

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

**Criminal Case No. HAC 282 of 2020**

**BETWEEN       :       THE STATE**

**AND             :       ABHINESH KUMAR**

**Counsel         :       Ms. Shameem, S. for the State**  
**:       Mr. Singh, R with Mr. Liganivai J for the Accused**

**Date of Trial     :       30 May – 6 June 2022**

**Date of Judgment:   29 July 2022**

**JUDGMENT**

**The charge**

1.     The Accused is charged with one representative count of rape contrary to section 207 (1) (2) (a) of the Crimes Act 2009.
  
2.     The Prosecution alleges that the Accused, between the 1<sup>st</sup> day of October 2019 and 31<sup>st</sup> day of May 2020 at Nasinu in the Central Division, had carnal knowledge of the Complainant without her consent.

**Burden and standard of proof**

3.     The burden of proving the allegation against the Accused lies with the Prosecution. They do this by proving each element of the offence beyond reasonable doubt.

**Elements of rape**

4.     The elements that the Prosecution must prove are:

- a. That the Accused
  - b. had sexual intercourse of or with the Complainant, meaning he penetrated her vagina with his penis
  - c. without her consent.
5. Consent is agreement with or giving permission for something to be done. To be valid, consent must be voluntary and not be out of compulsion or fear, or a result of deception. It must be freely and voluntarily given by a person with the necessary mental capacity to give the consent. Submission without physical resistance by a person to an act of another person shall not alone constitute consent. (Section 206, Crimes Act)

Agreed facts

6. The following facts are agreed between the Prosecution and the Defence and are taken as proved:

The Parties:

- a. Name of the Complainant.
- b. Between 1<sup>st</sup> October 2019 and 31 May 2020, the Complainant was in Year 12.
- c. The Accused is Abhinesh Kumar, hereafter referred to as 'Abhinesh'.
- d. Abhinesh was employed by Makans as a Sales Representative for the period 10<sup>th</sup> July 2017 until 12 November, 2020 as he had no choice but to resign after his bail was denied.

Family Relations:

- e. Names of the Complainant's parents and siblings
- f. Names of the Accused's wife and daughter.
- g. Names of the Complainant's father's brothers.
- h. The Accused is the Complainant's paternal uncle.
- i. Name of Complainant's grandmother.
- j. Name of Complainant's uncle and his wife.
- k. Name the Complainant's brother in law.

Residence:

- l. - n. Place of residence of the Complainant and the Accused at the time of the alleged offending.

The Prosecution evidence

7. The Prosecution called 9 witnesses.
8. WPC Maraia of the Crime Scene Unit photographed the scene of the alleged offence on 16 February 2021. The photos were taken on a D7000 Nikon camera, uploaded to a computer and burnt into a DVD. They were then extracted and compiled in a booklet tendered as evidence. The photos were taken in the presence of and on information provided by the investigating officer. They show the Complainant's home from the outside as well as the inside of the Complainant's home and bedroom where the alleged offences took place.
9. The Complainant is now 19 years old. In October 2019, she was 16 years old and was in Year 11 at school. She lived in an extended family setting with her parents, her brother, father's mother, her father's brother Kunal, his wife Reema and their son. Her father drove a taxi and her mother worked at a relative's restaurant. Her brother worked in the weekdays. Her uncle Kunal also drove a taxi and sometimes worked at other places. Kunal's wife Reema used to stay home but she did not always know whether she was at home or not.
10. She explained the layout of her home from the photographs tendered by WPC Maraia. There are two flats in the one building.
11. The Accused, his wife and daughter lived in the second flat next door in the building.
12. She used to stay with her grandmother at home when family members went out to work. She recalled a time in October 2019. She had been watching TV with her grandmother. After a while, her grandmother went to her room to rest and she went to her own bedroom to look for a piece of jewellery she had been looking for before. Her back was to the door of her room which was open while she was looking for her jewellery in the wardrobe. She did not know anyone had opened the door and entered the house until she turned around

and saw the Accused inside her bedroom. She asked him what happened and he replied, "Nothing." She then turned around and continued searching for her jewellery thinking he would go back as he had nothing to say.

13. After a while, the Accused touched her breasts from behind her. She pushed his hands away asking what he was doing and told him what he was doing was wrong. He came close to her and said into her ear not to tell anyone or he would do something to her. She felt he meant he would hit or murder her. He turned her sideways and pushed her to the bed. She fell face up on the bed.
14. He then removed her clothes and removed his pants and underwear and inserted his penis into her vagina. She tried to stop him but was not able to do so. He told her not to shout and covered her mouth with one hand while with the other hand he inserted his penis into her vagina. She said it was very painful. She felt ashamed because he was her uncle doing this to her. The Accused did not ask for her consent and she did not consent to sexual intercourse with him. She pushed him because she did not want to have sexual intercourse with him.
15. Her grandmother was in the next room resting but she felt helpless and could not shout because the Accused had told her not to tell anyone or he would do something to her. After doing this to her, the Accused put on his clothes and left as if everything was normal.
16. She did not tell anyone about this incident because of the Accused's threat. She felt he meant he would hit or murder her. He was always aggressive and used to fight with her father.
17. She said she did not have the courage to tell anyone because no one at home would listen to her and they always thought she was in the wrong. She recounted an incident where her aunty's brother Ravinesh had inappropriately touched her when she was in Year 10. She had told her mother but when nothing was done, she told about it at school. The matter was reported to Social Welfare and her parents were called to come. They were told to resolve the matter in their family.

18. The Complainant said the Accused person did the same thing to her a number of times. The second incident happened sometime between November and December 2019, the third incident happened in December 2019, and the last incident occurred in May 2020 while her mother was in Labasa.
19. She said the second incident happened when she was not feeling well and was lying down in her room. The Accused came inside the room without making a sound. He removed her pants and undergarment and told her not to tell anyone or he would do something to her or hit her. He inserted his penis into her vagina and left afterwards. He did not ask if she consented to sexual intercourse.
20. On another occasion sometime in December 2019, around midday, the Accused had put his penis in her vagina without her consent.
21. The last incident happened sometime between 5<sup>th</sup> – 9<sup>th</sup> May 2020 when her mother was in Labasa. On this day, she had been outside with her grandmother. Her aunt Reema was inside the house but she did not see where Reema was. When she came into the house from outside, the Accused pulled her into the room and closed the door. Her grandmother was somewhere outside. She tried to stop the Accused from pulling her but was not able to do so. He pushed her to the bed, removed her pants and undergarment, removed his own clothing and put his penis into her vagina without her permission. He covered her mouth with his hand and when he was finished, left as if nothing happened.
22. She did not tell anyone at home for fear that they would blame her and also out of fear that the Accused would do something to her.
23. After a while, there was an awareness program at school where they were told they could share things they could not share at home. They talked about people going through depression and the many suicide cases. She kept everything within her and it affected her school work. She felt she could have harmed herself. From the awareness, she felt it was the right time to tell someone about what the Accused was doing to her.

24. After a long time, she found the courage to tell someone at school. She told her form captain Maanvi after Maanvi yelled at her asking what was wrong with her. Maanvi took her to their form teacher. The matter was reported to the level dean and the principal. A report was lodged with the Social Welfare Department and her parents were called to see the Principal.
25. She was taken for medical examination but she did not go through with it as she was having her menses and was uncomfortable with being examined at that time. She also did not want to be examined out of concern for her father's medical condition. She was afraid something might happen to him. She was later medically examined when her menses finished.
26. Maanvi Singh was form captain of the Complainant's class in 2020. She noticed a change in the Complainant and decided to enquire. After insisting that the Complainant tell her what was wrong, the Complainant cried and finally said that her uncle had touched her private part. She said that he had raped her. She took the Complainant and reported the matter to their form teacher who then took the matter up with the level dean. The level dean told the Principal.
27. The Complainant's mother said the Complainant had complained to her about the Accused touching her breast and thigh. She had told the Accused not to touch the Complainant and to stay far from her when he talked to her. This was the only complaint the Complainant had made to her.
28. She only found out about the complaint in this case when she and her husband were called to the school after the Complainant told her teachers and the matter was reported to the Police. After the matter came to light, the Complainant was scared to go home, so her father had to drop her off at her sister's place. At home, the Complainant would stay in her room and not come out for fear someone would do something to her.
29. She recalled an incident where the Complainant had told her about what a Ravinesh had done to her. She had told her husband, and Kunal and Reema but they did not believe the

Complainant. In the end, the Complainant told the school and they were called to the Social Welfare Department. After this, they talked to Ravinesh and warned him. He stopped coming to their place.

30. WDC 2571 Sercima was the investigating officer in this case. She received a report from Ms. Rose, the school principal and she attended to the report in the presence of the Social Welfare Officer. She took the Complainant twice for medical examination. She also recorded witness statements and caution interviewed the Accused.
31. The form teacher Ms. Prasad, the level dean Ms. Reddy, and the principal Ms. Sharma testified to receiving a report on 11 August 2020 from the Complainant that she had been raped by her uncle. The Complainant had told her form captain and both students had gone to see Ms. Prasad who referred the matter to the level dean and then the principal.
32. The Complainant was first taken in for medical examination on 11 August 2020 but was not examined as both the patient and her mother did not consent to an examination on this day.
33. On 24 October 2020, the Complainant was medically examined. Her hymen was not intact. There was a healed tear on the hymen and a healed abrasion on the fourchette which was still tender to the touch. The genital injuries were old and healed. The examining doctor was of the opinion that the injuries could have been caused by blunt force trauma, by a male erect penis.

#### The defence case

34. The Accused chose to give evidence. He did not need to do so. He is presumed innocent and does not have to prove anything. Having chosen to testify, his evidence is subjected to the same scrutiny given to all other evidence before the Court, the onus remaining with the Prosecution at all times to prove his guilt. If his account is or maybe true, he must be found not guilty. Not believing his version of events does not automatically lead to a conviction or relieve the Prosecution of its burden of proving guilt beyond reasonable doubt.

35. The Accused denies the allegations against him saying that the Complainant fabricated the accusations because he was strict and stopped her brother in law from coming to their house. When the incident about Ravinesh came up in January 2019, he came from work and when told about what Ravinesh had done, he told Reema for her brother Ravinesh to leave the place. Later, in the presence of other family members, the Complainant cried to him saying that it was her brother in law Shivnesh who had made her make up the story about Ravinesh because Shivnesh did not want any other men at their place. He got angry and told the family he did not want to see Shivnesh in the compound again.
36. After this incident, the extended family lived together happily and everything was normal. Sometime in August 2020, the Complainant's father told him that the Complainant had made a report to the Social Welfare that the Accused had pushed her. He and his family had confronted the Complainant the next morning in the presence of the rest of the family. His daughter and wife asked the Complainant when the Accused had done these things to her. Kunal then asked the Complainant why she was telling lies as everyone stayed there and it was impossible for these things to happen there. The Complainant was defiant and told her father to see what she would do to his brothers.
37. I note that at the time of this confrontation, the report was already with the Social Welfare Department. The Complainant's father became aware of the allegations after the Complainant had made a report at school.
38. The Accused's wife gave evidence consistent with that of the Accused.
39. The defence called Rupashna, a neighbor and friend of the Complainant. They did not attend the same school but studied together in 2019. The Complainant told her about her boyfriend, her schoolwork and what she did at school.
40. Dr. Navakamocca gave evidence for the defence. He specializes in obstetrics and gynaecology. He was shown the medical reports prepared by Dr. Burua. He said the absence of a hymen does not necessarily mean sexual assault as there are many things that can cause a hymen to not be present. He said there was no clinical proof that the injuries were caused by a male erect penis. The fourchette still tender to touch could be days old, rather than months, and could be from riding a bike, from a fall, etc. He said it is impossible



to say for certain that the injuries were caused by blunt force trauma as it is possible also that it could have been caused by sharp force trauma.

#### Analysis

41. The charge against the Accused is representative in nature.
42. A representative count is an allegation that there were more than one separate acts of offending in the count. In such a case, the Prosecution is required to prove that between the specified dates in the charge, at least one act of rape occurred. (Section 70 (3) Criminal Procedure Act 2009; see also *Koro v The State* Criminal Appeal No: HAA0048 of 2002L 2 October 2002; *State v Kabaura* Criminal Case No. HAC 117/10, 9 August 2010, at [9]).
43. In this case, the Prosecution led evidence of four alleged incidents. Detailed evidence was led in support of an alleged incident in October 2019 and another in May 2020. There were two other alleged incidents within this period.
44. I bear in mind that the State need only prove that at least one act of rape occurred within the period from 1<sup>st</sup> October 2019 to 31 May 2020.
45. The Complainant and the Accused are known to each other. The identification of the Accused person is therefore not in issue.
46. The defence is one of denial. The defence say that the Complainant has made up these allegations against the Accused because he was a strict uncle who stopped her brother in law from coming to the Complainant's place. This happened in January 2019.
47. The Prosecution case rests substantially on the credibility of the Complainant. Accepting her account to be true would lead to a finding of guilt against the Accused.
48. On the other hand, if the Accused's account is or may be true, the benefit of the doubt must be given in his favour.
49. In addition to the Complainant's evidence, the Prosecution also relies on evidence from the form captain and school teachers, as well as the two medical reports.

50. The reports at school were made about 3 months after the last alleged act, and about 10 months from the first. The report was not promptly made. The nature of the reports to the school were from the Complainant and not from an independent source.
51. A late report does not necessarily point to falsity or fabrication. Complainants in sexual assault cases do not all react in the same or similar way. While some will make a prompt report, others take time to do so out of fear, shock and/or uncertainty. Still others may not wish to report to protect others who may be affected if the offending came to light. Thus the timing of the report is not all important. What is important are the reasons for any delay in reporting.
52. In this case, the Complainant said that the Accused had told her not to tell anyone or he would do something to her. She said he was an aggressive person and used to fight with her father. He would even say obscene things about her and her sister to her father. She did not tell anyone as she was afraid of him. Her mother also gave evidence that they were scared of the Accused.
53. The Complainant also said that she did not tell anyone at home as no one would believe her. They did not believe her when she told them about Ravinesh and so she reported it at school and her parents were called by the Social Welfare Department.
54. The Accused in his evidence said that when he found out about what Ravinesh had done to the Complainant, he growled Reema and told her for Ravinesh to leave the place. When this matter came up at home, Kunal had asked the Complainant why she was telling lies.
55. Following an awareness program at school touching on depression and suicide, she decided to report.
56. She eventually told Maanvi after Maanvi's persistent enquiry as to why she was withdrawn and not her normal self.
57. I accept as true the Complainant's evidence and accept as reasonable her reasons for not reporting the matter early. She struck me as a truthful witness.

58. The medical reports are not conclusive of penile penetration or of the Accused person's guilt.
59. There were some contradictions as to whether her aunt had been at home when the alleged incidents happened, and omissions in the statements given to the Police. Out of Court statements to the Police are not evidence. The contradiction and omissions highlighted do not in my opinion shake the basis of the Complainant's evidence in Court.
60. On the whole of the evidence before the Court, I believe the evidence of the Complainant that while her mother was in Labasa in May 2020, the Accused had pulled her into her bedroom and had forceful sexual intercourse with her on her bed without her consent. I accept that the Accused knew that the Complainant did not consent.
61. I reject as untrue the Accused person's denial of the charge and do not believe that the Complainant had fabricated these allegations against him.
62. I feel sure of his guilt and convict him accordingly.



*Stainiu F. Bull*  
Stainiu F. Bull  
**Acting Puisne Judge**

**Solicitors:**

Office of the Director of Public Prosecutions for the State  
Munro Leys for the Accused