

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 38 of 2023

STATE

vs.

NIKESH CHAND

Counsel: Ms. U. Tamanikaiyaroi for the State
Ms. A. Bilivalu with Mr. P. Chand for Accused

Dates of Hearing: 26th - 27th September 2023 and 18th – 19th October 2023

Date of Closing Submission: 03rd November 2023

Date of Judgment: 23rd February 2024

JUDGMENT

Introduction

1. The Acting Director of Public Prosecution on the 30th of August 2023 filed this Amended Information, charging the Accused, Mr. Nikesh Chand with one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act, one count of Rape, contrary to Section 207 (1) (2) (b) of the Crimes Act, one count of Rape, contrary to Section 207 (1) (2) (a) of the Crimes Act and two count of Defeating the Course of Justice, contrary to Section 190 (c) of the Crimes Act. The particulars of the offences are:

COUNT 1

Statement of Offence

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

Particulars of Offence

NIKESH CHAND on the 15th day of December 2022 at Navua, in the Central Division, unlawfully and indecently assaulted **PRITIKA TASHNI KIRAN**, by kissing on her lips, neck and thighs and sucking her breast.

COUNT 2

Statement of Offence

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

Particulars of Offence

NIKESH CHAND on the same occasion as in count 1, penetrated the vagina of **PRITIKA TASHNI KIRAN** with his finger, without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

NIKESH CHAND on the same occasion as in counts 1 and 2, penetrated the vagina of **PRITIKA TASHNI KIRAN** with his penis, without her consent.

COUNT 4

Statement of Offence

DEFEATING THE COURSE OF JUSTICE: Contrary to Section 190 (e) of the Crimes Act 2009.

Particulars of Offence

NIKESH CHAND on an unknown date between the 30th day of December, 2022 and the 20th day of January 2023 at Navua, in the Central Division, attempted to obstruct, prevent, pervert, or defeat the course of justice by

telling **MELVIN NARAYAN** to give a false statement to Police regarding the investigation in Navua CR 17-19/1/23.

COUNT 5

Statement of Offence

DEFEATING THE COURSE OF JUSTICE: Contrary to Section 190 (e) of the Crimes Act 2009.

Particulars of Offence

NIKESH CHAND on an unknown date between the 30th day of December 2022 and the 20th day of January 2023 at Navua, in the Central Division, attempted to obstruct, prevent, pervert, or defeat the course of justice by telling **KRITIKA TASHNI** to give a false statement to Police regarding the investigation in Navua CR 17-19/1/23.

2. The Accused pleaded not guilty to these offences; hence, the matter proceeded to the hearing. The hearing commenced on 26th September 2023 and concluded on 19th October 2023. The Prosecution presented the evidence of three witnesses, including the Complainant. At the end of the Prosecution's evidence, the learned Counsel for the Defence made an application under Section 231 (1) of the Criminal Procedure Act, submitting that the Prosecution failed to adduce evidence to establish that the Accused committed the two counts of Defeating the Course of Justice, hence, invited the Court to dismiss those two counts and acquit the Accused from the said two counts. The learned Counsel for the Prosecution conceded to this Application. I accordingly found that the Prosecution failed to present evidence to establish that the Accused committed the two counts of Defeating the Course of Justice, hence, acquitted the Accused of the same pursuant to Section 231 (1) of the Criminal Procedure Act. The matter then proceeded on to the Defence regarding the remaining three counts. The Accused gave evidence for the Defence.
3. Subsequently, the Court heard the closing submissions of the learned Counsel for the Prosecution and the Defence. In addition to their respective oral submissions, the learned Counsel for both parties filed written submissions. They then filed further written

submissions to clarify certain issues raised during the trial. Having perused the evidence adduced during the hearing and the parties' respective oral and written submissions, I now pronounce the judgment on this matter.

Burden and Standard of Proof

4. I first draw my attention to the burden and standard of proof. The Accused is presumed to be innocent until he is 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 he is 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 Offence

5. The main elements of the sexual Offence are that:
- i) The Accused,
 - ii) Unlawfully and indecently,
 - iii) Assaulted the Complainant by kissing her lips, neck, thighs and breasts.
6. The main elements of Rape under Section 207 (1) (2)(b) of the Crimes Act are:
- i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his fingers,
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with his fingers,
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his fingers in that manner.
7. The main elements of the Rape under Section 207 (1) (2) (a) of the Crimes Act are:

- 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.

8. 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 these offences 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 never raised the issue that the Complainant was mistaken in identifying the alleged perpetrator. The dispute is whether this alleged incident happened involving the Accused.
9. Evidence of the slightest penetration of the vagina of the Complainant with the fingers/penis of the Accused is sufficient to prove the element of penetration.
10. 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.
11. The Complainant must have the freedom to make a choice. She must not be pressured or forced to make that choice. Moreover, the Complainant must have the mental and physical capacity to choose freely. Consent can be withdrawn at any time. It is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. A person's consent should not be assumed.

12. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his fingers/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

13. The Prosecution and the Defence tendered the following Admitted Facts under Section 135 of the Criminal Procedure Act, they are:
- a) *The name of the person charged is Nikesh Chand ["Nikesh"], 42 years of age at the alleged offence, self-employed and resides at Tokotoko, Navua.*
 - b) *Nikesh owns a barber shop namely Skyline Barber shop and a Canteen shop namely Lambu's Retail Shop.*
 - c) *The Canteen Shop is located in Navua town and is beside Budget Mini Mart Shop.*
 - d) *Inside the Canteen shop there was a counter in front, behind there was an office that stored cash which was partitioned by glass and concrete and on the outside of the office there was a bed and a washroom which was situated on the side.*
 - e) *The Complainant is one Pritika Tashni Kiran [Pritika], 17 years of age and resides at Vuninokonoko Road, Navua with Jyoti Narayan who is the Pritika's friend.*
 - f) *Nikesh is in a De-facto relationship with Pritika's older sister namely Kritika Tashni Kiran [Kritika] hence, Pritika is the sister in law of Nikesh.*

- g) *The Pritika and Nikesh are known to each other and there is no dispute as to the identification of the accused in this matter.*
- h) *In December 2022, Pritika was residing at Tokotoko in Navua with her elder sister Kritika and her family and was employed at their canteen shop.*
- i) *Nikesh Chand was interviewed under caution on 22nd day of January, 2023 in the English Language by DC 5167 Krishneel Chand.*
- j) *Nikesh Chand was formally charged on 23rd January, 2023.*
- k) *Pritika was medically examined on 19th January 2023 at the Sigatoka Hospital.*
- l) *It is agreed that the admissibility of the following documents are not in dispute and the same is tendered by consent and annexed as follows:*
 - a) *Birth Certificate of Pritika Tashmi Kiran.*

Prosecution's Case

14. The Complainant stated that the Accused is her brother-in-law, whose de-facto partner is her elder sister. She moved to the Accused's place to live with them while working at the Canteen owned by the Accused. The Accused was running a Barber shop next to the Canteen, where the Complainant's brother works with the Accused. It was common for the Accused to come and stay at the office space inside the Canteen and drink grog there with others.
15. On the 15th of December 2022, at around 5 p.m., the Accused came to the Canteen with her brother and another two to settle their daily wages. The Canteen was closed by then, and the Complainant sat near the shop counter. The brother of the Complainant and the other two persons left the Canteen in a while. The Accused then came to her and covered her mouth

with one of his hands and pushed her to the bed, which was inside the Canteen, with his other hand. He then removed her clothes and undressed himself. He started to kiss her lips, neck, thighs and then her breasts. He made her lie on the bed and penetrated her vagina with his fingers and then with his penis. The Complainant had told the Accused to stop it, but he continued. When they had this alleged sexual intercourse, the Complainant heard that either the owner or the daughter of the owner of the neighbouring shop came to the shop.

16. After having sexual intercourse with the Complainant, the Accused went to the washroom while the Complainant dressed up. The Complainant's brother returned to the Canteen, and they all went home in the Accused's car. On the 6th of January 2023, the Complainant moved to her friend Jyoti's place. Jyoti is a friend and the sister of the Complainant's then-boyfriend, Ravikesh.

Accused's Case

17. The Accused vehemently denied this allegation and alleged that the Complainant had a *mala fide* motive for making this false allegation. The Accused claimed that he found the Complainant, who was a minor in December 2022, having sexual intercourse with her boyfriend Ravikesh inside the Canteen. The Accused had threatened her that he would inform her family and the Police as she was still an underage child. This issue led to an uneasy relationship between the Complainant and her elder sister, the Accused's partner. They continued to fight over this alleged incident of the Complainant having sex with her boyfriend in the Canteen. Due to these factors, the Accused had taken the Complainant, her boyfriend, the boyfriend's mother and the father of the Complainant to the Police Station and then sent the Complainant to Jyoti's place to stay with her.

Evidence of Doctor Gaikwad

18. During the Complainant's evidence, the Prosecution made an application to obtain a Psychiatric Evaluation Report of the Complainant to assess her competence as a witness. Doctor Kiran Gaikwad, the Medical Superintendent of St Giles Hospital, provided a Psychiatric Evaluation Report of the Complainant and gave evidence in Court explaining

his findings. I shall first proceed to discuss the admissibility and relevancy of Doctor Gaikwad's evidence regarding the competency of the Complainant as a witness.

19. The Court of law determines the disputes based on legal proof rather than scientific proof. (*vide*; *State v Ratuwaqa* [2021] FJHC 180; HAC135.2019 (10 March 2021)). It is a human judgment based on facts and evidence presented before the Court. The Court of Appeal of England in *R v Turner* (1975) 1 All ER 70 explained the relevancy and admissibility of evidence of expert opinion by quoting the view expounded by Lord Mansfield CJ in *Folkes v Chadd* (1782) 3 Dug KB 157, where Lowton LJ said that:

“The foundation of these rules was laid by Lord Mansfield CJ in Folkes v Chadd ((1782) 3 Doug KB 157 at 159) and was well laid: ‘The opinion of scientific men upon proven facts’, he said, ‘may be given by men of science within in their own science.’ An expert’s opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.”

20. Evidence of an expert opinion only requires where the expert could provide the Court with any scientific or technical information that is likely to be outside the experience and knowledge of the Court. On that account, the evidence of an expert explaining how an ordinary person not suffering from any mental disorder would react to a particular situation and what reliance the Court should give to such conduct are not relevant as they are well within the knowledge and experience of the Court.

21. In this case, the Prosecution adduced Doctor Gaikwad's evidence to establish the Complainant's mental condition. In *G v Director of Public Prosecutions* [1997] 2 All ER 755, the Queen's Bench Division, referring to the judgment of *R v Davice* (3 November 1995, unreported), found that the characteristics of a medical condition of the witness, such as mental illness, are not to be known to the Court without the assistance of experts. However, such experts cannot express an opinion on whether such witnesses are reliable or truthful since it is strictly within the exclusive domain of the Court.
22. In *HM Advocate v Grimmond* (2001 SCCR 708, 2001 Scot (D) 31/8), it was held that evidence establishing a witness's mental illness is relevant to determine the quality of that particular witness's evidence.
23. The above judicial precedents affirm that the evidence of a Psychiatrist explaining the mental condition of the witness is relevant. Therefore, Doctor Gaikwad's evidence is admissible and relevant.
24. Doctor Gaikwad said that the Complainant may have borderline intellectual disability. However, she can fully understand social boundaries and norms and the possible consequences of sexual activities. Doctor Gaikwad suggested that the Complainant is a competent witness to give evidence in Court.

Evaluation of Evidence

25. According to the evidence adduced by the Prosecution and the Defence, the Accused denied the allegation, stating such an incident had never occurred, and the Complainant made up this false allegation as she had a *mala fide* motive of doing that. Under such circumstances, the Court must consider all 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 these crimes. In doing that, the Court must evaluate the evidence presented in the Court. 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.

26. Lord Reading CJ in Abramovitch (1914) 84 L.J.K.B 397 held that:

"If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases; it always remains on the prosecution."

27. Accordingly, 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 offences. If 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 these offences as charged in the Information.
28. In evaluating the evidence, the Court must determine the testimonial trustworthiness of the evidence given by the witnesses based on the credibility and reliability of their 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 Solomon Qurai (HC Criminal - HAC 14 of 2022)*).
29. I observed certain inconsistencies *inter se* and *per se* in the evidence given by the Prosecution witnesses. The Defence urged that the Complainant made this false allegation

in order to protect her boyfriend from being charged for having sex with her as she was an underage minor in 2022. The Defence submitted that was the reason for the delay in reporting this matter.

30. Gamlath JA in **State v Serelevu [2018] FJCA 163; AAU141.2014 (the 4th of October 2018)** has extensively discussed the issue of delay in reporting. His Lordship found that "the totality of the circumstance test" is the correct approach to 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.
31. The delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the Prosecution case. It only cautions the Court to seek and consider a satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence if there is an unsatisfactory explanation for the delay or unexplained delay. (*vide; Masei v State [2022] FJCA 10; AAU131.2017 (3 March 2022)*)
32. The Complainant did not promptly inform anyone about this incident. Her evidence regarding informing someone was not consistent and specific. The Complainant said that she told her sister about the incident on the night of the same day. Her sister then told her to inform her if it happened again. The matter was not reported to the Police. However, the Prosecution chose not to call her sister as a witness.
33. Meanwhile, the Complainant admitted during the cross-examination that her sister fought with her, alleging that she had sex with her boyfriend in the Canteen, which eventually led her to move to Joyti's place on the 6th of January 2023. On the contrary, Joyti testified during her evidence that the Accused told her that the two sisters fought over an allegation that the Accused was having an affair with the Complainant. Hence, the Complainant wanted to move with Joyti. The learned Counsel for the Prosecution did not put this proposition to the Accused when he gave evidence for him to clarify the truthfulness of his comments made to Joyti as claimed by her.

34. The Complainant then testified that she told Joyti about this alleged incident on 6th January, 2023, the day she moved to Joyti's place. However, Joyti contradicted the Complainant's claim, saying that the Complainant told her about this allegation only on 16th January, 2023, not on the day she moved with her. The Prosecution failed to provide any explanation for this inconsistency.
35. Moreover, the Complainant initially said she moved to Joyti's place alone because she did not want to stay at the Accused's place after this incident. In addition to that, she initially denied that she went to the Police Station with her boyfriend, his mother, the Accused and her father on the day she moved to Joyti's place. Having changed her initial position, the Complainant admitted that the reason for moving with Joyti was the continuous fights she had with her sister over the allegation that she had sex with her boyfriend in the Canteen. She further admitted that she was taken to the Police Station by the Accused on the 6th of January 2023, and her boyfriend, his mother, and her father were present at the Police Station. The Complainant avoided answering the reasons for going to the Police Station on the 6th of January, 2023. Furthermore, the Complainant admitted that she informed the Police on the 6th of January 2023 that the Accused had done nothing to her.
36. According to the Complainant, she reported the matter to the Police three days after she moved in with Joyti. Once again, she changed her position, admitting that she made the report on January 20th, 2023, not three days after she moved with Joyti.
37. During the cross-examination of the Complainant, it was revealed that she ran away with her boyfriend. She did that before reporting this matter to the Police. They went to Sigatoka, where a Social Welfare Officer approached her and took her for a medical examination. The Social Welfare Officer then advised her that they would charge her boyfriend for having sex with her as she was an underage minor. The Complainant explained during the re-examination by the learned Counsel for the Prosecution that she and her boyfriend got scared of receiving a summons from the Police regarding a sex matter with Nikesh, and that was the reason for them to run away to Sigatoka. However, she admitted during the cross-examination that she ran away with her boyfriend before she reported this matter regarding the Accused to the Police.

38. The learned Counsel for Defence asked the Complainant the following questions to conclude her cross-examination, which I reproduce below with her answers.

Ms Bilivalu: *Did the Social Welfare Officer inform you that Ravikesh will be charged?*

The Complainant: *Yes.*

Ms Bilivalu: *And because of that you went to Ravikesh's sister Jyoti and informed her that Social Welfare has informed you that Ravikesh will be charged?*

The Complainant: *Yes my Lord.*

Ms Bilivalu: *And because of that your sister Jyoti and yourself went to the Police on the 20th of January and told the Police that instead that Nikesh was the one that had forcefully inserted his penis into your vagina?*

The Complainant: *Yes, (emphasis added)*

39. Considering the reasons discussed above and the above-stated answers given by the Complainant, there is a reasonable doubt whether the Complainant was caught by the Accused when she was having sexual intercourse with her boyfriend inside the Canteen. Then, that incident led to a continuous fight between the Complainant and her sister. Considering all these facts, it creates a further reasonable doubt whether she made up this allegation to save herself and her boyfriend from being charged.
40. Hence, there is a reasonable doubt about the credibility and the reliability of the evidence given by the Complainant. Therefore, the Prosecution failed to prove the allegations as charged in the Information against the Accused beyond a reasonable doubt.
41. In conclusion, I find that the Accused is not guilty of one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act, one count of Rape, contrary to Section 207 (1) (2) (b) of the Crimes Act, one count of Rape, contrary to Section 207 (1) (2) (a) of the Crimes Act as charged in the Information and acquitted of the same accordingly.

42. 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

23rd February 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.