

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

**Criminal Case No.: HAC 398 of 2022**

STATE

vs

SHARAD PRADEEP SHARMA

**Counsel:** Ms. P. Ram and Ms. T. Sharma for State  
Mr. T. Sharma for Accused

**Date of Hearing:** 25<sup>th</sup> -26<sup>th</sup> May 2023

**Date of Judgment:** 20<sup>th</sup> July 2023

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**J U D G M E N T**

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1. The Accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offence are;

**Count 1**

Statement of Offense

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

*Particulars of Offence*

**SHARAD PRADEEP SHARMA** on the 21<sup>st</sup> day of November, 2022 at Kinoya in the Central Division, had carnal knowledge of **Daya Wati**, without her consent.

2. The Accused pleaded not guilty to this offence; hence, the matter proceeded to the hearing. The hearing commenced on the 25th of May, 2023, and concluded on the 26th of May, 2023. The Prosecution presented the evidence of two witnesses, including the Complainant. The Accused gave evidence for the Defence. Subsequently, the Court heard the oral submissions of the parties. In addition to their respective oral submissions, the learned Counsel for the parties filed their respective written submissions. Having carefully considered the evidence adduced during the hearing, and the respective oral and written submissions of the parties, I now proceed to pronounce the judgement.

#### **Burden and Standard of Proof**

3. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

#### **Elements of the Offences**

4. The main elements of the offence of Rape as charged are that:
  - i. The Accused,
  - ii. Penetrated the vagina of the Complainant with his penis,
  - iii. The Complainant did not consent to the Accused to penetrate her vagina with his penis,
  - iv. The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.

5. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed this offence against the Complainant. There is no dispute about the correctness of the identification. The Accused and the Complainant are known to each other. The Accused admitted that he was in his house with the Complainant that day.
6. The Accused admitted that he penetrated the vagina of the Complainant with his penis at his home on the 21st of November, 2022. Therefore, there is no dispute about the elements of penetration.
7. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
8. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his penis and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.

#### **Admitted Facts**

9. The Prosecution and the Defence tendered the following Admitted Facts pursuant to Section 135 of the Criminal Procedure Act; they are that:
  - i. *The accused in this matter is Mr. Sharad Pradeep Sharma [herein referred to as "Mr. Sharma"], 60 year old, retired of Lot 11 Velau Drive, Koronivia.*

- ii. *The complainant in this matter is Ms. Daya Wati [herein referred to as "Ms. Wati"], 63 years old, Domestic Duties of Vuci South, Nausori.*
- iii. *Mr. Sharma and Ms. Wati are known to each other through social media application, Facebook. They become friends on Facebook sometime in November 2022.*
- iv. *That through Facebook, Mr. Sharma and Miss. Wati started communicating with each other via phone messages and voice call through the social media application; Facebook Messenger.*
- v. *On 21 November 2022 in the morning, Ms. Wati attended her doctor's appointment at Bailey Clinic in Suva and thereafter made plans to meet Mr. Sharma.*
- vi. *That Mr. Sharma had travelled to Bailey Clinic and waited for Ms. Wati. They both travelled to Mr. Sharma's residence in a taxi.*
- vii. *At Mr. Sharma's residence, Mr. Sharma and Ms. Wati had sexual intercourse i.e penis penetrating vagina.*
- viii. *Whether the sexual intercourse was consensual?*

### **Prosecution's Case**

10. The Complainant is 63 years old and living with her daughter, her grandchildren and her daughter's mother-in-law. In November 2022, they were living at Vuci South, Nausori, renting a one-bedroom house. On the 17th of November 2022, she received a friend request from the Accused on her Facebook account. She added him as a friend and gave him a missed call on the messenger the same day. They started to talk via telephone on the same day. The Complainant had told him that she was looking for a house with two or three bedrooms to rent for her family. The Accused had responded, stating that he had a flat to rent. The Complainant visited her doctor at a clinic in Suva on the 21st of November, 2022. She had given a missed call to the Accused to inform him that she was going to the clinic. The Accused called and told her that he was coming to meet her. After she finished her treatments at the clinic, the Complainant met the Accused and then got into a taxi to go to the Accused's house.

11. The Complainant testified in her evidence that when she entered the Accused's house, he closed the door stating that someone might come. He then offered her a glass of water. While she was sitting in the living room, the Accused went and changed his clothes. He only had a sulu and no undergarments. He came and lay on the small settee. He then held her hand and asked her to come and sit next to him. When she sat beside him, he pulled her and made her lie next to him on his side. The Complainant had told the Accused that someone might look at them through the window. He then suggested they go to the bedroom. The Complainant went and stood beside the door of the bedroom. The bed was just a few meters away from the door. The Accused came and pushed her; she then sat on the bed. The Accused asked her to remove her clothes, but she did not. The Complainant was scared and couldn't say anything when the Accused removed her clothes. She was sitting quietly. The Accused then pushed her with his hand, and she laid on her back. The Accused then licked her private part, pulled her legs, and penetrated her vagina with his penis.
12. The Complainant felt pain and told him she couldn't do all this. She got up and sat on the bed. She then went to the bathroom and had a shower. The Accused offered her food, but she said she wanted to go home. The Accused then arranged a taxi for her to go to the main road and get a bus home. The Accused paid the taxi fare. When the Complainant reached home, she did not tell anyone about this incident. A few days later, she reported the matter to the Police.
13. Doctor Rokoduru explained, in her evidence, the finding of her medical examination of the Complainant. She tendered in evidence the medical examination report of the Complainant as Prosecution's exhibit.

#### **Defence's Case**

14. The Accused vehemently denied this allegation, stating that he had consensual sexual intercourse with the Complainant at his home on the 21st of November, 2022. He admitted that he met her on a social media platform and then started to talk to her.

According to the Accused, he treated the Complainant as his girlfriend and lover. He denied that the Complainant came to see his flat as she wanted to rent one. According to the Accused, he met her at the health clinic in Suva based on their arrangement to meet that day. They then travelled to his house in a taxi. The Accused denied that the Complainant's visit was to see the flat to rent. He categorically refuted the claim of the Complainant that she only communicated with him in order to find a house for her family to rent.

15. When they were lying on the settee next to each other, the Complainant suggested him saying that someone might look at them through the window. They then went to the bedroom. They then had consensual sexual intercourse in the bedroom. The Accused testified that he stopped penetrating her vagina when she said it was painful. They both then had a shower in the bathroom. He offered her to eat food, but she declined, saying that she wanted to go home. The Accused arranged a taxi to the main road and paid the taxi fare.

#### **Evaluation of the Evidence**

16. According to the evidence presented by the Prosecution and the Defence and admitted facts tendered under Section 135 of the Criminal Procedure Act, the parties are not disputing the visit of the Complainant to the Accused house and the subsequent sexual intercourse the Accused had with the Complainant. The dispute is whether the Complainant consented to the Accused penetrating her vagina with his penis during that sexual intercourse.
17. In a circumstance where the Complainant and the Accused presented a different version of an event, the Court must consider the whole of the evidence adduced in the trial, including the evidence of the Accused, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed this crime. The task of the Court is not to decide who is credible between the Complainant and the Accused. (

**vide;Liberato and Others v The Queen ((1985) 159 CLR 507 at 515), Goundar v State [2015] FJCA 1; AAU0077.2011 (the 2nd of January 2015).**

18. The Accused is not required to give evidence. He does not have to prove his innocence as his innocence is presumed by law. However, in this case, the Accused decided to provide evidence. Therefore, such evidence presented by the Accused needs to be considered when determining the facts of this case. If the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offence. Even though the Court rejects the Accused version that does not mean that the Prosecution has established that the Accused is guilty of the crime. Still, the Prosecution has to satisfy that it has established, on its evidence, beyond a reasonable doubt, that the Accused committed this offence as charged in the Information.
  
19. In evaluating the evidence, the Court should first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy of the evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (*vide Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).*)
  
20. The Complainant said that the main purpose of visiting the Accused's house was to view his flat, as the Accused told her he has a flat to rent. The Complainant is living with her daughter, daughter's children and her daughter's mother-in-law. The rent of the house was paid by her daughter and her husband, who is living in Australia. It was revealed during her evidence that the Complainant had not informed her daughter about the Accused's offer of renting his flat to them. She had concealed her meeting with the Accused from her daughter because she thought the daughter might disapprove of it. Still, the Complainant went ahead with her mission of finding a flat to rent.

21. During the evidence-in-chief, the Complainant specifically said they did not have any conversation about the flat when she went to the Accused's flat. However, at the later stages of her evidence-in-chief, deviating from her earlier version, the Complainant said that she had a conversation about the flat when she entered the Accused's flat. The Prosecution did not present any clarification or explanation for this inconsistency. This inconsistent nature must be evaluated with the whole of the evidence given by the Complainant and the Accused.
22. According to the Complainant, she went to the small settee when the Accused asked her to come there after he laid on it wearing only a sulu with no undergarments. He then made her lie next to him on the settee. She admitted during the cross-examination that she told the Accused that someone might look at them through the window. The Accused then suggested that they should go to the bedroom. The Complainant then walked by herself to the door of the bedroom. When the Accused pushed her, she sat on the bed. The Accused removed her clothes, and then she lay on the bed. The Complainant explained that she was scared and couldn't say anything. However, she managed to tell the Accused that someone might look at them through the window when he made her lie next to him on the settee, thus, contradicting her own version that she was scared and couldn't say anything when all these happened.
23. No evidence suggests that the Accused forced or threatened her during this incident. The Complainant said she was scared because she did not know the area. It is highly impossible that she was completely unaware of the Accused flat's location if she went to look for his flat to rent. Usually, people find the location before they contemplate renting a house. Therefore, there is a reasonable doubt whether her claim that she was scared because she did not know where she was; hence, she did not resist when the Accused penetrated her vagina with his penis is credible and reliable.
24. On the other hand, the Accused said he stopped penetrating her vagina when she said that was enough for her. If he was penetrating her vagina with his penis against her consent, he would have easily overpowered her and concluded his alleged act as he wished. This



version of the Accused aligns with the Complainant's version of the same event. According to the Complainant, the Accused stopped when she got up and said it was painful and could not do all these things. They both admitted that after the sexual intercourse, they had their shower in the bathroom. Wherefore, I find the Accused had successfully created a reasonable doubt in the evidence the Complainant gave in this regard.

25. The Complainant had not promptly reported these incidents to anyone else. She did not tell her daughter when she reached home. Eventually, a few days after the incident, she reported the matter to the Police. Gamlath JA in **State v Serelevu [2018] FJCA 163; AAU141.2014 (4 October 2018)** has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
26. The Complainant testified that she was scared of her daughter and ashamed of what had happened. Therefore, she did not tell her daughter about this incident. However, the Court heard no evidence, explaining why she eventually decided to report this matter to the Police a few days after the incident.
27. Taking into consideration the reasons discussed above, I find the evidence of the Complainant is not credible and reliable. Hence, the Prosecution failed to prove beyond a reasonable doubt that the Accused committed this crime as charged in the Information.
28. In conclusion, I find the Accused not guilty of this offence of Rape, as charged in the Information and acquit him of the same accordingly.
29. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe", written over a horizontal dotted line.

Hon. Mr. Justice R.D.R.T. Rajasinghe

**At Suva**

20<sup>th</sup> July 2023

**Solicitors.**

Office of the Director of Public Prosecutions for the State.

Office of Tirath Sharma Lawyers for Accused.