

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

**Criminal Case No.: HAC 130 of 2018**

**STATE**

**V**

**PARMESH CHANDAR**

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

**Dates of Hearing** : 16, 17, 18, 19 May, 2022  
**Closing Speeches** : 25 May, 2022  
**Date of Judgment** : 30 May, 2022

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**JUDGMENT**

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*(The name of the complainant is suppressed she will be referred to as "R.C")*

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

**COUNT ONE**

***Statement of Offence***

**INDECENT ASSAULT:** Contrary to section 212 (1) of the Crimes Act 2009.

***Particulars of Offence***

PARMESH CHANDAR on the 25<sup>th</sup> day of June 2018 at Nadi in the Western Division, unlawfully and indecently assaulted “RC” by touching her thighs and breasts.

**COUNT TWO**

***Statement of Offence***

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

***Particulars of Offence***

PARMESH CHANDAR on the 25<sup>th</sup> day of June 2018 at Nadi in the Western Division, unlawfully and indecently assaulted “RC” by sucking her breasts.

**COUNT THREE**

***Statement of Offence***

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

***Particulars of Offence***

PARMESH CHANDAR on the 25<sup>th</sup> day of June 2018 at Nadi in the Western Division, penetrated the vagina of “RC” with his fingers without her consent.

**COUNT FOUR**

***Statement of Offence***

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

***Particulars of Offence***

PARMESH CHANDAR on the 25<sup>th</sup> day of June 2018 at Nadi in the Western Division, penetrated the vagina of “RC” with his penis without her consent.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of all the offences as charged.

### **BURDEN OF PROOF AND STANDARD OF PROOF**

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

### **ELEMENTS OF THE OFFENCE**

#### **INDECENT ASSAULT**

4. To prove count one the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
  - (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant "R.C" by touching her thighs and breasts.
5. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.
6. The words "unlawfully" and "indecently" in respect of the second element of the offence simply means without lawful excuse and that the act has

some elements of indecency that any right minded person would consider such act indecent.

7. Assault is the unlawful use of force on the complainant "R.C" by the act of touching her thighs and breasts.
8. In respect of the count of indecent assault the accused has denied committing this offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant "R.C" by touching her thighs and breasts.
9. If this court is satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then this court must find the accused guilty of the offence of indecent assault. However, if there is a reasonable doubt with respect to any elements of the offence of indecent assault then this court must find the accused not guilty.

### **SEXUAL ASSAULT**

10. To prove count two the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
  - (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant "R.C" by sucking her breasts.
11. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.

12. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
13. The final element of assault is the unlawful use of force on the complainant by sucking her breasts.

In this regard this court has to consider:

- (a) whether the force used in sucking the complainant’s breasts were sexual in nature; and
  - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
14. In this trial, the accused has denied committing the offence of sexual assault. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by sucking her breasts.
  15. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then this court must find the accused guilty of sexual assault. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then this court must find the accused not guilty.

## **RAPE**

16. To prove counts three and four the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Penetrated the vagina of the complainant "R.C" with his fingers and penis respectively;
  - (c) Without her consent;
  - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
  
17. In this trial, the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his fingers and penis respectively without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
  
18. The first element of the offence is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.
  
19. The second element is the act of penetration of the complainant's vagina by the fingers and the penis. This element of penetrating the complainant's vagina with the fingers is in dispute but the use of penis is not in dispute.
  
20. The third element of consent is in dispute, which means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without

physical resistance by the complainant to an act of another shall not alone constitute consent.

21. If this court is satisfied that the accused had penetrated the vagina of the complainant with his fingers and penis respectively and she had not consented, then this court is required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
22. To answer the above this court will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
23. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his fingers and penis into the complainant's vagina without her consent then this court must find the accused guilty as charged.
24. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offences of rape, then this court must find the accused not guilty.
25. The slightest of penetration of the complainant's vagina by the accused fingers and penis is sufficient to satisfy the act of penetration.
26. As a matter of law, I direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

27. In this case, the accused is charged with four offences, I have borne in mind that the evidence in each count is to be considered separately from the other. It is not to be assumed that because the accused is guilty of one count that he must be guilty of the others as well. This also applies to the outcome of not guilty.

### **ADMITTED FACTS**

28. In this trial, the prosecution and the defence have agreed to certain facts titled as Amended Final Admitted Facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
29. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

### **PROSECUTION CASE**

30. The complainant informed the court that on 25<sup>th</sup> June, 2018 at around midday she met the accused in Nadi Town and asked him if someone wants to buy her laptop. She knows the accused who is the school mate of her partner.
31. Before the complainant reached the bus stand the accused gave a call saying that there was someone who wanted to buy her laptop and the buyer was at Danny's shop, Korovuto, Nadi. The complainant went to Korovuto in the twin cab driven by the accused. The laptop was bought by the wife of the accused.



32. It was around 4 or 5pm the accused offered to drop the complainant at Nadi Town, on the way he said he has to go to Wailoaloa to pick something. At Newtown Beach there was a yellow taxi parked, the complainant stopped the vehicle and went into the taxi. Before, leaving the accused locked the vehicle and returned after about 10 to 15 minutes.
33. The accused drove the vehicle more inside the bush and the first thing he did was to lock all the vehicle doors. The complainant was sitting in the front passenger seat, the accused moved his hand towards her seat. At this time, she asked why he was putting his hand towards her. The accused did not respond but moved from his seat to her seat facing her.
34. He then lowered the back of the seat to almost down, held her hand and tied it with the seatbelt. When the back rest of the passenger seat was down the accused was over her with one knee on the seat. The complainant tried to open the door but could not because her hands were tied. At this time, the accused hit her on the back and also pinched her lower thighs.
35. Thereafter, the accused pulled her skirt and top up lowered her bra and panty, he then grabbed her breast and started sucking it whilst doing this he put his fingers into her vagina. After fingering her vagina the accused put his penis into her vagina and had forceful sexual intercourse. The sexual intercourse lasted for almost half an hour.
36. The complainant was shocked and upset she couldn't stop him so she started crying since she was scared. The door of the vehicle was locked and she couldn't move. The complainant asked the accused to stop and also asked him why he was doing this to her. The accused told her to leave her partner and live with him.

37. After the accused ejaculated he untied her hands and went back to his seat. After a while the accused told her that he would drop her home. The complainant did not object to this because by this time it was dark about 6.30 to 7pm and she was at the beach. The accused dropped her home and at the gate he was giving her his calling card to call him back the complainant refused.
38. At home the complainant had a shower after a while Sofia came to pick her since that evening the complainant was to go to Sofia's house. In the car Sofia was talking to her but the complainant started to cry. Sofia asked her why she was crying the complainant told Sofia that the accused had forceful sexual intercourse with her.
39. The complainant also told her partner about what the accused had done to her. After two days of the incident the complainant reported the matter to the police. The complainant identified the accused in court.
40. In cross examination, the complainant stated the vehicle driven by the accused was a twin cab. After the laptop was purchased by the wife of the accused, both the complainant and the accused had a cigarette outside the shop. The complainant agreed the accused had said that he admired her and also asked her why she was in a relationship with a girl. The complainant denied that when asked by the accused if she wanted to sleep with him she had agreed. Upon further questioning the complainant said *"I did not agree to it"*.
41. While going to Nadi Town the complainant agreed she had asked the accused where he was living but denied that she wanted to go to his house. The complainant stated that the accused had told her that he was going to Lautoka so she asked him to drop her at Sabeto on the way. At Nadi Town the complainant had asked the accused to stop the vehicle

since she wanted to buy groceries but the accused said he was to go to Wailoaloa first to pick something and he was getting late.

42. The complainant denied they had gone to Wailoaloa because she had agreed. The complainant denied the suggestion that when the accused had parked the vehicle at the Wailoaloa Beach near the golf area both had gone to the back seat of the vehicle. The complainant denied at the back seat both had kissed each other for 5 minutes and then both had removed their clothes. The complainant denied lying on her back and then the accused started touching her private part from on top and then she asked the accused to lick her private part.
43. The complainant also denied saying that she needed him and that at this time the accused went on top of her and inserted his penis into her vagina. The complainant further denied that she had asked to suck the accused penis, after sucking his penis they had sexual intercourse again and that she had said for him not to ejaculate inside. The complainant denied after leaving the beach going past the boat shed there was a parked yellow taxi and that the accused had smoked a cigarette where the taxi was. When it was put to the complainant that the tying of the seat belt would have led to injuries on her wrist, the complainant said there was reddening of her wrist but there were some bruises on her thigh because the accused had pinched it.
44. The complainant did not shout for help because the windows were up and there was no one around. The complainant denied the suggestion that the accused had not sucked or rubbed her breasts but only kissed and had sexual intercourse. The complainant denied the suggestion that the accused had not fingered her vagina but only touched her private parts with his fingers. The complainant maintained the accused had

fingered it and also inserted his penis into her vagina three times and then ejaculated.

45. The complainant denied consenting for the accused to have sexual intercourse with her. The complainant stated that she did not bump the head of the accused with hers because it did not occur to her at that time although she had managed to move and try to open the door. Upon further questioning the complainant said it was dark when she got dressed after what she had been through she couldn't go in the bus, she couldn't walk, she was scared and in shock that she could not do anything so she said yes when the accused said he will drop her home.
46. The complainant denied that the only reason she cried rape was to save her relationship with her partner. The complainant regrets meeting and sitting with the accused in his vehicle which wasn't her fault.
47. In re-examination the complainant stated that she had not consented for the accused to have sex with her.
48. The final prosecution witness Sofia Begum informed the court that she knows the complainant who is in a relationship with her niece. On 25<sup>th</sup> June 2018, at around 7 pm the witness went to the house of the complainant to bring her home.
49. When the complainant sat into the car the witness noticed that the complainant looked sad and upset so she asked what had happened. Upon hearing this, the complainant started to cry, the witness asked what happened. The complainant responded by saying that the accused had raped her. The witness told the complainant to inform her partner and report the matter to the police.

## RECENT COMPLAINT EVIDENCE

50. Complainant's of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
51. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight would be given to the fact that the complainant told Sofia in the evening of the alleged offending about what had happened to her.
52. This is commonly known as recent complaint evidence. The evidence given by Sofia Begum is not evidence of what actually happened between the complainant and the accused since Sofia was not present and did not see what had happened between the complainant and the accused.
53. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant had told Sofia that the accused had raped her.
54. The complainant was distressed and in response to Sofia she had without hesitation told Sofia about what the accused her done to her. The complainant gave relevant and important information about what the accused had done which was sufficient to alert Sofia. The

prosecution also says there was no need for the complainant to go into every detail of what had happened to her and therefore she is more likely to be truthful.

55. On the other hand, the accused says the complainant had made up a story against him after having consensual sexual intercourse and it was only upon questioning by Sofia that the complainant had lied to Sofia about being raped by the accused. Furthermore, the complainant did not tell Sofia about the other allegations because it did not happen and therefore she should not be believed.
56. It is for this court to decide whether the evidence of recent complaint helps in reaching a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is a matter for this court to decide whether it accepts the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
57. In cross examination, the witness mentioned that the complainant had only told her that she had been raped.
58. This was the prosecution case.

### **DEFENCE CASE**

59. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also called one

witness. This court must also consider the defence evidence and give it such weight as is appropriate.

60. The accused informed the court that on 25<sup>th</sup> June 2018, at around 12.30pm he was in Nadi Town when he met the complainant. After greeting each other he asked her what happened. The complainant told him that she was selling her laptop and if the accused knew anyone who was keen to buy the same.
61. The accused called his partner who wanted to see the laptop at her workplace. The complainant agreed to go with him to Korovuto, Nadi at Danny's Supermarket. At Korovuto the accused partner agreed to buy the laptop. After the deal was finalized the complainant and the accused went to the front of the supermarket and smoked a cigarette.
62. Whilst having a conversation the accused stated flirting with the complainant and said that she looks beautiful and that he admired her. The accused also asked the complainant to have sex with him. The complainant laughed and said they can talk about it on the way.
63. The accused was driving and the complainant was sitting on the front passenger seat going towards Nadi Town. In the vehicle the complainant agreed to have sex with him. She wanted to go to his house but the accused refused saying that his landlord and neighbours will see them. According to the accused he was driving an old model Ford Ranger twin cab.
64. At the request of the complainant the accused drove the vehicle to the Nadi Bus stand so that the complainant could give her phone to someone. When the complainant returned the accused suggested that they go to Wailoaloa Beach to which she agreed. At the Wailoaloa Beach

the vehicle was parked at the golf area away from the sea by this time it was about 5pm.

65. Both got off the van and went to the back seat and started kissing each other and then both removed their clothes. The accused continued kissing the complainant and was touching her private part from the top with his finger. The complainant was normal and was taking feelings from it. At this time, the accused was on top of her while she was lying down and he was touching her private part from the top.
66. At this time the complainant asked him to lick her private part which he did for 2 to 3 minutes. The complainant then told the accused that she wants him to have sex with her. The accused then inserted his penis into her vagina and had sexual intercourse for 2 minutes. The complainant was normal taking feelings and then he asked the complainant to suck his penis.
67. The complainant then sucked the accused penis and again they had sexual intercourse for two minutes. While having sexual intercourse the complainant told the accused not to ejaculate inside her vagina. The accused ejaculated on her stomach, after both wiped themselves, they got dressed. The accused drove the vehicle near the boat shed there were 5 to 6 yellow taxis the accused knew the driver of one taxi so he got off and had a smoke with the driver.
68. The taxi driver was his friend Vincent. After this, the accused drove the vehicle, on the way the complainant reminded the accused to drop her home and also for him to buy a packet of cigarette, after buying and giving the cigarette to the complainant he dropped her home. On the way back the complainant's reaction was normal and the accused was flirting with her asking her why she was having a relationship with a girl.



69. The accused stated that nothing happened in the front seat of the vehicle since there is not enough space there. The complainant is huge, he is tall and big as well. The seat is not big enough to fit both of them, the gear area and the console box are in between. The accused maintained nothing happened in the front passenger seat as mentioned by the complainant and they had sex at the back seat.
70. The accused denied tying the complainant's hands with the seat belt, hitting her on the back when she tried to open the door, and pinching her thighs. The accused maintained they had consensual sexual intercourse at the back seat of the van. The accused denied having sex for half an hour.
71. The accused maintained he had consensual sexual intercourse with the complainant and denied completely the acts of indecent and sexual assault and the fingering of the vagina raised by the complainant.
72. In cross examination the accused maintained that when he asked the complainant to have sex with her she had agreed. The complainant asked whether it was safe at Wailoaloa and he had told her that it was, so they went there. The accused agreed he had chosen an area where they won't be seen there were vehicles about 60 metres away.
73. When it was suggested that the accused had taken the complainant into the bush near Wailoaloa Beach because she had not consented the accused stated that they had consensual sex and that the area was not a bush. However, no one would be able to see what they were doing inside the vehicle.
74. The accused denied the suggestion that the back seat of the vehicle did not have enough space to fit the complainant and the accused in the

manner described him. The accused admitted having sexual intercourse with the complainant but with her consent at the back seat of the vehicle and he denied all the other allegations completely. The accused maintained that he was telling the truth in court.

75. The accused agreed that before and after sex the complainant was talking nicely to him, she had no problems with him and they were both cooperating with each other and he had helped her sell her laptop and also had dropped her home safely and their relationship was good. The accused does not know why she had made the allegations against him.
76. The final defence witness Dr. Lice Vaniqi informed the court that she graduated with an MBBS degree from the Fiji School of Medicine in the year 2009 and this is her 13<sup>th</sup> year of service. The witness has also completed a Post Graduate Diploma in Public Health.
77. The witness had examined the complainant on 25<sup>th</sup> June 2018, at the Nadi Hospital at about 11.30 pm. The specific medical findings were:
  - (a) The hymen was not intact;
  - (b) No bruising was noted.
78. The witness had carried out a head to toe and also a perineum examination and she did not see any visible bruising and the hymen was not intact. Perineum examination meant checking for any physical injuries and marks on the vagina.
79. According to the witness there were no visible injuries or bruises on the patient's body and also on the vagina.

80. In the professional opinion of the witness she was unable to make any comment and no specific injuries were noted. The witness further stated that she cannot say whether or not the complainant was raped.
81. The Fiji Police Medical Examination Form of the complainant dated 25<sup>th</sup> June, 2022 was marked and tendered as defence exhibit no. 1.
82. In cross examination the witness stated that even though there were no injuries noted, in this case rape of the patient could not be ruled out. In her experience in rape cases most of the patients had injuries but not all.
83. This court has heard the evidence of Dr. Vaniqi who had been called as an expert on behalf of the defence. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in her evidence as a whole is to assist this court.
84. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to my conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.

85. This evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence.
86. This was the defence case.

## **ANALYSIS**

87. The prosecution alleges that on 25<sup>th</sup> June, 2018 the complainant met the accused in Nadi Town and had asked for his assistance to sell her laptop. Shortly after, the accused gave a call saying that a buyer was at Danny's shop, Korovuto, Nadi. The complainant went to Korovuto in the twin cab driven by the accused.
88. On the way back the accused offered to drop the complainant at Nadi Town, however, on the way the accused said he has to go to Wailoaloa to pick something. At Wailoaloa, the accused drove the vehicle inside the bush and the first thing he did was to lock all the vehicle doors. The complainant was sitting in the front passenger seat. The accused moved his hand to her seat. At this time, she asked why he was putting his hand towards her. The accused did not respond but moved from his seat to her seat.
89. He then lowered the back rest of the seat to almost flat position held her hand and tied it with the seatbelt. The complainant tried to open the door but could not because her hands were tied. At this time, the accused hit her on the back and also pinched her thighs.
90. Thereafter, the accused forcefully pulled the complainant's skirt and top up lowered her bra and panty, he then grabbed her breasts and started sucking it, touched her thighs and whilst doing this he inserted his

fingers into her vagina. After fingering her vagina the accused penetrated his penis into her vagina and had forceful sexual intercourse.

91. The complainant was shocked and upset she couldn't stop him so she started crying since she was scared. The door of the vehicle was locked and she couldn't move. After the accused ejaculated he untied her hands and went back to his seat. After wearing her clothes the accused dropped her home. The complainant did not consent to what the accused had done to her.
92. At home the complainant had a shower after a while Sofia came to pick her since that evening the complainant had to go to Sofia's house. In the car Sofia was talking to her but the complainant started to cry. Sofia asked her why she was crying the complainant told Sofia that the accused had forceful sexual intercourse with her.
93. On the other hand, the defence says the allegations raised by the complainant are lies and a made up story. The defence is asking this court to look at the evidence objectively. The accused only had consensual sexual intercourse in the back seat of the vehicle and nothing else happened. The allegation in respect of sexual assault, indecent assault and penetrating her vagina with the accused fingers did not happen.
94. The first lie is that the vehicle was an old twin cab and for a person to move from the driver's seat towards the passenger's seat is impossible. There was not enough space in the front compartment of the vehicle contrary to what was narrated by the complainant. The vehicle gear and the console box will not allow such a movement. Furthermore, the front

seat cannot sustain the pressure of two individuals both being tall and of big physique which was also observed by the court.

95. The second lie is there was no reddening of the complainant's wrist due to the seat belt tied tightly to her hands. She also told the court that the accused had pinched her thigh leaving visible marks. The complainant was seen by the doctor a few hours of the incident but there no were visible marks on her thighs or reddening around her wrist seen by the doctor.
96. The complainant had the opportunity to shout or yell or push the accused away from on top of her yet she did not do so. Moreover, the accused has been honest in admitting that there was consensual sexual intercourse at the back seat of the vehicle which had enough space for the two to do what they wanted to do. The accused did not commit all the others acts of sexual assault, indecent assault and penetration of the complainant's vagina with his fingers because it did not happen as alleged. The only thing he did was to suck the vagina of the complainant and have penile sexual intercourse with the consent of the complainant.
97. This is a case of betrayal of trust by the complainant. The chain of events expressed by the complainant will have to be examined closely and at no time the accused could have done anything in the front passenger seat as narrated by the complainant. The complainant is trying to avoid humiliation and embarrassment about the fact that she had consented to have sexual intercourse with the accused whilst she was in relationship with another woman and that relationship had broken after this incident.
98. Finally, the accused was forthright and honest in what he told the court. The consent of the complainant is also implicit in her not saying or doing

anything to stop the accused, cooperating in a manner that allowed the accused to have consensual sexual intercourse. The defence is asking this court not to believe the complainant.

### **DETERMINATION**

99. At the outset, I would like to state that I have disregarded the self-incriminating evidence of the accused that he had leaked and touched the vagina of the complainant.
100. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
101. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a comprehensive and consistent account of what the accused had done to her. The complainant was also able to withstand vigorous cross examination and was not discredited as to the main version of her allegations.
102. The complainant was steadfast in what she had encountered that afternoon and I have no doubt in my mind that she told the truth in court. Her demeanour was consistent with her honesty. It is also noteworthy that the complainant had promptly reported the matter to the police. I agree with Dr. Vaniqi that it is not necessary for injuries to be seen on a complainant to suggest forceful sexual intercourse and other abuses.

103. Experience has shown that individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress and some not. The fact that the complainant did not shout or yell or push the accused away in the circumstances of this case does not mean that she was consenting to the forceful acts of the accused.
104. I agree with the complainant that if she had she consented to what the accused had done to her she would have gone to a Motel not in a bush. I also observed that the complainant had a strong view against the conduct of the accused on her and she had expressed herself clearly that she did not like or agree to or approve of what the accused had done to her.
105. The accused told the court that he had a good relationship with the complainant and the defence did not raise any motivation on the complainant to falsely implicate the accused. There was no evidence of any enmity between the two as well.
106. The issue in this case is whether the complainant had consented to have sexual intercourse with the accused and whether he had penetrated the vagina of the complainant with his fingers, sexually and indecently assaulted the complainant. The definition of consent as mentioned in the early part of this judgment is crucial to resolve this issue. It is obvious to me from the conduct of the accused that he was forcefully doing what he wanted to do. The accused also knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
107. Furthermore, the defence contention that the complainant was not doing anything to push him away or was just lying down doing nothing



hence showing consent is rejected by this court as untenable on the totality of the evidence. It is to be noted that the legal meaning of consent is wide which includes submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

108. The complainant had promptly told Sofia that the accused had raped her although not in complete detail of every act allegedly done by him does not affect the credibility of the complainant. It is not expected that a complainant will immediately tell every detail about an unexpected sexual encounter to the first person seen. Sofia gave credible evidence about what the complainant had told her. The doctor called by the defence also confirmed that a person can be raped without any visible injuries on the body or perineum.
109. It is also noted that during the cross examination of the complainant it was never put her that there was not enough space in the front compartment of the vehicle. I also noticed that the accused was not forthcoming in his response during cross examination.
110. Despite vigorous cross examination the complainant was not shaken as to the basic version of her allegations. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) had made the following pertinent observations about the above at paragraph 16 as follows:

[16] *The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (supra):*

*“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important “probabilities-factor” echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. .... It is unrealistic to expect a witness to be a human tape recorder;”*

111. On the other hand, the accused did not tell the truth he gave a version of events which is not tenable or plausible on the totality of the evidence. The accused did not tell the truth when he said the complainant had consented to have sexual intercourse with him and he did not insert his fingers into her vagina, or sexually and indecently assault the complainant.
112. This court accepts the evidence of both the prosecution witnesses as reliable and credible. On the other hand, this court rejects the defence of consent in respect of penile penetration and denial in penetrating the fingers into the complainant’s vagina, sexual and indecent assault as untenable and implausible.
113. Right from the time the accused had driven the complainant to the buyer of the laptop he was in control of the van as the driver and I accept that it was the accused who had driven the complainant to the Waialoa Beach to an isolated area and did what the complainant told the Court. Moreover, the complainant had immediately told Sofia that the accused had raped her shows consistency in her evidence.

114. The defence has not been able to create a reasonable doubt in the prosecution case.

## **CONCLUSION**

115. This court is satisfied beyond reasonable doubt that the accused on 25<sup>th</sup> June, 2018 had unlawfully and indecently assaulted the complainant by touching her thighs, breasts and sucked her breasts. In respect of the above counts this court is satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse and indecently in what he did to the complainant. The acts of the accused in the above counts have some elements of indecency that any right minded person would consider such conduct sexual and indecent in nature. Finally, the complainant did not consent to the above mentioned acts of the accused.

116. Furthermore, this court is also satisfied beyond reasonable doubt that the accused on the same date had penetrated the vagina of the complainant with his fingers and penis without her consent.

117. The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

118. In view of the above, I find the accused guilty of one count of indecent assault, one count of sexual assault and two counts of rape as charged and he is convicted accordingly.

119. This is the judgment of the court.

**Sunil Sharma**  
**Judge**

**At Lautoka**  
30 May, 2022

**Solicitors**

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

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