".*

(xxxii) *It was suggested to the complainant that on 7 April 2017, her uncle and her cousin brother were drinking beer in the sitting room. The witness denied this and said that on that day her uncle was drinking alone. It was also put to the witness that while her uncle and brother were drinking, other family members were also present. The witness rejected this suggestion and said that only her uncle was drinking, while everybody else went to sleep.*

(xxxiii) *It was further suggested to the witness that on 7 April 2017, her aunt went for her bath at 9.00 p.m. (and not at 11.00 p.m.), while all the family members were still sitting in the sitting room. The witness said that her aunt takes her bath at 11.00 p.m. every day, and that she did the same even on 7 April 2017. She said at 9.00 p.m. her aunt was washing dishes.*

(xxxiv) *It was suggested to the complainant during her cross-examination that on 8 April 2017, she did not tell anything to her sister in law (Bhabhi), about what the accused had done to her the night before. The witness reiterated that she did inform her sister in law about it and that her sister in law had told her to report the incident to her mother.*

(xxxv) *It was also suggested to the complainant that at no time has the accused person done shopping with her while she was staying in Sabeto, from January*

to April 2017, and furthermore, that she did not go for shopping with the accused on 8 April 2017. The witness firmly stated that on 8 April 2017, she went to do shopping with the accused.

(xxxvi) The witness agreed that soon after the alleged incident, she did not complain to her teachers or to the police about the incident. She explained that she was ashamed and afraid too (at the time)-that's why she didn't tell anyone.

(xxxvii) The witness was questioned about the statement she made to the police, on 19 April 2017, which was nearly two weeks after the alleged incident. Furthermore, she agreed that she had made a second statement to the police on 7 December 2018, which was nearly one year and 8 months after the incidents. As to the making of the second statement she said: "The Police (Officer) came to me and he was asking me if I would add to my statement anything I have missed".

(xxxviii) In relation to the incident which took place on 7 April 2017, the Defence highlighted certain omissions in the complainant's statements made to the Police on 19 April 2017 and 7 December 2018, in comparison to the testimony given by her in Court:

- i. That there is no mention in her statements that when the accused had slapped her that she fell on the mattress.
- ii. That there is no mention in the statements that he opened the zip of her dress, pulled it down and sucked her breast.
- iii. That there is no mention that the accused person pulled her hand to the back, covered her mouth and told her not to shout.
- iv. That there is no mention to say that she was awake the whole night and was crying and couldn't do anything.

(xxxix) Similarly, In relation to the incident which took place on 8 April 2017, the Defence highlighted further omissions in the complainant's statements made to the Police on 19 April 2017 and 7 December 2018, in comparison to the testimony given by her in Court:

- i. That there is no mention in the statements that the accused stopped the vehicle near a white building and a big tree.
- ii. That there is no mention in the statements that whilst in the car at the Nadi back road, the accused had pulled his seat back, pulled the seat down and forcefully pulled her hands to come towards him.

- iii. *That there is no mention that the witness was sitting in the middle at the back of the vehicle.*
 - iv. *That there is no mention that the accused pulled her hand and with the other hand pulled her zip down.*
 - v. *That there is no mention that the accused fingers were in her vagina for 4 to 6 minutes.*
 - vi. *That there is no mention in the statements that the accused person pulled down her zip, pulled down her dress and bra (and sucked her breast).*
 - vii. *That there is no mention that the witness was wearing a black dress on 8 April 2017.*
- (xi) *The witness agreed that there was no mention of the above in her statements. She explained that some of these matters were told by her to the Police but has not been written down. She further explained that the Police did not ask her in detail (for further details) about the above matters.*
- (xli) *The following further questions were asked from the witness in cross-examination and she answered as follows:*
- Q. *I suggest to you that this whole charge/s is made up because your mother did not want to send you to the accused's house for further studies?*
 - A. *That is not correct because if I don't want to stay, I would tell my father and he would bring me back.*
 - Q. *I suggest to you that you are lying because your father came to pick you from the accused person's house because you were not concentrating on your studies?*
 - A. *I was not concentrating because of what had happened and my phone was with my aunty, because she said that I am studying-so that is why my phone is not allowed.*
 - Q. *I suggest to you that you are lying because you gave your statements 2 weeks after the alleged incident of 7 of April 2017 and 8 April 2017 and it took you another 1 year 8 months to give a second statement?*
 - A. *I was crying that time when I went to my mother's place. Then she asked me then I told her.*
 - Q. *I suggest to you that giving you second statements after 1 year 8 months, it was a made-up story because you had all the time to remember and make up a statement?*
 - A. *I am not making it up.*

(xlii) *In re-examination, the State Counsel attempted to clarify from the witness the answers given by her in cross examination, specifically in relation to the omissions highlighted during her cross-examination.*

[34] Evidence of Lalini Nita Chand

- (i) *The witness testified that she is 46 years old. She is a housewife. She is currently residing at Veiseisei By-pass, Lautoka, with her mother, her daughter and her son. Her daughter's name is PPK, while her son's name is Prenal Kumar.*
- (ii) *The witness testified that in 2017 she was residing at the same address, together with her mother, daughter and son. Her husband, Pradeep Kumar, was residing in Sigatoka.*
- (iii) *She explained that she moved from Sigatoka to Veiseisei when her daughter was small. This is because some iTaukei people came and started living beside their house and they used to be without clothes and have a shower without clothes. She said for the sake of her daughter, she couldn't stay in that environment in Sigatoka. Therefore, she moved to Veiseisei By-pass. Her husband had built a house for them at Veiseisei.*
- (iv) *The witness testified that the relationship between her and her husband was good. Her husband had passed away on 22 February 2020. Until the time he had passed away, she said she had a good relationship with her husband. "We were still together but living in two different places".*
- (v) *The witness said that in the year 2017, her daughter went to Sabeto to her uncle's place. She went there to attend Technical College. The uncle's name is Parbind Chand, the accused in this case. Her husband had taken her daughter to the accused's place.*
- (vi) *The witness said that the complainant had stayed there from January 2017 till April 2017. She came back home during Easter of the same year.*
- (vii) *Prior to coming home, the complainant had called and had been crying telling her that she wanted to come home. She had said that they were not allowing her to come home. So she had called her husband and asked him to bring the complainant back home. The witness said that her daughter had made this call to her on a Wednesday or Thursday in the month of April 2017.*
- (viii) *When the complainant had come home, she had asked her why they were not sending her back and the complainant had said that there were some problems. She had explained: "On Friday night whilst she was sleeping, her uncle woke her up. He was drunk. He also offered my daughter beer and she refused to drink. And then uncle tried to kiss her. Then she pushed her uncle. And then uncle slapped her and my daughter fell down. Then uncle tried to calm her same time the aunt (Fua) crossed to go to her room. She went to sleep. After that uncle held my daughter, kissed on her lips and sucked her breast".*
- (ix) *When asked when this had happened, the witness said it happened a long time ago and that she has forgotten the date.*

- (x) *When asked if the complainant had told her anything else, the witness said: "Next day they went to town to buy vegetables....It was a Saturday but I can't recall the date....The aunt told my daughter, lot of vegetables had to be bought so you go with uncle. While they were coming back from shopping, they stopped on the way to eat something. After eating, he repeated the same thing – kissed on her lips, sucked her breast, put his hand in her panty and put the finger in her private place".*
- (xi) *When asked what she meant by private part of her body, the witness said: "The place where we get menses – from the vagina".*
- (xii) *The witness testified that after the complainant had told this to her, she had mentioned this to one of her cousin brothers and he had advised her to report the matter to the Police. Therefore, they went to the Lomolomo Police Post. They were advised that they will have to go to the Sabeto Police Station to report the matter. Accordingly, she went to the Sabeto Police Station with her daughter and reported the matter.*
- (xiii) *The witness said that after the Easter weekend in April 2017, her daughter didn't go back to her uncle's place. She did not send her back there.*
- (xiv) *During the cross-examination of this witness, she was referred to the statement made by her to the Police on 19 April 2017. The Defence highlighted certain omissions in the statement made to the Police by the witness on 19 April 2017, in comparison to the testimony given by her in Court:*
- i. That there is no mention in the statement that the accused woke her daughter up (on 7 April 2017).*
 - ii. That there is no mention in the statement that the accused forced to kiss her daughter.*
 - iii. That there is no mention that the accused slapped her daughter and she fell down.*
 - iv. That there is no mention that the aunty crossed the sitting room and went to sleep.*
 - v. That there is no mention that the accused had kissed her lips and sucked her breast.*
 - vi. That she has not mentioned in her statement that the accused's wife sent the complainant to the market to buy vegetables with the accused.*
 - vii. That there is no mention in the statement about the accused kissing her daughter, sucking her breast and putting the finger in her private place on Saturday 8 April 2017.*

viii. *That there is no mention in the statement that when they were returning home on 8 April 2017, that the accused and her daughter had food.*

(xv) *The witness agreed that there was no mention of the above matters in her statement. She explained that some of these matters were in fact told by her to the Police but has not been written down. She further explained that she did mention about the accused kissing the complainant on her lips. But about sucking her breast and inserting his finger, she didn't mention because she was feeling shy.*

(xvi) *It was suggested to the witness that her evidence in Court was a lie because she didn't want her daughter staying with the accused person. The witness responded as follows: "My Lord if nothing has happened, why will I bring my daughter to Court. No mother will want her daughter's character to be put at risk, especially in Court. I didn't tell a lie. The only reason was, I was shy to tell everything".*

[35] At the end of the prosecution case Court decided to call for the defence of the accused. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[36] The accused decided to testify on his own behalf. He also called three other witnesses in support of his case-Parnesh Chand (His son), Kritika Vandana Deo (His daughter in law) and Reena Kumari (His wife).

Case for the Defence

[37] Evidence of Parbind Chand

- (i) *The witness testified that he is 54 years old. He used to be a Bus Driver. At the moment he is working as a Farmer. He is currently residing at Sabeto. He is married. His wife's name is Reena Kumari. He has been married to her for 35 years. He has one son who is 23 years old. His son is married. His son, daughter in law and his two grandchildren are staying with him at Sabeto.*
- (ii) *The witness said that his religion is Hinduism. He belongs to the Sanatan Dharam and he is an active member.*
- (iii) *The witness testified that in 2017 he was residing at Sabeto, with his whole family. Towards the end of January, the complainant came to stay with them*

for her further education at Technical school. The complainant is his brother in law, Pradeep Kumar's daughter. Pradeep Kumar's sister is his wife.

- (iv) When asked how his relationship was with the complainant, he said: "Before, they never used to come to my place. We were not in talking terms. But Munish (Pradeep Kumar) came and said that my daughter is a good girl and I just said no to him at the first stage. That I have a very small house. And now the life is not like before. He continuously kept coming to my place and kept on calling. And when the school day it was near to start, he came again".*
- (v) The witness said that his relationship with the complainant was very good at the beginning. The complainant's relationship with his wife and family members was also very good. He said it was like brothers and sisters (with his son and daughter in law).*
- (vi) The witness said that when the complainant came to his place, she used to sleep in front. She would spread a mattress and sleep on that in the front room. He and his wife used to sleep in their room. After a month or so later - somewhere at the beginning of March, his wife started to monitor her and sleep with her, because most of the time she will be on the phone, she will leave the doors open and go outside. So he had asked his wife to monitor her closely.*
- (vii) The witness testified that in 2017, he was working as a Bus Driver. He used to leave home for work in the morning around 6.30 and return home around 6.30 in the evening.*
- (viii) The witness said that he recalls the 7 of April 2017, which was a Friday. He was at work driving the bus during the day. He had left home that morning at his normal routine time at 6.30 a.m. and returned home at 6.30 p.m.*
- (ix) Upon returning home, he had a cup of tea. Soon after he came home, his son had also come home after work. His son too was working as a Bus Driver at the time. His wife, his daughter in law, his grandchildren and the complainant were all at home.*
- (x) Thereafter, he had asked his son whether to have some beer. His son had said, if you have money you can buy the beer. So the witness had gone alone to buy the beer. They started drinking the beer around 7.00 p.m. in the sitting room. They had 2 bottles of beer.*
- (xi) The witness said that the complainant was also in the sitting room at the time but was on her phone most of the time. He denied that the complainant had been restricted from using her mobile phone.*
- (xii) The witness said that he finished drinking beer around night. After that his wife came back from the shower. He had asked her to dish out the food and they had dinner. When asked if he recalls the exact time his wife came back after the shower, he said: "Around 9.00 p.m. I cannot recall the exact time".*
- (xiii) He said that after having dinner, they didn't go to bed straight away. "Because there are small kids in the house. So we mostly wait for them. While waiting we watch TV programs".*

- (xiv) *The witness said that after they watched TV, he went to sleep. He said: "I went to sleep around 11.00 p.m.". He said he cannot recall what time the other family members went to sleep. He had gone to his room to sleep.*
- (xv) *The witness totally denied that he did anything to the complainant that night as alleged by her.*
- (xvi) *On the next day, 8 April 2017, which was a Saturday, he said he had woken up late because it was not a working day for him. At the time he woke up, his son had already gone to work. The rest of the family members were at home.*
- (xvii) *He said that after waking up he had his shower, did his prayers, had his tea and then went to Nadi town. At the time he went to Nadi town, the complainant had remained at home. He had gone alone. He testified that he had left home around 9.00 or 10.00 in the morning, but cannot recall the exact time. He said that he had returned home after 12.00 noon because he had come and had lunch at home.*
- (xviii) *The witness said that in Nadi town, he had a haircut, went to the market and bought fish and some fruits and went to get his car washed at a Car Wash and then returned home.*
- (xix) *The witness denied that the complainant had accompanied him when he went to Nadi town. The witness totally denied that he did anything to the complainant that day as alleged by her.*
- (xx) *The witness said that the complainant had stayed at his house until Good Friday, which was 14 April 2017. On that day he and his wife had dropped the complainant at her home in Veiseisei. She had spent the long weekend there, from 14 to 17 April at her home with her mother. On the 17 April (Easter Monday) he and his wife had gone and picked the complainant and brought her back to Sabeto. The same evening, the complainant's father had come to Sabeto, picked up the complainant and taken her back home.*

[38] Evidence of Parnesh Chand

- (i) *The witness testified that he is 32 years old. He is currently residing at Sabeto. He works as a Truck Driver.*
- (ii) *The witness testified that he has been staying at Sabeto for 10 to 15 years. He is married and has two children – a son and a daughter. His wife's name is Kritika Vandana Deo. He is married to her for 10 years. The accused in the case is his father. The complainant is his cousin sister-his mother's brother's daughter.*
- (iii) *The witness said that in 2017 he was staying in Sabeto, with his wife, his father, his mother and his two kids. At the time he was the Bus Driver by occupation. The complainant had come to stay at their house for a few months. She came to stay there and go to school. Her father had brought her to Sabeto.*
- (iv) *The witness testified to the events which transpired on 7 April 2017. He said he had gone to work that day and returned home around 6.30 in the evening. All*

family members were at home at the time. His father had asked him if he wanted to have beer. He had agreed. So his father had gone and bought two bottles of beer.

- (v) He said that around 7.00 in the evening, they started drinking the beer in the sitting room. While they were drinking the beer, everybody was sitting in front watching movies and the kids were playing. Even the complainant was present in the sitting room.*
- (vi) They had finished drinking beer around 9.00 p.m. and then had dinner. Later the witness said that they had dinner around 9.30 p.m. After dinner, they were all sitting and watching movies. Around 11.00 p.m. they had gone to sleep. He said his father had gone to his room to sleep, while his mother had remained with the complainant in the sitting room. He does not recall anything that happened that night.*
- (vii) The next morning, 8 April 2017, which was a Saturday, he had left for work around 6.00 a.m.*

[39] Evidence of Kritika Vandana Deo

- (i) The witness testified that she is 32 years old. She is unemployed. She is currently residing at Natova, Sabeto, with her husband, Parnesh Chand, her father in law, her mother in law and her two kids. She's married to her husband for 10 years. The accused is her father in law.*
- (ii) The witness said that the complainant came to reside with them in January 2017.*
- (iii) The witness testified to the events which took place on 7 April 2017. At the time she had been working. That day she had gone to work around 6.00 a.m. in the morning. Her husband and her father in law had also gone to work in the morning.*
- (iv) She had knocked off for the day around 2.30 p.m. and reached home around 3.00 – 3.15 p.m. Her father in law had returned home around 6.00 – 6.30 p.m. while her husband had returned home around 6.30 p.m.*
- (v) After they came home, everyone was sitting together and having tea. Thereafter, her husband and her father in law were having beer. They were having beer between 7.00 – 9.00 p.m. in the sitting room. They had consumed 2 bottles of beer. At the time all the family members were present including the complainant who was using her phone and watching TV with them.*
- (vi) Around 9.00 p.m. they had dinner and had gone to sleep after 11.00 p.m.-she said around 11.30 p.m.*
- (vii) On 8 April 2017, she was at home in the morning. Then between 10.30 and 11.00 in the morning she had left to attend a wedding. She testified that the complainant was at home in the morning.*

(viii) *She denied that the complainant had mentioned anything to her about what the accused had done on the previous night. She also denied that she told the complainant to report the matter to her mother.*

[40] Evidence of Reena Kumari

- (i) *The witness testified that she is 54 years old. She is currently residing at Natova, Sabeto. She is unemployed. The accused is her husband. They have been married for 35 years. They have one son. Her son, daughter in law and their 2 kids reside with them.*
- (ii) *The witness said that Pradeep Kumar, the father of the complainant, is her brother.*
- (iii) *The witness testified that the complainant came to reside at their place at the end of January 2017. Her brother had brought her to their house so that she can study from there. At the time her brother was staying in Sigatoka.*
- (iv) *The witness said that during the time the complainant was staying at their house, she was sleeping in the sitting room with her. She explained further that for 1 month she slept alone. Thereafter, she has slept with the complainant in the sitting room.*
- (v) *The witness testified to the events which took place on 7 April 2017, which was a Friday. Her husband returned from work around 6.00 – 6.30 p.m. and her son returned home around 6.30 – 7.00 p.m. that day.*
- (vi) *After they came home, she had prepared tea for all the family members. Thereafter, her daughter in law had prepared dinner. Between 7.00 – 8.00 p.m. her husband and her son had been drinking 2 bottles of beer. After 9.00 p.m. they had dinner. The complainant was on her phone and watching TV.*
- (vii) *She said she usually goes for a bath before 9.00 p.m. and not at 11.00 p.m. as stated by the complainant.*
- (viii) *That night her son and daughter in law had gone to sleep first. Then between 11.00 – 11.30 p.m. she and the complainant went to sleep in the sitting room. Her husband had gone to his room to sleep around 11.00 p.m. The witness testified that nothing happened after they went to sleep.*
- (ix) *The witness denied that she had asked the complainant to accompany the accused to do marketing in Nadi the next morning. She said her husband went to the market alone. At the time the complainant and she were at home.*
- (x) *She also denied having called the accused on his mobile phone when he was on his way home (on the Nadi back road).*

[41] The accused and each of the witnesses for the defence were cross-examined by the Learned Counsel for the State and the prosecution version of the case was put to them. During the cross-examination of each of these witnesses, it was suggested to them that the complainant's relationship with all family members was good, that they talked to

her nicely and treated her nicely and that she was provided food on time. The complainant respected them as elders and had no problems with them. If any of the family members were to go out, they used to take the complainant with them. Therefore, it was suggested that the complainant had absolutely no reason to make any false allegations against the accused in this case.

Analysis

[42] As stated before, the prosecution, in support of their case, called the complainant (PPK), and her mother, Lalini Nita Chand. The accused testified on his own behalf and called three witnesses in support of his case.

[43] The burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove all the elements of the charges beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove in paragraphs 7, 12, 13 and 21 of this judgment.

[44] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.

[45] Based on the said admitted facts it is admitted that the complainant is the niece of the accused and that the complainant's father, Pradeep Kumar, had made arrangements with the accused for the complainant to stay at his place and attend Nadi Technical College, from January 2017. It is also admitted that the complainant used to sleep in the sitting room of the accused.

[46] I have summarized the evidence of all witnesses led during the trial.

[47] The accused has testified in Court and totally denies all the allegations made against him by the complainant. His son, daughter in law and wife have testified in support of his case.

[48] With regard to the incidents which took place on 7 April 2017, the accused's position is that he and his son were drinking beer, in the sitting room of the house, from about 7.00 p.m. to 9.00 p.m. that day. Thereafter, they had dinner, watched some television programs, and that the accused had gone to sleep around 11.00 p.m. All defence

witnesses gave testimony in support of this version. Basically to say that around 11.00 p.m. the accused had gone to sleep.

[49] However, this contradicts the Admitted Facts signed by the accused himself and his Counsel. It is clearly stated at paragraph 6 of the admitted facts as follows: *“On the 7th of April 2017, at around 11.00 p.m., the accused was drinking beer in the sitting room and the complainant was also in the sitting room”*. As I have stated earlier in this judgment the *“Admitted Facts”* are considered to be proved beyond reasonable doubt. This is precisely the time according to the complainant’s testimony that the accused had committed the offences on her, on the 7 April 2017.

[50] For the aforesaid reason, it is my opinion, that the defence version cannot be accepted as truthful and reliable and I reject the defence version.

[51] The complainant testified at length as to how the accused had committed the alleged offences on her. At the time she testified in Court the complainant was 22 years of age. She said her date of birth was 22 February 2000. Therefore, as on 7 and 8 April 2017, the dates of offending, she was only 17 years old, and still a child under 18 years of age.

[52] On arriving home after the incident, on 17 April 2017, she had complained to her mother about what the accused had done to her. Although a few days belated, this clearly qualifies as a recent complaint. It is trite law with regard to recent complaint evidence that the complainant need not specifically disclose all of the ingredients of the offences and describe every detail of the incidents, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. I am satisfied that the complainant made a prompt and a proper complaint in this case. Accordingly, I consider that her credibility is strengthened in view of that recent complaint.

[53] I must emphasize that I have borne in mind that the recent complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[54] The Defence attempted to impeach the complainant’s credibility during her cross examination by stating that the complainant did not complain of the incidents immediately as it happened.

[55] This Court is conscious of the fact that children do not always react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned.

[56] The defence also attempted to impeach the complainant's credibility by highlighting several omissions in her statements made to the police on 19 April 2017 and 7 December 2018, in comparison to the testimony given by her in Court. This was also so with regard to the testimony of the complainant's mother, Lalini Nita Chand.

[57] The complainant had explained that some of the matters that were highlighted as omissions were told by her to the Police but has not been written down. She further explained that the Police did not ask her for further details about some of the matters raised.

[58] Even the complainant's mother provided a similar explanation when asked to explain the reasons for the omissions. She further explained that she did mention to the police about the accused kissing the complainant on her lips, but about sucking her breast and inserting his finger, she did not mention because she was feeling shy.

[59] This Court is conscious of the fact that several omissions have been highlighted in the prosecution case, in relation to previous statements made to the police by the witnesses. I am also conscious of the fact that the second statement of the complainant was recorded by the police on 7 December 2018, which was over one year and 8 months after the alleged incidents. However, having carefully considered the explanations offered by the complainant and her mother, it is the opinion of this Court that the said explanations are reasonable and acceptable. As such, I am of the opinion that the reliability and credibility of the said evidence is unaffected.

[60] In this case the defence is alleging that the complainant and her mother have made up this whole story against the accused. However, it must be borne in mind that the complainant in this case is not merely complaining of an isolated incident or a single act. Here the complainant has testified to a sequence of events or a series of acts which the accused perpetrated on her, over a period of two days. Therefore, it is the opinion of this Court that it is highly unlikely for the complainant, who was merely 17 years old

at the time, to make up or manufacture such a sequence of events, unless it really took place.

[61] Having analysed all the evidence in its totality, it is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable. The complainant withstood the rigorous cross examination by the Defence and remained consistent throughout her evidence, in relation to the material particulars of this case.

[62] It must also be mentioned that in terms of the provisions of Section 129 of the Criminal Procedure Act, "Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted".

[63] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charges of Common Assault, Sexual Assault and Rape with which the accused has been charged.

[64] In the circumstances, I find the accused guilty of the first count of Common Assault, second and third counts of Sexual Assault and fourth count of Rape with which he is charged.

[65] Accordingly, I convict the accused of the first count of Common Assault, second and third counts of Sexual Assault and fourth count of Rape.




Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 9th Day of May 2022

Solicitors for the State: Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused: Messrs Babu Singh & Associates, Lautoka.