

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 278 OF 2023**

**BETWEEN** : **STATE**

**AND** : **NAFEEZ MOHAMMED**

**Counsel** : Ms J Fatiaki for the State  
Mr L Vateitei for the Accused

**Date of Hearing** : **19 October 2023, 1 December 2023, 20 December 2023**

**Date of Judgment** : **28 November 2024**

## **JUDGMENT**

[1] **Charges**

The accused is charged with one count of sexual assault (count 1), two counts of digital rape using finger and tongue (counts 2 and 3) and one count of penile rape (count 4).

[2] The charges are founded on the same facts. The charges allege that the accused on 16 August 2023 at Uprising Beach Resort in Navua indecently assaulted the complainant by kissing her on the mouth, digitally penetrated her vulva with his finger and tongue and had sexual intercourse with her, without her consent.

[3] **Burden and Standard of Proof**

The burden is on the prosecution to prove each charge beyond a reasonable doubt.

[4] The accused chose to remain silent. He does not carry any burden to prove or disprove anything. The burden remains on the prosecution to prove his guilt beyond a reasonable doubt.

[5] **Elements of Rape and Sexual Assault**

To prove the offence of sexual assault as alleged on count one, the prosecution must prove the following elements beyond a reasonable doubt:

1. On the date and place alleged, the accused assaulted the complainant.
2. The assault was unlawful and indecent.
3. The assault was without the consent of the complainant.
4. The accused knew that the complainant was not consenting.

[6] An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that caused the complainant fear or pain. There is no suggestion in the present case that, if the accused kissed the complainant on the mouth as the prosecution alleged he did, the act of kissing was lawful.

[7] The word "indecent" means contrary to the ordinary standards of respectable people in this community. For an assault to be indecent it must have a sexual connotation or overtone. If an accused touches the complainant's body or uses it in a way which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent.

[8] To prove the offence of rape as alleged on counts two, three and four, the prosecution must prove the following elements beyond a reasonable doubt:

1. On the date and place alleged, the accused penetrated the vulva or vagina of the complainant with his finger, tongue or penis.

2. The complainant did not consent to penetration of her vulva or vagina.
3. The accused knew that the complainant was not consenting.

[9] Slight penetration is sufficient to amount to rape. It is not necessary to prove that the accused ejaculated.

[10] The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent or the absence of consent can be communicated by the words or acts of the complainant. The knowledge of the accused that the complainant did not consent is a matter for inference from all the proven facts.

[12] **Admitted Facts**

The following facts are not in dispute and are taken as true:

- The accused was born on 16 November 1990 and is 32 years and 11 months of age.
- The complainant is 23 years of age and is a Dutch national.
- The complainant had come to Fiji to do a voluntary internship with Projects Abroad Organization Limited which is a Learning Provider that oversees a Shark Conservation project based in Pacific Harbour.
- The Uprising Resort has two bars, the Main Bar which is situated indoors next to the Restaurant and the Beach Bar which is situated closed to the beach.
- The complainant was medically examined at the Navua Hospital by Dr Matelita Waqatabu on the 16<sup>th</sup>-17<sup>th</sup> August 2023.

[18] **Prosecution Case**

The prosecution led evidence from three witnesses:

1. The complainant.
2. Mary Kato, waitress at Uprising Resort, Pacific Harbour.
3. Dr. Matelita Waqatabu.

In addition, the following exhibits were tendered:

1. Photographs of the alleged crime scene consisting of the Uprising Resort's Main Bar, Beach Bar and the Beachfront admitted as prosecution exhibit 1.
2. The medical report of the complainant admitted as prosecution exhibit 2.

[19] The sworn evidence of the complainant is that on 16 August 2023, she accompanied her friends by the name Callum and Mirthy to Uprising Beach Resort after dinner between 8 pm and 9 pm for a social outing. They walked to the Resort which was about 10 minute walk from the apartment they were staying in. While at the Resort she played some pool near the Main Bar and consumed two or three cocktails.

[20] On that night the Bar was quite empty. While she was chatting with her friends the accused's name came up and he was invited to join them. The invitation was sent by Mirthy and Callum who grabbed the complainant's mobile phone and used her Snapchat account to invite the accused. After about 5 to 10 minutes, the accused arrived and joined the group at the Bar. The accused was known to the complainant. She had used his transport services (taxi) after arriving in Fiji. She had also socially met the accused at a theme night function at Uprising Resort earlier that month where Mirthy was also present.

[21] From the Main Bar, the complainant and Mirthy went to the Beach Bar for a smoke and the accused followed them. While they were smoking, Mirthy got up and left after reminding the complainant not to forget her flip flops and phone. At that point, the complainant was still smoking. After Mirthy left, the accused asked the



complainant if he should give her a massage which she declined and said for them to return to others at the Main Bar. Both then returned to the Main Bar where Mirthy was and that is when they realized that the accused was holding only one flip flop of the complainant and the other one was missing. All three then went to the beach to search for the missing shoe. They found the missing shoe where they had been sitting earlier and at that point the accused placed his hand around the complainant's waist and started walking with her. He did not force her to walk with him but she was not completely willing. She said that she trusted the accused. Mirthy asked the accused whether she should join them but the accused responded saying it was okay and that they would just walk along the beach. When the complainant turned around she couldn't see Mirthy.

[22] While they walked along the beach, the complainant felt uncomfortable being alone and therefore she suggested on numerous occasions that they should go back. She felt something was not right and she had tried to distract him when he turned around and started kissing her on the mouth pretty aggressively. She said she froze and he pushed her and she fell down. The accused then started touching her private parts with his fingers and she told him a few times "please stop" but he did not. She felt pain. He touched inside of her vagina with his fingers. He pulled down his pants and used his tongue and lips on her vagina and then penetrated her vagina with his penis. She felt his penis go in slightly. She told him 'please, it's hurting' but he continued. He suddenly stopped having looked up and seen that someone was approaching them. He told the complainant to get up and he pulled her up and tried to get her dressed. It was at that point that the accused said out loud "Callum is coming".

[23] By the time the complainant was on her feet. When she saw the shadow of Callum she pulled up her pants and underwear and ran as fast as she could. When she reached Callum, she wrapped her arms around him and was crying and asking him for help and not to leave her with the accused. She was disoriented. They

walked back to the Resort and at one point the complainant heard the accused who was walking beside her and Callum say "don't listen to her, she is drunk".

- [24] When they arrived at the Resort, the complainant went straight into the Ladies Washroom area near the Main Bar and locked herself in the middle toilet. She was crying. She was in pain and was bleeding from her vagina. She did not tell anyone at the Resort what had happened to her. She said she was ashamed of what had happened and she felt disgusted and was in pain and very upset and crying a lot and couldn't talk properly. Callum and a waitress came inside the washroom and when they saw her condition they called the police.
- [25] The waitress, Mary's evidence is that she saw the complainant crying and clinging onto Callum. Mary said the complainant appeared terrified. Mary followed the complainant into the Ladies Washroom and the complainant told her that she was bleeding from her vagina. Mary saw the complainant was bleeding in fact. The complainant told Mary that something had happened to her but did not give any details. The police were called and the complainant was taken to the Navua Hospital for a medical examination on the same night.
- [26] Upon physical examination of the complainant on the early hours of 17 August 2023, the doctor noted fresh bruises and blood mixed with mucus on the labia majora and labia minora.
- [27] That sums up the evidence of the prosecution.
- [28] The defence called Satendra Sharma, the Finance Manager at the Uprising Resort to give evidence. Satendra's evidence is that he knew the accused as a taxi driver who provided transport services to the Resort's staff. Satendra was present at the Resort on 16 August 2023. At around 8 pm, he was at the Main Bar with his Director, another man and two girls and a boy who were from abroad and working

on a Project. After a while the accused joined the two girls and the boy at the bar. Later he saw the accused and the two girls at the beach, near the Beach Bar. He then saw the girl who was walking along the beach with the accused return to the Main Bar and immediately went inside the Ladies Washroom. The girl's other male companion followed her and Satendra out of concern requested Mary to go inside the washroom to check.

[29] That sums up the evidence led by the defence.

[30] **Analysis**

The identity of the accused is not an issue in this case. The complainant, Mary and Satendra gave evidence that the accused was present at the Resort on the night of 16 August 2023 and he was socially interacting with the complainant and her friends at the Main Bar and then at the Beach front. Satendra's evidence supports the complainant's account that the accused walked along with her on the beach and when she returned to the Bar area she went straight into the Ladies Washroom.

[31] The complainant's account is that she was reluctant to go with the accused alone but he grabbed her by her waist for her to walk along with him on the beach. She trusted him. As they were walking, he suddenly and aggressively kissed her on the mouth. She froze. He then pushed her and she fell down. He penetrated her vagina with his finger and mouth. After that he penetrated her vagina with his penis. She told him many times to stop but he did not listen. He only stopped when Callum approached them. She ran to Callum and returned to the Bar area. She was distressed and crying and could not speak. She was bleeding from her vagina and was in pain. Mary's evidence supports the complainant's distress condition and the medical evidence supports the complainant's account that she sustained injuries to her genitalia and was in pain.



[32] When the defence cross-examined the complainant, it was put to her that she had consented to the sexual acts as follows:

Ms Vateitei: I put to you that whatever happened that night was consensual, you liked it, you consented to the whole thing that is what I putting across to you?

Complainant: No I never willing took sex with him and also I was bleeding and I was in pain and it was hurting I had bruises, I never wanted to have sex with him.

[33] To explain her lack of physical resistance to the sexual acts by the accused, the complainant said her body just froze and that she did not know how to react and what to do. She maintained she did not consent to the sexual acts when asked the following question in cross-examination:

Ms Vateitei: What I am saying is you consented to everything that Nafeez was doing because you didn't run away?

Complainant: Again that is not true, as told you the story about freeze, the moment he got me up I was still in shock and I saw Callum I could get control back over my own body and at that point it just snapped in my brain and I knew at that point I should run to the only thing that is safety right now at this moment.

[34] The defence say that the lack of physical resistance is because the complainant fully consented to what took place between her and the accused.

[35] Lack of physical resistance to sexual acts does not mean that the complainant consented to what took place or what the complainant said happened cannot be true. Judicial experience has shown that different people can respond to unwanted sexual acts in different ways. Some may protest and physically resist



throughout the event while others may be unable to protest or physically resist. This may be out of fear or because they are not a very forceful person.

- [36] The complainant told the court that even though the accused did not threaten her or use any force on her, she did not consent to the sexual acts. The complainant said this was because she was so shocked by what the accused was doing that she froze and was unable to resist him or shout to raise alarm. She told him to stop many times but he did not listen.
- [37] Mary told the court that she found the complainant crying and bleeding from her vagina when she saw her inside the Ladies Washroom. The medical evidence supports the complainant's account that she suffered physical trauma to her vagina as a result of sexual penetration, which she says was not consensual.
- [38] The evidence of distress must be considered with care. There are two reasons for that. Firstly, there is no 'normal' reaction to a rape or sexual assault. Some people will show emotion or distress and may cry. But other people will seem very calm or unemotional. Secondly, it is possible for someone to put on act if they choose to.
- [39] If the complainant's behaviour at the time was genuine it may help to decide whether the prosecution has proved its case. On the other hand, if there is a reasonable doubt about the complainant's behaviour at the time was genuine, then it would not provide support for the prosecution case.
- [40] I consider the truth of the complainant's evidence dispassionately, without sympathy or prejudice or stereotypes about how women should conduct themselves. The complainant struck me as an honest and reliable witness. She was consistent and forthright in her answers during examination-in-chief and cross-examination. Her explanation for lack of physical resistance and complaint

is reasonable in the circumstances of the case. She was in a state of shock and in pain. Her body froze out of fear. I feel sure that she was genuinely distressed as a result of what happened to her at the Resort.

- [41] On count one, I believe and accept the account of the complainant that the accused without any lawful excuse and without her consent sexually kissed her on the mouth. I feel sure that kissing on the mouth is indecent because the act is contrary to the ordinary standards of respectable people in this community. The prosecution has proved the accused's guilt on count one beyond a reasonable doubt.
- [42] One count two, I believe and accept the account of the complainant that the accused penetrated the vulva of the complainant with his finger. I believe the complainant that she told the accused to stop but he did not stop. I feel sure that the complainant did not consent and that the accused knew that the complainant did not consent. The prosecution has proved the accused's guilt on count two beyond a reasonable doubt.
- [43] One count three, I believe and accept the account of the complainant that the accused penetrated the vulva of the complainant with his tongue. I believe the complainant that she told the accused to stop but he did not stop. I feel sure that the complainant did not consent and that the accused knew that the complainant did not consent. The prosecution has proved the accused's guilt on count three beyond a reasonable doubt.
- [44] One count four, I believe and accept the account of the complainant that the accused penetrated the vagina of the complainant with his penis. I believe the complainant that she told the accused to stop but he did not stop. I feel sure that the complainant did not consent and that the accused knew that the complainant

did not consent. The prosecution has proved the accused's guilt on count four beyond a reasonable doubt.

[45] **Verdict**

The verdict of the court is:

- (a) Count one – sexual assault – guilty – convicted.
- (b) Count two – digital rape using finger – guilty – convicted.
- (c) Count three – digital rape using tongue – guilty – convicted.
- (d) Count four – penile rape – guilty – convicted.



A handwritten signature in blue ink, appearing to read "Daniel Goundar", is written over a horizontal dotted line.

**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for the State  
Astas Law for the Accused