

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 42 of 2021

STATE

vs.

NASONI NAWANAWALAGI

Counsel: Ms. U. Tamanikaiyaroi for the State
Mr. T.Varinava & Mr. S. Ravu for the Accused

Date of Hearing: 12th and 13th July 2022

Date of Closing Submission: 14th July 2022

Date of Judgment: 14th July 2022

JUDGMENT

(The name of the victim is suppressed she will be referred to as "P.T.N")

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 24th March 2021:

COUNT ONE

Statement of Offence

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

Particulars of Offence

NASONI NAWANAWALAGI between the 1st day of January 2018 and the 31st day of December 2018 at Vatuwaqa, in the Central Division, unlawfully and indecently assaulted **P.T.N**, by squeezing her breasts.

COUNT TWO

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: contrary to Section 213 (1) (b) of the Crimes Act, 2009.

Particulars of Offence

NASONI NAWANAWALAGI between the 1st day of January 2019 and the 31st day of December 2019 at Suva, in the Central Division, intruded upon the privacy of **P.T.N**, by exposing his penis towards **P.T.N**, offending her modesty.

COUNT THREE

Representative count

Statement of Offence

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

Particulars of Offence

NASONI NAWANAWALAGI between the 1st day of January 2019 and the 31st day of December 2019 at Suva, in the Central Division, had carnal knowledge of **P.T.N**, without her consent.

COUNT FOUR

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: contrary to Section 213 (1) (b) of the Crimes Act, 2009.

Particulars of Offence

NASONI NAWANAWALAGI between the 1st day of September 2020 and the 31st

day of September 2020 at Suva, in the Central Division, intruded upon the privacy of **P.T.N**, by exposing his penis towards **P.T.N**, offending her modesty.

2. The trial commenced on 12th July 2022 upon reading and explaining the charges the accused pleaded not guilty to all the counts.
3. The prosecution case was closed with the evidence of P.T.N, her younger brother Stino Fred and Dr. Losana Burua. As it appeared to this court that there was prima facie evidence of the charges, the defence was called for and the rights were explained. The accused opted to give evidence but did not call any witnesses and the cases for both parties were accordingly closed and this court heard their closing submissions. Accordingly, I will now endeavor to pronounce my judgement.

Ingredients of the offences

4. For the accused to be found guilty of count No. 1 that of “sexual assault” under section 210 (1)(a) of the Crimes Act, the prosecution must prove beyond reasonable doubt, that the accused Nasoni Nawanawalagi himself did on the date and place specified in the charge, unlawfully and indecently assault P.T.N as described in the charge.
5. Sexual assault is an aggravated form of indecent assault. The prosecution must prove the above elements against the accused beyond reasonable doubt. “Assault” is to apply unlawful force to the person of another without his or her consent. The “assault” must be considered “indecent” by right thinking members of society. The test is basically objective.
6. The ingredients of Sexual assault under the 1st limb of section 210 and indecent assault as defined under section 212 of the crimes Act are the same except for the distinction in the titles of the respective sections. It appears that sexual assault is an aggravated form of indecent assault as it carries a higher sentence. Thus, considering the use of the word ‘*sexual*’ in the title of section 210, I am of the view that, sexual assault should necessarily be involuntary contact of a ‘sexual’ nature that occurs through the Accused's use of force, coercion or the victim's incapacitation.

7. The representative count No.3 that of rape is based on sub sections 2(a) of Section 207 of the Crimes Act. Under this section, the offence of Rape is continued when a person having carnal knowledge with or of another person without that other person's consent. In the context of this case, 'carnal knowledge' is the act of penetration of the vagina of the complainant with the penis that of the accused. The slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.

8. The offences of indecently annoying any person namely counts No.2 and No. 4 of the present case are based on sub sections 2(b) of Section 213 of the Crimes Act 2009. Under this section, the offence of indecently annoying is committed if *a person, intending to insult the modesty of any person intrudes upon the privacy of another person by doing an act of a nature likely to offend his or her modesty.*

Burden of proof

9. The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence. The prosecution must prove the Accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, or that the court was not sure of the Accused's guilt, or if there be any hesitation in my mind on any of the ingredient or on the evidence led by the prosecution, the Accused must be found not guilty of the charge and accordingly acquitted. The accused has a right to remain silent and no adverse inference can be drawn if the Accused remains silent.

Admitted Facts

10. The follow facts are admitted;
 - a. The name of the person charged is Nasoni Nawanawalagi ("Nasoni").
 - b. Nasoni was 61 years old at the time the alleged incident occurred.

- c. The name of the complainant is P.T.N
- d. P.T.N's biological mother's name is Maraia Watidredre "Maraia".
- e. Nasoni and Maraia are legally married.
- f. In 2020, Maraia was diagnosed with breast cancer and has been bed ridden.
- g. There is a domestic relationship between the parties namely Nasoni is P.T.N's stepfather.
- h. P.T.N has a brother named FS and two younger sisters namely Grace and Tirisani.
- i. Sometime in 2018, P.T.N's family including Nasoni resided with her grandmother namely Seci at Nanuku settlement, Vatuawaqa.
- j. Sometime in 2019, P.T.N's family including Nasoni moved from Nanuku settlement, Vatuwaqa to a flat in Laucala Beach, Suva.
- k. The birth certificate of P.T.N.
- l. The photographic booklet dated 10/12/21.

The Prosecution case

11. According to the evidence of P.T.N, she is the stepdaughter of the Accused, Nasoni Nawawalagi. In 2018 she along with, her siblings, her mother, and the accused were living in the Nanuku settlement at Vatuwaqa in the maternal grandmother's house. Then in 2019 they have shifted to a flat in Laucala Beach. By 2020 her mother was diagnosed with cancer. P.T.N had known Nasoni for almost 8 years and had been residing together in since 2018.
12. In 2018 when they were at the grandmother's house the Accused had wanted P.T.N to play hide and seek with him. The Accused had gone to his room and then called her to come and seek him. However, P.T.N had not complied but been in the kitchen. Then the Accused had come from her rear and then put his arms around and with one hand squeezed her breasts. She had not liked it and it had made her very uncomfortable. At this moment her siblings and the mother have been out of the house. She had been in shock and asked the Accused, "*Why are you doing this?*" The accused had taken it as a joke and then smiled and giggled. P.T.N had not told this to anyone.
13. The in 2019 they have shifted to an apartment in Laucala Beach. She identified the house on photographs number 2, 3 and 4. Photo number 2 depicts the house in two colours the left portion of a pinkish brown colour and the right half is yellow in colour. It is a corrugated sheet and a wooden single-story house. She identified these two parts as the rooms. She with her mother and siblings have been living in the left side room and her

stepfather in the yellow room towards the right side. Whilst in this house on a day in 2019, she had gone to a shop nearby with her brother to buy some juice for her mother. When the two returned home it has been somewhat dark and the two children have thrown stones towards the house and P.T.N has hidden in a cassava patch whilst her brother hid himself in a nearby hill. Then the accused has come out of the house due to the pelting of stones and looked around. Then he has lowered his zip and taken out his penis and then had shaken it. She also says that the accused hugged her thereafter then she went into the house. Her mother had been in bed but P.T.N had not told anything to her mother. She says that her mother would not believe her and that she was afraid.

14. After this incident, during the same year she had been alone at home and had gone to sleep during mid-day. Her mother and siblings have gone to the town. The accused had been at work that day. Whilst she was asleep she had suddenly felt something heavy on her and woken up and seen the accused on top of her. She had felt pain in her vagina and seen the accused inserting his penis into her vagina. Seeing this she had been in shocked and also frightened of the accused and she had not done anything. The accused had put his penis in and out for about 3 to 4 minutes then stopped it and ejaculated it outside. The accused had asked her to go to the bathroom to wash herself before her mum returned.
15. On this occasion too, she had been distressed and uncomfortable and though she wanted to scream she had been worried that the accused may harm her more. After this incident she had seen blood stains on the bedsheet and then she had changed the sheets and subsequently burnt it. When she was asked why she burnt it she said if her mother saw it she would think she had brought some outsiders to the house and that her mother would not believe her.
16. Apart from this incident once again during the same year when she was alone at home the accused has suddenly returned and then told her that he wanted to have sex with her. She had been reluctant when the accused had held by her hands put her down, forcibly pulled down her shorts and panty, separated her legs with his and then inserted his penis into her vagina. This had lasted for a short time and she had felt pain in her vagina. This incident too she had not told anybody. When asked as to why she did not tell, she says that she felt ashamed of herself and thought that she will be blamed for the whole thing.

17. Sometime thereafter during 2020 somewhat late in the evening, she had gone to the porch in front of the room of the accused to hang some clothes on the line. Then she had heard a tapping noise which she had ignored and as it was persisting, she had looked into the room of the Accused through the window which was just there. Then she had seen the Accused with his penis out on the floor of the room. She had been quite disturbed and upset and she had run into her room where her mother was. As she was crying and her mother had asked what it was when P.T.N had told her mother that she cannot take it anymore and told her what had happened.
18. After she told her mother, her mother has informed another friend who comes to the church who intern had brought this to the notice of the Pastor who then has informed the police. The police had then recorded her statement and taken her stepfather away. She also had been taken to a doctor and had been examined.

Evaluation

19. The above is a general narration of the facts narrated by P.T.N. She was subjected to cross-examination during which it was suggested thus; the exposing of the penis near the cassava patch was not intentional. The accused hearing the noise had come out and then wanted to relieve himself (urinate). When he was so trying to urinate, it was seen by the girl. As regards the last incident of seeing the Accused with his penis in the room the position suggested was that the girl looked at and saw something but the accused did not expose himself. It was suggested that the accused did not touch the breasts and denied both acts of sexual intercourse. It was suggested that the accused used to swear at them and as he was somewhat cruel and that P.T.N is angry and is making a false allegation.
20. In the course of cross-examination there were no contradictions or omissions elicited. I did not observe any contradictions *per se* either. P.T.N has not promptly complained or told her mother. There is a delay. The sexual acts in some degree have been going on since 2019. This have been disclosed only in or around late 2020 to her mother. When the trial commenced her mother was dead. Thus, she could not be called as a witness. However, there is certainly a delay of over 2 years in disclosing. If there is a reasonable ground or an

explanation which is acceptable then the delay will not defeat her evidence. The reasons that she gave are the fear she had of the accused, the fact that her mother may not believe her and that she would be blamed. These reasons will have to be considered in the circumstances in which P.T.N was in during that time. The circumstances when I say are, that the accused was her stepfather and he was living with the girl and her family in the same house. It is in evidence that the accused had been cruel and swearing at them and was of a controlling nature. This considered with the fact that her mother was sick and bedridden at some point with cancer further compounds the situation in which she was. She as well as her siblings and her mother have been at the mercy of the Accused. She had been around 15 to 16 years of age then. When she gave evidence, I clearly observed though she was almost 18 years now she was an extremely timid and to some extent naive. She did not speak out a loud and was very soft spoken. At the commencement of her evidence, she appeared to be somewhat at ease. However, as and when she was questioned about the various acts of sexual nature committed by the stepfather, I clearly observed that she was extremely emotional and a great degree of pain, agony and inhibition was evident. This demeanor was consistent with and clearly demonstrated that she was in fact recalling and re-living the unpleasant incidents and narrating what she had actually experienced. This I clearly observed and to my mind this demeanor and deportment is that of a truthful witness.

21. In cross examination the defence also suggested that the accused had been swearing at P.T.N and her brother and that they were angry with him and that she is making a false allegation against him. I would now consider these suggestions. P.T.N had been around 16 years when the complaint was made. Her mother has been sick. If we consider the nature of the allegation, it spends out to a period of almost 3 years. This also includes several different acts of sexual nature. If she wanted to fabricate a false allegation one would in the normal course expect her to make an allegation that she was abused recently? Fabricating a complicated allegation running back to 3 years is somewhat unusual. Further considering the circumstances, the nature and the demeanor of P.T.N, I am convinced she does not have the capacity or the courage to fabricate such a complicated false story. The Defence did not elicit any contradictions or omissions during her evidence. If a girl of this nature falsely fabricated such a complicated series of events one would expect some contradiction or omission to arise. Nothing of that sort was seen. In addition if the P.T.N

and her mother fabricated a false story due to anger or vengeance, in the normal cause of events one would expect the P.T.N and her mother to have proceeded to the Police and made a complain. That has not happened in this case. As the girl was crying after seeing the Accused with his penis out and the mother had enquired as to why she was crying when the P.T.N had disclosed what has been happening to her. This had been conveyed by the mother to another friend attending the same church. That friend has informed the Pastor who has passed the information to the Police. The manner in which the complaint was made clearly defeats and negates any inference of a false fabrication as this is not the conduct of a person making of a false allegation. Neither P.T.N nor her mother have initiated the complaint to the Police. It is by chance that this reach the Police. In this circumstances the allegation that this is a false fabrication is extremely improbable.

Belated Complaint

22. P.T.N has not complained for almost 3 years. There is certainly a delay. The reasons given by P.T.N are that she was afraid of the accused and was scared of her mother that she would not believe her and she was ashamed. She finally had to tell mother because her mother saw her crying and asked her why. The delay *per se* will not make her evidence inadmissible or unreliable, provided that there is a valid reason or a plausible excuse for the same. However, there is a serious duty on this court to consider the reason for the delay and consider if it is reasonable and satisfactory. It is settled law that recent complaint is relevant to the question of consistency, or inconsistency, of the complainant's conduct, and as such is a matter that goes to her credibility and reliability as a witness. (Vide **Raj V The State 92014) FJSC 12: CAV 3 of 2014, 20 August 2014**).
23. The delay in making the complaint against the Accused for over three years, has to be considered in the circumstances of this case. P.T.N was in the house under the custody and care of Accused as her stepfather over whose family and house the Accused would naturally have control and influence. Her mother was sick. As I observed P.T.N is an extremely timid and weak in nature. A hapless girl of 15 to 16 years of this nature will naturally be under his influence and when subjected to sexual abuse will be confused and will succumb and not have the nerve or the courage to complain to another. As observed P.T.N is a girl of a mild nature and timid character she certainly does not appear to have

the character to rest and complain against her stepfather. Justice Fernando (President of the Court of Appeal of Seychelles) in **Jean-Luc Louise v state** [2021] SCCA 72 considering the delay similar circumstances opined that,

“The matter of recent complaint only goes to the issue of credibility and consistency of the complaint...” and that, *“...Delay is a typical response of sexually abused children, as a result of confusion, denial, self-blame, embarrassment, powerlessness and overt and covert threats by offenders”*.

24. This is applicable to the present case too. P.T.N from a very young age being under care and custody of the accused with a mother who was not very receptive, would require courage and emotional strength to reveal this even to her own mother or to another. It appears that P.T.N, with the passage of time been abused has come to a breaking point and has cried in front of her mother after seeing the Accused with his penis out in his room. It appears with time she has gained courage and understanding and was psychologically prepared for the consequences of divulging and has finally told her mother. Hence, I hold that the reasons for the delay are reasonable and acceptable to this Court. In the aforesaid circumstances I am of the view that the evidence of the P.T.N is truthful, reliable and creditable.

25. Stino Fred, the brother of P.T.N was the next witness. He testified that he went to the shop to buy juice for the mother and as they returned home, they threw stones at the house and hid nearby. Then the accused had come out of the house, looked around and lowered his zip and taken out his penis. He also says that his sister P.T.N was hiding in the cassava patch and he was hiding in a hill nearby. In Cross Examination it was put to him that the accused was nasty used to swear at him and even chases him out of the house as such he did not like the Accused. This he admitted. Stino also admitted that though the accused took his penis out he did not see the Accused doing anything with his penis. He said that he cannot remember if the accused urinated out there.

Evaluation of his Evidence

26. This witness was 12 years old. Apart from narrating the first incident he did not speak as regards any of the other incidents. In giving evidence, he very frankly and genuinely disclosed whatever he saw and even under cross examination admitted whatever he had observed. There were no contradiction or omissions that was elicited from hm. His demeanor was consistent with that of a truthful witness. He did not go out of his way to give evidence against the Accused. The defence line of cross examination was that the boy did not like the Accused as he was ill-treated and as such was giving false evidence against the Accused. As stated above he limited his evidence to just one incident and that too he did not exaggerate and readily admitted what was true and in favor of the accused too. If he wanted to falsely support his sister one would expect him to say more even in respect of other incidents. He did not do so. In these circumstances I accept his evidence as being truthful and reliable.
27. Finally, the Prosecution called Doctor Losana Burua who had examined P.T.N on 25.01.2021. Qualifications and expertise and experience was led in evidence admitted and was not disputed. In view of which this court is able consider her as an expert witness. She has obtained the case history from the P.T.N. The girl had told her that when she was 8 years, she had moved with the step father to live in Suva. The accused had started touching her indecently [breast]. In 2019 the step father has forcibly raped her twice. In 2020 he has exposed his private parts to her on several occasions. Upon recording the history, P.T.N had been examined and she has observed an old healed hymenal tear at 7 o'clock and 5 o'clock position and by-lateral labia minora abrasions caused by blunt force which according to her opinion could be caused by an erect penis. She also stated that when a tear of the hymen is caused there is pain and bleeding. In cross examination it was suggested and she admitted that there is no medical evidence to connect the Accused to these injuries.
28. This witness had mainly performed her duties and given evidence and the defence too did not challenge her evidence. I accept her evidence as being truthful and reliable.

Defence Evidence

29. The Accused Nasoni Nawanawalagi gave evidence and his testimony was that he was married to the mother of P.T.N and he was working at Permal Construction. He works from Monday to Friday and his work schedule was from 7.30 a.m. to 5 p.m. After work he usually reaches home around 6 o'clock. He admits living in Laucala Beach house as seen in photograph No.2. His family members always swear at him and that he chases them out. However, he says his relationship with P.T.N was good however Fred was always angry with him as he swears at him.
30. On the day stones were pelted he says that he knocked off at 5 p.m and came home and wanted to relieve himself as the younger daughter was inside the toilet, he went outside to relive himself just outside the house. He admits that in 2019 one night some stones were thrown at the house and that he went out to check on it. He had not seen anyone around and then he had come back into the house. He denies showing his penis to P.T.N and says he was shocked when these allegations were made. He also said that P.T.N's friends used to come to the house and want to take her to their houses which the accused had not allowed as she was schooling. After this brief evidence in chief, he was cross examined and admitted that in 2019 and 2020 his wife was sick with breast cancer and he was only other adult in charge to look after the children. He admitted that Saturdays and Sundays he does not have work but, he would be working on some Saturdays and sometimes on Sundays too. When asked about holidays such as Diwali, he said that when he does not go to work, he usually goes to Cunningham to visit. He admitted being mean to the children and that they were afraid of him and that he swears at them using bad words. He also admitted that by this time he had stopped sexual relations with his wife. It was suggested that he continued to have sexual urges which he denied. It was suggested that because he stopped having sexual relationship with his wife, he had on two occasions forced P.T.N and had inserted his penis into her vagina and had sexual intercourse with her. The accused denied this. It was further suggested that he was in his room when he exposed his penis to the step daughter which he denied. However, he admits being in the room when P.T.N was hanging clothes but denies tapping or taking his penis out. This was the Accused's evidence.

Evaluation

31. When you consider the evidence that of the Accused in it's totally the main thrust is that these are false allegations made against him as he was cruel and used to swear at P.T.N and her brother and also used to chase them out of the house. In short, his position is that P.T.N has fabricated a false case against him due to anger and vengeance. Let me consider the veracity of this. As considered and evaluated above, it is highly improbable for a P.T.N to fabricate such a complicated multi-incident story. Further in the normal course of events if one intended to make a false allegation you would naturally expect the narration of a simple straight forward incident to be fabricated and immediately to go to the Police and complain. As narrated above that has not happened so but the complaint has been made by the Pastor quite independent of P.T.N or her mother. This sequence of events and nature of the allegations clearly vitiates and negates any inference or colour of it been a false allegation or fabrication. Therefore, the position advanced by the accused is highly improbable.
32. The accused unsuccessfully attempted to take up the position that he works from 7 a.m., to 5 p.m., from Monday to Friday and that he had done so continuously and has never come home during midday. He tried to impress this court that even on holidays he had worked sometimes and if not, he goes out to Cunningham. Thus, the accused tried to impress this court that he was never at home during midday. This is practically not possible and is not realistic. It is so improbable and it should be false in all probabilities. To that extent I hold the accused as evidence is false.
33. Thus, the main grounds taken up by the accused happens to be extremely improbable. Why should he take up such improbable positions which are thus false? To my mind this is because he wanted to hide the truth which he knew was against him. Accordingly, I hold that the accused evidence is not truthful and I reject his evidence in its totality.

Proof of charges

34. Because the accused's evidence is determined to be false and is rejected, it will not prove the charges or relieve the burden of the Prosecution in any way. The Prosecution still has to prove all the ingredients of each of the offences beyond reasonable doubt. Thus, now I will consider if the charges have been proved beyond reasonable doubt.

35. Firstly, I will consider count No.1, the sexual assault charge. According to P.T.N when she was at Vatuwaqa in 2018 the accused had asked her to play hide and seek. The Accused had gone in to a room and called P.T.N to come in and look for him. She had not done so but and remained in the kitchen. Then the accused had then come from her behind and put his arms around and with one hand squeezed her breasts. The accused totally denies this. The defence suggested to P.T.N that the accused does not play hide and seek with the children and this story is improbable. In fact, Stino has admitted that the Accused had never played hide and seek with him. If I may consider this, it is true that the accused at his age and the circumstances of this case may not play hide and seek with his step children. He has not done so with Stino. Then is it possible for him to invite P.T.N to play hide and seek? To my mind what transpires from the circumstances and the inference that necessarily arise is that the accused was making an attempt to get P.T.N to come into the solitude of the room on the guise of seeking him. That is why he went in to the room and called her to come and seek him in there. In hide and seek the person who hides does not call out and tell where he is but the Accused did so. This was no game of hide and seek but an attempt to get P.T.N in to the room with an ulterior motive of satisfying some sexual desire. As he was not successful in getting her into the room the Accused has then gone to the kitchen hugged and squeezed her breasts.
36. That being so, I would now consider if the hugging from behind was done due to the fatherly love and affection. Step father hugging her step daughter may not be unusual. In so hugging he may accidently and unintentionally knock or brush against the girl's breasts. But in the present case P.T.N clearly and unequivocally said that the Accused with one of his hands did "squeeze" her breasts. Squeezing means not merely touching or brushing or rubbing over but it is something more. What is it then? Squeeze is to firmly press (something soft or yielding), typically with one's fingers (Oxford dictionary). Thus, squeezing with the hand is contracting the fingers and exerting pressure. Then, squeezing the breasts cannot happen accidently or unintentionally and the accused should have consciously brought his hand upon the breast and by a positive act exerted pressure on the breasts by contracting his fingers. Therefore, the evidence clearly proves that the accused has deliberately and intentionally squeezed her breasts.

37. A step father of 61 years squeezing the breasts of a 15-year-old step daughter in these circumstances is certainly not decent by any standard of conduct in our society. The circumstances further lead to the inference that this act was done for some form of sexual pleasure and it is an act of a sexual nature. In these circumstances I hold that the Prosecution has proved count No.1 beyond reasonable doubt.
38. I will now consider counts 2 and 4 together as both these counts are charges of indecent annoying of P.T.N. As far as the physical acts are concerned on the evidence of P.T.N. it is proved that in 2019 at the cassava patch the accused has taken his penis out and the girl had seen it. However, this court should consider if the Accused saw P.T.N at the point he took his penis out. The evidence of P.T.N as well as her brother is that they were hiding and it was dark. P.T.N has been hiding in a cassava patch. In these circumstances an inference arises that the accused may have not seen P.T.N when he took his penis out. If so, he had not known that P.T.N was there. If that be so one cannot conclude that the Accused did the act of taking out the penis with the intention to insult the modesty of P.T.N. When there is an inference in favor of the accused that arises simultaneously with an inference against him in a criminal matter the inference in favor of the accused should be preferred. Thus, I conclude that there is a reasonable doubt created in respect of count No.2 and that the Prosecution has failed to prove the same beyond reasonable doubt.
39. Now let's consider count No.4. In this too the fact of the incident namely the accused been in the room with his penis out was seen by P.T.N is proved by her evidence. However did the accused intentionally expose his penis towards her to insult the modesty or was it an accidental sighting? P.T.N states that she heard a tapping noise and looked around and she had peeped into the accused's room through a window and seen the accused on the floor with his penis out. At this point the Accused has not said anything or done anything more but had been looking up towards the ceiling. When one considers these circumstances and inference that arises is that the accused was engaged in some act with his penis out in the privacy of his room which P.T.N had happened to see. In the absences of any other gesture or at least looking at P.T.N it is not possible to necessarily conclude that the accused was intentionally engaging in that act to insult the modesty of P.T.N. If the Accused wanted to

expose his penis to P.T.N, one would expect him be standing and not be on the floor. In these circumstances this court is required to give the benefit of the inference that is in favor of the Accused. Thus I hold that the Prosecution has failed to prove count No. 2 beyond reasonable doubt.

40. Now I will consider count No.3, the representative count of rape. According to P.T.N when she was asleep, she felt something heavy on her and then seen the accused on top of her with his penis in her vagina. She had tried to resist but was unable due to his weight and also as she was shocked and frightened and also, she was worried that he may harm her more. The Accused had been harsh and moving up and down. She says she felt pain in her vagina and after the act saw blood on the bed sheet. She had burned and destroyed the bed sheet as she was worried that her mother will not believe her and she felt ashamed of herself. She was also afraid that her mother will believe that someone else has been to the house. Her mum sees only the good side of her step farther. Then she narrates that once again the accused has forcibly had sexual intercourse with her during 2019. (That the details are narrated above). The first act of intercourse where she claimed was painful and that there was bleeding is supported by the medical evidence. The Doctor says that when the hymn ruptures or tears there will be pain in the vagina and bleeding. This is in line with P.T.N's evidence of the first act of penetration by the Accused. Though she says that the Accused did on a second occasion penetrate her vagina she does not say that there was any bleeding on this second occasion. Considering this evidence with the medical evidence, on the one hand the medical evidence supports the evidence of P.T.N as regards the first encounter of bleeding and pain. Then the second incident the lack of bleeding clearly establishes that P.T.N is telling the truth. If she was lying one would expect her to repeat the same scenario including bleeding but she did not do so. In the above circumstances I hold that the Prosecution has clearly established that the Accused did penetrate his penis into the vagina of P.T.N.
41. P.T.N said that she did not permit the accused to insert his penis into her vagina. As regards the first incident the accused had inserted his penis when she was asleep upon waking up, she had not been able to resist due to fear as well as she was overpowered. Therefore, the

accused has committed the act of sexual intercourse without P.T.N's consent. Accordingly, I hold that the Prosecution has proved count No.3 beyond reasonable doubt.

42. For the avoidance of any doubt I would place on record that the failure to prove counts No.2 and 4 of indecently annoying is not in any way due to any weakness or non-acceptance of the evidence of the Prosecution. I have accepted the Prosecution evidence without any reservation. However, upon accepting the Prosecution in its totality there arises an inference which is in favour of the Accused which is consistent with his innocence along with the inferences that are consistent with the guilt of the Accused. I have given the Accused the benefit that has so arisen.

Conclusion

43. Accordingly, I hold that the Prosecution has proved the sexual assault count No.1 and the rape count No.3 beyond reasonable doubt. Thus, I find the Accused guilty of count No. 1 and count No.3 separately as charged and I hereby convict the accused of count No.1 and count No.3 separately. However, I hold that the Prosecution has failed to prove count No. 2 and count No.4 beyond reasonable doubt and accordingly I acquit the accused in respect of counts No. 2 and count No.4.



At Suva

14th July, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.
Legal Aid Commission for both the Accused.