

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 35 of 2024

STATE

-v-

SUBASH CHAND

Counsel: Ms. E. Thaggard for the State
Mr. A. Kohli and Ms. Naidu for the Accused

Date of Trial: 9, 10, 12 June 2025

Date of Judgment: 8 August 2025

JUDGMENT

1. Mr. Subhash Chand (“the accused”) is charged with two counts:
 - (i) Indecent Assault, contrary to section 212 (1) of the Crimes Act 2009, the particulars being that, between 1 July and 31 July 2023 at Seaqaqa in the Northern Division, the accused unlawfully and indecently assaulted the complainant by caressing her breast and rubbing his hand on her clothed vulva.
 - (ii) Rape, contrary to section 207 (1) and (2)(b) of the Crimes Act 2009, the particulars being that, between 1 September 2023 to 30 September 2023 at Seaqaqa in the Northern Division, the accused penetrated the complainant’s vagina with his penis without her consent.

The prosecution case in outline

2. The prosecution case is that the accused, a middle-aged married man, became sexually fixated on his 23-year-old first cousin, and sexually abused her by indecently assaulting her in July 2023, and raping her in September 2023 when, on both occasions, her husband was out at work, and she was home alone.

The defence case in outline

3. The defence case is that the accused and the complainant first began a consensual sexual relationship when the complainant went to stay with the accused and his wife during the school holidays in December 2019. After the complainant's marriage, they continued to have sex at her home when her husband was out at work. The accused had consensual sex with the complainant at her home in July 2023 and September 2023.

Prosecution evidence

4. The complainant testified that she was at home alone in Seaqaqa in July 2023 when, at around 5pm, the accused came to her place. He was planning to visit their sick grandfather at Solove, together with his family. He said that he was hungry and asked her to prepare food. He came into the kitchen and suggested that they should go to the bedroom. When she asked why, he just replied that they should go to the bedroom. He held her left wrist tightly and took her to the bedroom. She tried to free herself, but couldn't. From behind, he started caressing her breasts over her clothes. She tried to remove his hands, but couldn't because he was holding her tightly from the back. She told him not to do it as she was not comfortable with him, but he didn't listen and started rubbing her vulva over her clothes. He stopped when his phone rang continuously. His family were calling him as they were about to reach Seaqaqa. The accused told her not to tell anyone that he did those things to her.
5. She did not tell anyone what the accused had done to her because she was scared. She was also afraid that her husband would leave her if she told him.
6. In September 2023, the whole family planned to attend prayers for the accused's sick father at the church near to the complainant's house, and then visit the

complainant's home. The accused dropped his family at the church and then, at around 8pm, he came to her place alone. She was home alone as her husband was at work at Jim's Bakery. He visited the washroom and she asked after his family. He said they were at church.

7. Whilst she was cooking, the accused called out to her that he wanted to change his clothes. She went to her bedroom to look for a vest. As she was bending down looking for a vest, the accused came behind her and started caressing her breasts. She told him not to do that, but he kept on doing it, and also rubbed her private parts. She tried to free herself, but he held her tightly. He laid her on the mattress. She told him to stop as he was her brother. After laying her down, he told her to "*drink*" his penis. She said that she would not. The accused was kneeling and taking his pants down. He was straddling her thighs. He tried to pull her clothes and put his penis inside. She held her clothes tightly, but he pulled her panty to the side and penetrated her vagina with his penis. She tried to free herself, but was unable to. After two to three minutes, he put his clothes on and warned her not to tell anyone: "*otherwise he gonna do something to me.*"
8. After dressing, he went to the living room, and then to the church.
9. The complainant lay on the mattress for 5 to 10 minutes as she was really scared, confused, and shocked. She stood up to close the sitting room door and saw that her undergarment was wet.
10. She was cooking dinner for their visitors when her husband came home from work at around 8.30 – 8.45pm.
11. She did not tell anyone what had just happened as she was really scared. She did not tell her husband because they had been having marital problems, and she was afraid he would get angry and leave her.
12. The accused and his family arrived at around 9pm, and stayed until around 2am.
13. One day in November 2023, around midday, the complainant was home alone when the accused called her about 10 times. She didn't answer her phone because she was afraid that he would do all those things to her again. She was in

her bedroom and heard the accused's voice calling her from outside. She put her phone on silent and pretended to sleep. Her husband then started calling her from work, but she did not answer his calls because she did not want the accused to hear her voice. The accused was outside her house for about half an hour.

14. When her husband got home from work, at around 9pm to 10pm, he asked why she had not answered the accused's and his phone calls. She was really scared about how he would react, but she told her husband what the accused had done to her since July.
15. Her husband called the accused. His wife answered and said that he was sleeping. Her husband left a message for the accused to call him in the morning.
16. Her husband spoke to the accused the following morning. When the accused did not want to come to their place to sit and talk, her husband decided to report the matter to the police.
17. In cross-examination, Mr. Kohli asked what was stopping her from telling the accused's wife what the accused did to her. The complainant answered:

"I didn't tell his wife because we were family and I was ashamed ... How could I tell my sister-in-law that he's doing all those things with me. What will she think?"

18. When it was suggested that she had sex with the accused at his house in Batinikama in 2019, the complainant denied having sex with the accused, and explained that she had not gone to the accused's home in 2019.
19. The complainant denied that the accused had full sexual intercourse with her in July 2023. She agreed that she knew his intentions were bad in July 2023, but did not tell the accused's wife because she was ashamed to say it.
20. When pressed on why, in light of the July incident, she had opened her door to the accused in September 2023, the complainant said that she was not expecting that he would do it again because she had rebuffed him in July. She explained that she did not yell out because she was scared. She was pregnant at the time, and

the accused was pressing her stomach, which made her concerned about her pregnancy.

21. When Mr. Kohli put it to the complainant that the reason she told her husband in November that the accused had raped her was because she had discussed with the accused that the baby may be his, the complainant denied that.
22. The complainant also denied that she had sex with the accused on several occasions at different locations during the period 2019 to 2023. She reminded Mr. Kohli that she was married in 2019. The complainant added that the accused had tried it on with her at Hari Chand's place and at Raju's place, but she had refused him.
23. The complainant's husband testified that the accused had called him at work to tell him that he wanted to use the washroom at his house, and the complainant was not answering his calls, and did not open the door for him. He questioned his wife about this when he got home after work, and she told him that the accused had raped her, and she was afraid to open the door. He called the accused and was informed by his wife that he was sleeping. He confronted the accused over the phone the following morning and told him to come to his home to sort the matter out. The accused denied raping his wife, and said he did not want to go to his home. When the accused failed to turn up, he reported the matter to the police. His wife agreed with his decision to report the matter.
24. Under cross-examination, the witness agreed that the accused was angry and swore at him when he suggested a family gathering to decide what was right and wrong. The witness said that he wanted to know who was telling lies and who was telling the truth.
25. When Mr. Kohli asked the witness whether he believed that his wife was telling him the truth, he said that he did.

Defence Evidence

26. The accused elected to give evidence in his case.
27. He testified that the complainant had come to stay at his house during the school

holidays in December 2019. After one week, the complainant went to work with his wife at a shop in Labasa. During that first week, the complainant was talking to her boyfriend. When he questioned whether her parents knew about the relationship, she grabbed his hand and told him not to tell anyone. They then had consensual sex two or three times that week. They did not have sex after the complainant started working with his wife.

28. He next had consensual sex with the complainant at her place in Namara in 2020, and twice at her place in Seaqaqa in 2022. In May 2023, he had consensual sex with her at her home in Raimuri Road. He also had consensual sex with her there in July 2023 and September 2023. The September sex took place at around 8pm, whilst his family was at church. The complainant said that they should have sex quickly before the family came from church. She did not undress, but moved her panty to the side. He ejaculated outside. She told him she was pregnant, and didn't know whether the baby was his or her husband's. He told her it was not his. He knew this because he always ejaculated outside. After sex, he went to collect his family from church. They came back to the complainant's place, and stayed until around 2am. The complainant cooked for the family and appeared normal during that time. She was talking loudly with everyone.
29. In November 2023, he went to the complainant's place, but she did not open the door. He called her husband and said that he wanted to use his washroom, but the complainant would not answer the door. When asked to clarify whether he had gone there to use the washroom or to have sex, the accused said that he went there for sex, but the complainant had refused to answer his call or open the door.
30. Around 6am the following morning, he received a call from the complainant's husband. He swore at the accused and accused him of raping his wife. He denied rape and cursed the complainant's husband. The accused's wife took his phone and spoke with the complainant's husband, who told her that the accused had raped the complainant. When his wife confronted him about this, he admitted to her that he had been having an affair with the complainant. His wife then called the complainant's husband.

31. The accused said that he did not go to the complainant's home at Seaqaqa because he feared he would be charged for trespassing, or he would be assaulted. He told them that he would not go to their place and, if they wanted to ask something, they could go to his father's place at Tovata.
32. In cross-examination, he maintained that he had consensual sex with the complainant on several occasions during the period 2019 to 2023. She was always home alone when he had sex with her.
33. The accused confirmed that he had called the complainant's husband on 1 November 2023 to say that he wanted to use his washroom, but his real purpose in going to her home was to have sex with the complainant. He also maintained that, after the complainant's husband had spoken to his wife on the morning of 2 November 2023, alleging rape, he had admitted to his wife that he had been having an affair with the complainant.
34. When the Court sought to clarify whether the accused was ascribing any reason for the complainant refusing to open the door to him on 1 November 2023, he said that he did not know why she refused to answer his call and open the door to him on that day.
35. The accused's wife testified that, when the complainant's husband called on the evening of 1 November 2023, she told him that her husband was sleeping. She told her husband the following morning that he had called. When the phone rang, her husband answered, and she overheard him asking why the caller was swearing at him. She heard her husband say that he had not raped her. Her husband did not swear back. After the call, she asked her husband what the story was. He told her that they were having an affair, but he did not rape her. She was angry. She suggested that they take an oath at the temple because she wanted to know the truth. She believed him when he told her that he was having an affair with the complainant, but she still wanted them to take an oath. She called the complainant's husband and proposed that they take an oath at the Snake Temple. An oath was never taken.
36. The witness said that the complainant had stayed at her house in December 2019.

She said she was very good friends with the complainant and trusted her. In 2020, she came to know that the complainant had run away with her boyfriend. The witness only came to know about her husband's affair with the complainant on 2 November 2023.

37. In September 2023, the witness went to church with her husband and family to get a healing done for her father-in-law. They arrived at the church at around 6.30pm to 7pm. Her husband told her he was going to the washroom at the complainant's house. He left at around 8pm and returned to church 10 to 20 minutes later. After church, they went to the complainant's house, and stayed there until around 2am. The complainant was laughing and enjoying with them.
38. In cross-examination, the witness said it was her idea that the complainant and her husband take an oath at the Snake Temple to find out the truth. In the event, neither party attended at the temple to take an oath.
39. The witness never suspected that her husband was having an affair with the complainant. They were cousins, and tying Raksha Bhadan. She did not suspect anything when the complainant stayed with them in December 2019. They were sitting and chatting together, and it did not feel like they were having an affair. The only day that her husband and the complainant were home alone together was Saturdays, when the witness was at work.

Closing submissions

40. The parties filed written submissions, and I heard closing speeches on 12 June 2025.
41. In his analysis of the evidence, Mr. Kohli made the point that the credibility of the witnesses is of central importance in this case. He invites the Court to take into consideration the tests of spontaneity, consistency, probability, and the independence of the evidence.
42. Under the heading 'Spontaneity', Mr. Kohli makes the point that the complainant did not complain until months after the alleged incidents. He argues that the excuses she gave are "*bereft of logic*".

43. Mr. Kohli made extensive submissions under the rubric "*Probability and Improbability*". He asks rhetorically whether it is not more probable that they had a relationship. Also, whether it is probable that a person subjected to the alleged incidents would not share it with anyone despite having the opportunity to do so.
44. Mr. Kohli argues that, if the complainant had been raped in September 2023, she would have shown signs of being in fear, shocked, distressed, depressed, uncomfortable, withdrawn or anxious, but the evidence establishes that she was normal. He suggests that it is more probable that she had consensual sex with the accused that evening, and was enjoying being with the accused.
45. Mr. Kohli also addressed an issue of non-disclosure. It emerged during the trial that the complainant's husband (PW-2) had made two statements to police, but only the later statement had been disclosed to the defence. He describes this as "*very sad and concerning*". He speculates that the first statement may have exonerated the accused.
46. In conclusion, Mr. Kohli submits that the accused took advantage of the complainant's request for him not to tell anyone about her boyfriend to start a relationship with her in the 2019 Christmas Holidays. They took advantage of the fact that no one would suspect that cousins would indulge in sexual intercourse to have consensual sex whenever they wanted.
47. Ms. Thaggard submits that the veracity of the complainant's evidence remained unscathed after cross-examination.
48. Commenting on the defence case, Ms. Thaggard submits that the theory about the complainant not being sure about the paternity of her unborn child made no sense. Also, the issue about the complainant and the accused not swearing an oath is neither here nor there. People lie under oath all the time. The truth must be found on the evidence alone.
49. It is submitted that the complainant's conduct in not answering the accused's phone calls, and not opening the door to him, on 1 November 2023, supports her evidence about being sexually assaulted and raped by the accused. Her conduct was consistent with being afraid because of those earlier assaults.

50. Ms. Thaggard cites cases on delayed reporting, and argues that the complainant gave a reasonable explanation as to why she had not told anyone about the accused's offending. She was afraid that her husband would leave her, and ashamed to share with the accused's wife what he had done to her.
51. In conclusion, Ms. Thaggard submits that the evidence is sufficient to make the Court sure of the accused's guilt.

Legal Directions/Warnings

52. The prosecution must prove that the accused is guilty. The accused does not have to prove anything to me. The defence does not have to prove that the accused is innocent. The prosecution will only succeed in proving that the accused is guilty if I have been made sure of his guilt. If, after considering all of the evidence, I am not sure that the accused is guilty, my verdict must be not guilty.
53. I remind myself that if the accused's denials are, or may be, true, I must find him not guilty. Even if I reject the accused's evidence, I must not find him guilty unless the prosecution has made me sure of his guilt.
54. Since the defence has, without any great conviction, advanced the complainant's doubts about the paternity of her baby, and the accused's financial demands to settle the purchase price of a car that he sold to the complainant's husband, as motives for her to have lied about the accused sexually assaulting and raping her, I warn myself that the accused bears no onus to prove a motive to lie, and rejection of the motive asserted does not necessarily justify a conclusion that the complainant's evidence is truthful. A motive to lie or be untruthful may substantially affect the assessment of the credibility of a witness, but it would be wrong to conclude that the complainant told the truth because there is no apparent reason for her to lie. There might be a reason for her to be untruthful that nobody knows about.
55. The prosecution has, to a limited extent, placed reliance on the complainant's complaint to her husband as supporting her credibility on the key issue of consent. I remind myself that a complaint is not evidence of truth. Also, just because a

person gives a consistent account about an event does not necessarily mean that account must be true.

56. Having said that, in cases of rape and other sexual offences, evidence that the complainant made a complaint is admissible to show that her conduct in complaining was consistent with her evidence in the witness box. In order to be admissible, the complaint must have been made at the first reasonable opportunity. It is a matter for the court to determine whether the complaint was made as speedily as could reasonably be expected.
57. In this case, the complainant did not tell her husband, or anyone else, about the alleged offending until 1 November 2023.
58. It must be kept in mind that there may be many reasons why a complainant of a sexual offence might not immediately make a complaint, whether to family, friends or others. Research shows that complainants of sexual offences react in different ways. Some complain close in time to the alleged offending. Others do not. This can be because of threats of harm, shame, shock, confusion or fear of getting into trouble, not being believed, causing problems for other people, or because of fear about the process that may follow. Importantly, there is no such thing as a "*typical*" response. Different people react to situations in different ways. A complaint made some time after the alleged offending does not of itself mean the complaint was untrue, just as an early complaint does not of itself mean it was true.

Analysis and resolution

59. The issue I must determine boils down to whether I am sure that the complainant is a truthful and reliable witness whose evidence, considered separately in connection with each count, makes me sure that the accused is guilty as charged. Also, I must be sure that the accused's denials are untrue.
60. Since the accused elected to give evidence, and to call his wife as a defence witness, it is convenient to deal with their evidence at the outset.
61. I should start by saying that I leave out of the equation altogether the evidence that neither the complainant or the accused went to take an oath at the Snake Temple.

That seems to me to be a red herring. The only oath that matters in a criminal case is the oath taken in the witness box. As Ms. Thaggard quite rightly points out, it is the daily experience of the courts that witnesses often lie under oath.

62. The accused's evidence that the complainant stayed at his home in Batinikama during the Christmas Holidays in 2019 is supported by his wife. It is common ground that the complainant eloped with her boyfriend in 2020. The accused claims to have been aware of that relationship in 2019. His wife's evidence was that she was not aware of that relationship. It follows that, if the accused had known about that relationship, he had not shared that with his wife. Consequently, there is no support for his evidence that he had come to know of that relationship when the complainant stayed at his house in December 2019. The complainant testified that she had not stayed with the accused and his wife in December 2019.
63. To my mind, it is inherently unlikely that, had she been staying at the accused's house, together with his wife and children, the complainant would have been so unguarded about her relationship with the man she was about to run away with as to be overheard by the accused. It is even more unlikely that the complainant would have sex with the accused in his family home in order to, in effect, buy his silence.
64. Whilst there is obviously a risk that a manipulative older male relative may extort sex from a love-struck young female relative, as Mr. Kohli appears to suggest happened in this case, I find that theory to be both contrived and unsavoury. Indeed, the accused did not suggest that he had taken advantage of the complainant. Rather, on his account, she was all too willing to have sex with him immediately after asking him not to reveal her relationship with her future husband.
65. I have no hesitation in rejecting the accused's evidence that he started a sexual relationship with the complainant in 2019. I also reject as a tissue of lies the accused's evidence that he and the complainant conducted an illicit affair under the noses of their respective spouses during the period 2019 to 2023. It is the stuff of pure fantasy.
66. The evidence supports that the accused *wanted* to have a sexual relationship with

the complainant during that period. I accept the complainant's evidence that she had rejected his unwelcome advances on a number of occasions. That is consistent with the accused's evidence about making frequent visits to the complainant's home when she was home alone, ostensibly to use her washroom.

67. There is no dispute that the complainant's husband spoke with the accused on the morning of 2 November 2023, and accused him of raping his wife. The accused's wife overheard her husband denying rape. It is only natural that she would ask him what it was all about. Finding himself in a difficult situation, it is also entirely plausible that the accused would choose the least worst option, and tell his wife that he had been having an affair with the complainant. Interestingly enough, it was his wife's evidence that she did not consider an extra-marital affair to be a sin.
68. I have no doubt that the whole story about a long-running affair between the accused and the complainant is an elaborate cover to explain away the serious allegations the accused faces.
69. I am sure that the complainant did not consent to sex with the accused in July and September 2023, and I reject that part of his evidence entirely.
70. The complainant gave evidence in a calm and measured way. She was clear and coherent in her recollection. Her descriptions of what the accused did to her were unembellished and plausible. She was not shaken in cross-examination.
71. I find it inherently unlikely that she would have entered into a sexual relationship with her much older cousin merely to buy his silence about her secret relationship with the man she was clearly in love with, and was intending to marry.
72. I have no doubt that the complainant told the truth when she said that she never had sex with the accused at his house in 2019. I accept her evidence that she never had sex with the accused in the period before the alleged rape in September 2023. I also accept her evidence that the accused made a number of unwelcome sexual advances during that period.
73. Turning to the specific charges. I am sure that the complainant told the truth about

the manner in which the accused indecently assaulted her in July 2023, and penetrated her vagina without her consent in September 2023.

74. As for the delayed reporting, the complainant gave a reasonable explanation for not having reported sooner to her husband, or anyone else, what the accused had done to her. I can well understand why the complainant would let go the incident in July 2023, having rebuffed the accused's advances. No doubt she felt that was the end of the matter, and she did not wish to jeopardise her marriage. Indeed, it was her evidence that she let the accused into her home on that fateful evening in September 2023 precisely because she assumed he would not try it on again with her.
75. Mr. Kohli has made great play about the complainant's demeanour after the incident in September 2023, but I am untroubled by the fact that she put on a brave face for the family gathering, as difficult as that must have been for her. The suggestion that she should have immediately complained to her husband and the accused's wife is, to my mind, wholly unrealistic.
76. It is highly significant that the complainant had refused to open the door to the accused on 1 November 2023. I accept her evidence that she feared that he would sexually abuse her again. It was the accused's evidence that he had, indeed, gone there for sex.
77. During the trial, I was puzzled by the evidence about how the accused's offending came to light. It will be recalled that the matter came to a head because the accused had phoned the complainant's husband to complain that she was not opening the door for him to use the washroom. When I asked Ms. Thaggard for her theory about this aspect of the case, she suggested that it may be that the accused's urges were so strong that he was even prepared to call the complainant's husband in order to gain access to her. Ms. Thaggard may well be on to something, but whether it was his urges or plain old hubris is not something I need to resolve in order to dispose of this matter.
78. After carefully considering all the evidence, I find the complainant to be a truthful

and reliable witness. I have no hesitation in accepting her testimony about what the accused did to her in July and September 2023.

79. The reasons advanced by the defence for the complainant to have made false allegations against the accused make no sense. I dismiss them.
80. I accept the complainant's evidence that the accused touched her breasts and private parts without her consent in July 2023. I find that such touching is contrary to the ordinary standards of respectable people in this community, and is indecent. I also accept her evidence that the accused penetrated her vagina without her consent in September 2023. I am sure that she resisted and told the accused not to do it.
81. After closing speeches, Mr. Kohli reminded me that it is an element of rape for the prosecution to prove that his client knew that the complainant was not consenting to penetration. It inevitably follows from my acceptance of the complainant's evidence about the incident in September 2023 that I am sure that the accused knew full well that the complainant was not consenting to what he did to her.
82. I am sure that the accused is guilty as charged, and I convict him accordingly.
83. Before I leave this case, I should say a few words about the prosecution duty of disclosure. I share Mr. Kohli's concerns about the failure to disclose PW-2's first witness statement. Regrettably, it is a recurring issue in my Court that it often comes to light during trial that witnesses have made several statements, only some of which have been disclosed to the defence. This risks unfairness to the defence. It should not happen. I urge the prosecuting authorities to pay greater heed to their disclosure obligations in every case.
84. In the present case, I am satisfied that the non-disclosure of PW-2's first witness statement did not cause any unfairness or prejudice to the defence. PW-2 confirmed under oath that what he said in his second statement mirrored what he said in his first statement. I have not attached any weight to the complaint evidence in reaching my verdicts in this case. With respect, Mr. Kohli's submission that PW-2's first statement may have exonerated his client is wholly unrealistic.

85. 30 days to appeal to the Court of Appeal.



A handwritten signature in black ink, consisting of a stylized initial "W" followed by a long, sweeping horizontal line.

Hon. Mr. Justice Burney

At Labasa

8 August 2025

Solicitors

**Office of the Director of Public Prosecutions for the State
Kohli & Singh for the Accused**