

**IN THE MAGISTRATES' COURT OF FIJI  
AT TAVUA  
CRIMINAL JURISDICTION**

Criminal Case No: 200 - 2015

**STATE**

-v-

**SHABNESH PRASAD**

For Prosecution : Inspector Lenaitasi S. [ Police Prosecution ]  
Accused : Mr. Luvena S. [ Howell & Associates ]  
Date of Trial : 6<sup>th</sup> July 2020  
Date of Judgment : 28<sup>th</sup> July 2020

**JUDGMENT**

**BACKGROUND**

1. The Defendant denied the allegation reflected in the amended charge [filed on the 6<sup>th</sup> of July 2020] preferred by the prosecution and which describes the following:

*Statement of Offence*

**INDECENT ASSAULT**: Contrary to section 212 ( 1 ) of the **Crimes Act 2009**.

*Particulars of Offence*

**SHABNESH PRASAD** on the 5<sup>th</sup> day of August, 2015 at Tavua in the Western Division unlawfully and indecently assaulted **SHAYAL VIKASHNI DEVI** by touching her thigh and breast.

2. The defendant first appeared on the 1<sup>st</sup> of September 2015 where he was granted bail and given time to secure legal representation.
3. On the 19<sup>th</sup> of October 2015 after securing legal representation, the defendant pleaded not guilty to the then charge of indecently insulting or annoying any person contrary to section 213 ( b ) of the **Crimes Act 2009**.

4. The prosecution later amended the charge to the one reflected above in this judgment.
5. Consequently because the defendant denied the allegation, a trial had to be conducted.
6. For their case, the prosecution called only 1 witness.
7. Thereafter, I found that there was a Case To Answer for the defendant.
8. The defendant gave evidence and did not call any other witness.
9. I summarise the oral evidence of the parties below:

**PW1**

10. Prosecution witness 1 [ PW1 ] is Ms. Shayal Vikashni Devi. She is now 23 years old.
11. She would have been around 18 years old on the 5<sup>th</sup> of August 2015.
12. She came to town with her grandmother on the 5<sup>th</sup> of August 2015.
13. They went to the hospital first as her grandmother was sick and then they both went to a supermarket to do some shopping.
14. They then went to the market and bought some things from the defendant's stall.
15. PW1 describes the defendant to be an uncle or his father's cousin.
16. The defendant is also a carrier driver and PW1's grandmother hired the defendant to take them home later that day.
17. Before PW1 and her grandmother were transported home by the defendant, PW1 did some more shopping at a shop while her grandmother waited at a nearby Café.
18. The defendant called PW1 saying 'ssst' and told PW1 that her grandmother told him to pick PW1 from the shop.
19. PW1 saw that there were some groceries inside the defendant's vehicle and so she got in the vehicle with the defendant.

20. The defendant said that they will go to the service station and then he took PW1 there and parked the vehicle.
21. PW1 described that the defendant started staring at her and told her that she looked pretty and for them to go to the Ba Hotel.
22. The defendant also said that he will give her money and a mobile phone.
23. The defendant met an old man and ordered for some food.
24. PW1 described that the defendant then took her towards the direction of Ba.
25. PW1 described that she was so scared when the defendant was driving her towards Ba.
26. PW1 cried.
27. This was the first time she experienced this.
28. On the way, the defendant was touching her thigh with his hand and his hand as PW1 described, 'was going towards my private part'.
29. PW1 pushed the defendant's hand away.
30. The defendant also touched her breast and was pulling her head towards him to kiss him but she pushed him.
31. The defendant was saying that he will give her clothes and a mobile phone.
32. The vehicle was moving and PW1 tried to open her door but the 'knob' was broken.
33. PW1 told the defendant to stop or she will jump.
34. PW1 was seated in the front passenger seat.
35. PW1 never gave consent to the defendant to touch her and she did not like what he did.
36. PW1 is not in a boyfriend-girlfriend relationship with the defendant.
37. PW1 told the defendant that she will tell her parents.
38. When the defendant asked her whether she will tell her parents, PW1 responded saying 'No' as she was scared.

39. The defendant then turned the vehicle towards Tavua and they returned and picked PW1's grandmother with the shopping.
40. When cross examined, PW1 said that when she exited the shop, the defendant called her and that is when she saw the defendant's vehicle.
41. Her grandmother was waiting 3 shops away.
42. It was around midday when they were at the service station.
43. The defendant made her uncomfortable.
44. PW1 said that she was scared and this is the first time it has happened to her.
45. There was no threat made to PW1 while they were at the service station.
46. They went towards a Restaurant where the defendant parked and ordered while he was seated inside the vehicle.
47. PW1 said that she did not say anything to the man whom the defendant gave his order as PW1 was scared and this was the first time it had happened to her.
48. PW1 denied that the defendant turned the vehicle around when they were at the edge of town or near the LTA office.
49. PW1 said that she did not leave while the defendant parked and gave his food order as her grandmother had already hired the defendant and up to that time, the defendant was only saying things.
50. PW1 said that when they picked up her grandmother, she was still crying.
51. PW1 did not tell her grandmother as she is elderly and in her 60s.
52. PW1 said that as soon as she reached home, she told her mother.

**DW1**

53. Defence witness 1 [DW1] is the defendant Mr. Shabnesh Prasad, 37 years old.
54. In 2015 he had a stall in the market.

55. He met PW1 and the grandmother on the 5<sup>th</sup> of August 2015.
56. They bought some potatoes and chicken.
57. Then they hired the defendant to take them home.
58. The defendant did not agree to take them as he was selling in the market.
59. The defendant was going to buy some food and fill some fuel but the grandmother stopped him to hire him.
60. The grandmother loaded some groceries into the vehicle.
61. PW1 was at a shop and stopped his vehicle and got in.
62. The defendant denied saying anything to PW1.
63. They met someone named Douglas when the defendant was ordering food and this person sat in the vehicle, at the back.
64. It was around 12.30pm.
65. The defendant described PW1 to be smiling and laughing.
66. The defendant turned his vehicle around when they were close to LTA.
67. He did not stop anywhere else.
68. They came to the supermarket where the grandmother was waiting.
69. There was no problem with the passenger side door of the vehicle.
70. PW1 was not crying or alarmed and there was no indication that she was scared.
71. When they were loading the shopping at the supermarket and at the market, PW1 did not sound any alarm.
72. When they were on the way to drop PW1 and her grandmother, PW1 asked the defendant to give her some clothes.
73. The defendant replied that when she gets married, he will give her clothes.

74. On their way home, the grandmother sat in between PW1 and the defendant.
75. The defendant was at PW1's home for about 30 minutes when he dropped them. They are his family the defendant described.
76. The defendant denied touching PW1's thigh or breast.
77. When cross examined, the defendant accepts that the vehicle he was driving is a single cab.
78. The defendant said that he could not make a '3 point turn' when he was at the restaurant as the road was busy. He went towards LTA to turn from there.
79. The defendant denied touching and caressing PW1.
80. The defendant denied that he made sexual advances towards PW1.
81. The defendant said that Douglas got in where he ordered food and he dropped this person when they came back into town.

## **ANALYSIS**

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

82. I remind myself that the defendant is presumed innocent until proven guilty.
83. The prosecution carries the burden of proving his guilt.
84. I also remind myself that I must be convinced beyond a reasonable doubt or I must be sure that the defendant committed the offence before I find him guilty.
85. The defendant has elected to give evidence.
86. His evidence can be neutral or inconsequential, it could exonerate him and it could even be used against the defendant.
87. I remind myself that even if I do not believe the defendant or accept his denial, that does not necessarily mean that the prosecution has proven their case.

**ELEMENTS OF THE OFFENCE**

88. The elements of the offence of indecent assault contrary to section 212 (1) of the **Crimes Act 2009** all of which the prosecution must prove beyond a reasonable doubt are:
- i. **The defendant;**
  - ii. **Unlawfully and indecently;**
  - iii. **Assaulted PW1;**
89. Unlawful is anything that is without legal justification. Ordinarily, physical sexual contact and advances between 2 consenting adults is not unlawful.
90. An assault is an act which intentionally or recklessly causes someone else to apprehend immediate and unlawful personal violence [ **Fagan v Metropolitan Police Commissioner** [ 1968 ] 3 All E.R 442 ] .
91. What is indecent is relative or depends on factors such as the act itself, the context in which it was done, the relationship of the parties [ if any ] amongst other factors and whether they would lead a right thinking person to conclude that it was indecent.
92. It is inevitable in many cases that there would be circumstantial evidence.
93. I remind myself that circumstantial evidence can be powerful evidence but it must be considered with care in-order to avoid speculation. The circumstantial evidence must be consistent with the defendant having committed the act or the guilt of the defendant but that also the facts must negative any other reasonable conclusion that may exonerate the defendant. At the end of the day, the court must be satisfied beyond a reasonable doubt of the defendant's guilt [ **Varasiko Tuwai v.The State** Criminal Appeal Number CAV 13 of 2015 ( 26<sup>th</sup> August 2016 ) at paragraph 51 to 53.
94. I have adopted and considered the above when preparing this judgment.

**FINDINGS**

95. There are facts in this case which were unchallenged during the course of the trial and has been adduced in evidence by both the prosecution and defence. As a consequence, I accept these facts as being proven beyond a reasonable doubt.
96. I am sure that PW1 and her grandmother were in town on the 5<sup>th</sup> of August 2015 at around midday doing some shopping. They had returned from hospital as the grandmother was sick. The defendant runs a market stall in town and the parties made some purchases from him too. The defendant was also hired to take PW1 and the grandmother home after their shopping in town was done. That only the defendant and PW1 were inside the defendant's twin cab vehicle when they were at the service station. That the defendant then made an order for food at a restaurant. That PW1 and the defendant returned to town and picked up the grandmother and the remaining shopping and the defendant dropped them home.
97. The case for the prosecution rests on the evidence of PW1 and whether I accept her to be a reliable and credible witness.
98. Having observed and listened to her and considering the case in its entirety, I am sure that she satisfies both requirements comfortably.
99. PW1 struck me as a person having a timid or bashful personality.
100. Not in a way that she is trying to hide something or being deceitful, but someone who does not like the spotlight or does not draw attention to herself.
101. I found her natural and convincing in her evidence. Nothing suggested to me that she is lying and should be disbelieved.
102. She was 18 years old at the time and when listening and observing her in court now when she is 23 years old, she recounts the incident as if it happened recently. It was vivid in her mind and she was compelling when she gave evidence.
103. She is a reliable witness and I see no reason to think otherwise.
104. PW1's evidence that the defendant is an uncle was unchallenged during the trial.
105. I find this fact proven beyond a reasonable doubt.



106. I am sure that PW1 is not a person who would initiate getting into the vehicle alone with the defendant even though he is an uncle, she was 18 years old at the time and I am sure that she would have been more reserved then.
107. I believe PW1 that it was the defendant who called her into the vehicle saying 'sssst', telling her that her grandmother had told him to pick her up.
108. I am sure that PW1 would have rejected the offer and would have gone to see her grandmother waiting at a Café a few blocks away but PW1 was persuaded when she saw some shopping in the defendant's vehicle.
109. I also understand from her perspective that he is an uncle and she naively went along.
110. I believe and accept PW1's evidence that when they were parked at the service station, the defendant stared at her and told her that she looked pretty and for them to go to the Ba Hotel.
111. The defendant offered to give her money and a mobile phone.
112. I believe PW1 and it is understandable that she did not get off the vehicle or complain to anyone as this was the first time it had happened to her and she was scared.
113. I accept her explanation that at that time, the defendant was only making verbal cues or verbal advances and nothing physical had eventuated yet.
114. PW1's evidence gave me the distinct impression although she did not express it specifically, that she was shocked by what the defendant was doing. She did not know what to do or say. I am sure that it disgusted her as well seeing that this was her uncle.
115. That after ordering his food, the defendant drove PW1 in the direction of Ba.
116. On the way, the defendant was touching her thigh and moving his hand towards her private part.
117. The defendant touched her breast.
118. I am sure that he is able to do this even if he is driving and he does not need both hands on the steering wheel.
119. I believe and accept PW1's evidence that she did not like what the defendant was doing and did not consent.

120. She pushed his hand away and pushed the defendant away when he tried to make her kiss him.
121. PW1 was afraid.
122. She threatened to jump off the moving vehicle when the vehicle was proceeding in the direction of Ba.
123. I am sure that the defendant had driven past LTA or the edge of town and was driving in the direction of Ba. I am not sure though how far past LTA.
124. I believe and accept PW1's evidence that she could not open the side of her door as the 'knob' was broken.
125. On the way the defendant continued trying to entice her with valuables such as a clothes and a mobile phone.
126. I believe and accept PW1's evidence that she lied to the defendant that she will not tell her parents.
127. That PW1 cried as a result of what the defendant did.
128. It maybe immoral and not necessarily unlawful or illegal for a person to make sexual advances or have sexual relations with another consenting adult even if that adult is a niece.
129. It becomes unlawful if the advance made by the defendant goes too far and when it goes too far, the defendant still perseveres. When the act or omission of the defendant goes too far will depend on the circumstance of each case.
130. I don't accept PW1 to relate in her evidence specifically that she apprehended immediate and unlawful personal violence. Her evidence certainly reflects that and I find and accept that she did have that apprehension. For example, her threat to jump off the moving vehicle is consistent with her feelings of revulsion and non-consent.
131. People react differently to the situations they face and I do not accept uniformity. Each case must be looked at carefully.
132. PW1's personality comfortably explains why she did not make any complaint to anyone while the defendant was transporting her from the service station right up until the defendant dropped her off and her grandmother at home. In addition, I believe her that she was scared. I trust her assessment that her grandmother was probably not a suitable candidate at the time to reveal what had happened. As PW1 explained in her evidence, they

returned from the hospital as her grandmother was sick and that her grandmother is elderly. I also do not expect her to complain to strangers.

133. Incidentally, I believe the version of the defendant that a person did get in the vehicle when he ordered food but this person sat in the rear or the back of the vehicle.
134. I do not think that this would have deterred the defendant and it is not clear whether this person saw or heard anything and by all accounts, the defendant knows this person and was willing to drop this person in town.
135. I reject the defendant's evidence where it is inconsistent with PW1's evidence.
136. The defendant's claim that PW1 asked him for clothes when they were on their way home is remarkable and unbelievable considering the personality and evidence of PW1.
137. My rejection of the defendant's denial does not mean that I require him to prove anything. I found PW1's evidence compelling and sufficient.
138. The actions of the defendant such as in trying to entice his niece or PW1 with valuables or trying to buy her affection, touching her thigh and breast, trying to make her kiss him, her pushing him away and her reactions, the defendant driving the vehicle towards Ba as if he was intent on carrying out his proposal earlier that they go to a hotel in Ba, I am sure that any right thinking person would conclude that it was unlawful and indecent.
139. I see no defence succeeding here.

### **CONCLUSION**

140. I find all the elements of the allegation proven by the prosecution beyond a reasonable doubt. They have discharged their burden.
141. I find the defendant guilty of the charge of indecent assault contrary to section 212 (1) of the **Crimes Act 2009** and I convict him accordingly.
142. I will take further evidence or information in relation to sentence after this from the parties before sentence is passed.



A handwritten signature in blue ink, appearing to read "Lisiate T.V. Fotofili".

**LISIATE T.V FOTOFILI**  
**Resident Magistrate**

At Tavua this 28<sup>th</sup> day of July, 2020.