

IN THE MAGISTRATES' COURT OF FIJI  
AT TAVUA  
CRIMINAL JURISDICTION

Criminal Case No: 02 - 2016

STATE

-v-

RAVENDRA KUMAR

For Prosecution : IP Lenaitasi S. [Police Prosecution]  
Accused : Mr. Yunus M. [MY Law]  
Date of Trial : 3<sup>rd</sup> August 2020  
Date of Judgment : 23<sup>rd</sup> February 2021

**JUDGMENT**

**BACKGROUND**

1. The defendant denies the following amended charge [amended on the 30<sup>th</sup> of September 2019] which was preferred by the prosecution:

*Statement of Offence*

**INDECENT ASSAULT**: Contrary to section 212 of the **Crimes Act No. 44 of 2009**.

*Particulars of Offence*

**RAVENDRA KUMAR** on the 2<sup>nd</sup> day of November, 2014 at Tavua in the Western Division unlawfully and indecently assaulted **PW1**.

2. I have generalised any reference to the alleged victim as this case involves an allegation of a sexual nature. I will refer to her as 'PW1'.
3. The defendant was first produced on the 12<sup>th</sup> of January 2015.
4. The defendant was charged at the time with indecently insulting or annoying a person pursuant to section 213 (b) of the **Crimes Act 2009**.

5. The defendant was released on bail.
6. After securing the services of the Legal Aid Commission, the defendant pleaded not guilty to the then charge on the 1<sup>st</sup> of June 2015.
7. The subsequent dates fixed for trial between 2016 and 2019 did not proceed for various reasons such as the defence counsel from the Commission not being fully instructed or that the defendant failed to appear.
8. Leave was eventually granted to the Commission to withdraw as counsel for the defendant as he subsequently secured private counsel.
9. The defendant pleaded not guilty to the amended charge [reflected in page 1 of this judgment] on the 24<sup>th</sup> of February 2020.
10. The trial regarding the allegation in the amended charge was held before me on the 3<sup>rd</sup> of August 2020.
11. During the trial, the prosecution called 1 witness or PW1.
12. After the prosecution closed their case, I found that there was a case to answer.
13. The options available were explained to the defendant and he discussed the options with his counsel.
14. Thereafter, the defendant indicated that he will give evidence. He had no other defence witness.
15. I summarise the oral evidence of the sole prosecution witness and the defendant below:

**PW1**

16. Prosecution witness 1 [ PW1 ] is A, 30 years old, housewife.
17. PW1 used to stay in a rented place at Tavua town with her husband.
18. On the 2<sup>nd</sup> of November 2014 she was at home in town.
19. Her husband was at work.

20. PW1 was at home cleaning the house as they had just moved in.
21. The defendant described by PW1 as 'Rishi' came over to the house.
22. It was around 12 mid-day.
23. The defendant is the friend of her husband.
24. PW1 thought of the defendant as a 'good person'.
25. PW1 knew the defendant from before.
26. She has known the defendant for about 8 years.
27. The defendant would address her as his daughter.
28. PW1 told the defendant that her husband was at work.
29. PW1 allowed the defendant inside the house.
30. PW1 offered the defendant tea and biscuit.
31. PW1 told the defendant to sit and she will cook.
32. While PW1 was washing the rice cooking pot, the defendant came to the kitchen with the left over biscuit and cup.
33. The defendant left the biscuit and cup at the sink.
34. Then the defendant 'forcefully' touched her breast.
35. PW1 said that the defendant wanted to 'rape' her.
36. PW1 described that the defendant was on her left side and he squeezed her left breast.
37. PW1 told the defendant to leave or she will call the police.
38. PW1 did not consent to the defendant touching her breast.
39. The defendant told her that she is not a good girl and that she is a 'bajaru' or prostitute.
40. PW1 was angry as the defendant used to treat her as a daughter.

41. PW1 treats him as a father or uncle.
42. They had a good relationship as the defendant used to visit PW1 and the husband.
43. In cross-examination, PW1 accepted that the 2<sup>nd</sup> of November 2014 was a Sunday.
44. The defendant knocked on the door to her house.
45. When the defendant asked for her husband, PW1 said that he was at work.
46. It was the first thing the defendant asked for.
47. At that time, it was a day prior to PW1 and her husband moving into the house.
48. PW1 accepts that there is a 24 hour shop in front of the house.
49. After the defendant said that he wanted to see the house, PW1 then invited the defendant in.
50. The defendant did not see all of the house but only 'went half way'.
51. PW1 accepts that in her police statement given or dated the same day of the incident, it is reflected that she made tea for the defendant when in fact it was coffee.
52. PW1 said that at the time she was afraid and she must have told police it was tea.
53. PW1 said that police wrote down her police statement but did not read it back to her.
54. The defendant sat on the sofa.
55. Since the defendant is a great friend of her husband, she was going to cook for the defendant.
56. When PW1 was in the kitchen, she was not facing the defendant.
57. PW1 shouted loudly.
58. When PW1 told the defendant to leave, the defendant did not want to go.
59. The defendant swore at PW1 and then left.

60. PW1 did not tell police that the defendant swore at her saying bajaran.
61. PW1 called her aunty and told her what happened and her aunty told PW1 to report to police after which PW1 came to the Police Station.
62. PW1 said that she told police she had spoken to her aunty but this is not reflected in her police statement.
63. PW1 accepts that she has family at Nausori.
64. PW1 denied asking the defendant for \$30 while the defendant was having tea.
65. PW1 denied making up the allegation because the defendant refused to give her money.
66. That was the first time the defendant came to the home at Tavua but before that the defendant visited her and her husband frequently at Mataniwai.

**DW1**

67. Defence witness 1 [DW1] is the defendant Mr. Ravendra Kumar, 44 years old, singer by profession for religious and other social functions.
68. The defendant accepts that he is also known as Rishi.
69. He accepts that he was at the home on the 2<sup>nd</sup> of November 2014 at Tavua town.
70. PW1's husband is the defendant's friend and he called the defendant to the house.
71. The defendant is in a good relationship with PW1's husband.
72. The defendant has known the husband for 20 years.
73. The defendant has known PW1 for 7 to 8 years.
74. The defendant treats PW1 like a daughter.
75. The defendant used to visit them in their former residence.
76. PW1 made the defendant tea and gave the defendant cookies.

77. PW1 sat in the living room while PW1 made coffee.
78. This was the first time for the defendant to go to the new house.
79. PW1 sat in front of the defendant about 1 meter away.
80. PW1 told the defendant that they moved to their new place as there were 'too many problems' in their old place.
81. PW1 asked the defendant for \$30 as she wanted to go to Nausori.
82. PW1 used to go frequently to Nausori as her parent stays there.
83. The defendant asked PW1 what she will use the \$30 on and PW1 replied that she will use it for her bus fare.
84. After tea, the defendant left.
85. While leaving, PW1 told the defendant not to tell her husband.
86. The defendant replied jokingly to her that he will tell her husband.
87. The defendant did not know that PW1 will behave differently.
88. The defendant denied going into the kitchen.
89. The defendant denied touching PW1's breast.
90. The defendant said that he spent about 20 to 25 minutes inside PW1's home in town.
91. There is a billiard shop, a saloon and grocery shop near PW1's home in town.
92. The shops were open.
93. The defendant was not arrested by the police.
94. The following day, a female police officer advised the defendant that there was a report against him and so the defendant came to the police station.
95. The defendant says that he has always treated them well. He is ashamed of the allegation.

96. In cross-examination, the defendant accepts that he is a well known 'kawali' singer.
97. He has been singing for 30 years.
98. The defendant accepts that he had a mobile phone in 2014.
99. The defendant did not intend to visit because he had to accompany a friend to Lautoka but that friend was not around at the time and so the defendant decided to visit PW1's home in town.
100. The defendant said that PW1 told him that her husband was at work when they were in the sitting room.
101. The defendant denied having the intention of doing 'something' to PW1.
102. The defendant denied touching her breast.

#### **SUBMISSIONS**

103. Defence counsel has made oral and filed written submissions on behalf of the defendant.
104. It is undisputed that the parties are known to each other.
105. It is argued that no medical report has been tendered to establish that PW1 was indecently assaulted by the defendant. The medical report is 'vital'. It is also accepted that corroboration is not required in cases of a sexual nature pursuant to section 129 of the **Criminal Procedure Act 2009**.
106. It is submitted that some of what PW1 related in her oral evidence is not in her police statement. For instance, it is not recorded in PW1's police statement that she had told her aunty.
107. That PW1 was hesitant to give oral evidence while her husband was in the courtroom.
108. That PW1 failed to inform her husband immediately.
109. That PW1 has made the complaint because of the \$30.
110. I have considered these submissions in the course of preparing this decision.

### BURDEN AND STANDARD OF PROOF

111. I remind myself that the defendant is presumed innocent until proven guilty [section 14 (2) (a) of the 2013 Constitution; Woolmington v DPP [1935] A.C 462].
112. The prosecution carries the burden of rebutting this presumption.
113. The prosecution can rebut the presumption of innocence, when the prosecution prove their case beyond a reasonable doubt or make the court sure that the defendant committed the offence [section 58 (1) of the Crimes Act 2009].
114. The defendant has elected to give evidence alone.
115. Even if I reject the defendant's evidence, that does not necessarily mean that the prosecution has proven their case.
116. The case rests on whether I believe and accept PW1's evidence.

### ELEMENTS OF THE OFFENCE

117. The elements of the offence all of which the prosecution must prove beyond a reasonable doubt are:
  - i. The defendant;
  - ii. Unlawfully and indecently;
  - iii. Assaulted;
  - iv. The alleged victim or PW1.
118. Unlawful is anything that is without legal justification.
119. 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 ].

120. 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 any right thinking person to conclude that it was indecent.
121. For there to be an indecent assault, it is necessary that the assault have a sexual connotation. The area of the body may go towards establishing that there is some sexual connotation [**Ross on Crime** [3<sup>rd</sup> eds], 2007 at page 603 citing **R v Harkin** (1989) 38 A Crim R 296 (NSW CCA) at page 301].
122. The Court of Appeal in **Balelala v State** [2004] FJCA 49; AAU0003.2004S ( 11 November 2004 ) expressed the following definition of corroboration:
- ...corroboration is evidence independent of the witness to be corroborated which "confirms in some material particular not only the evidence that the crime had been committed but also that the prisoner committed it": **Reg v. Baskerville** (1910) 2 KB 658. It means "confirmation" or "support": **DPP v. Hester** (1973) AC 296. It does not have to prove, by itself, the guilt of the accused beyond reasonable doubt; it is sufficient if it confirms or tends to confirm the accused's participation, or involvement, in the crime charged **Doney v. The Queen** (1990) 171 CLR 207.*
123. Section 129 of the **Criminal Procedure Act 2009** prescribes that PW1's evidence need not be corroborated if the defendant is tried for an offence of a sexual nature.
124. It is inevitable in many cases that there would be circumstantial evidence.
125. 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.
126. I have borne the above principles in mind when assessing this case.

**ANALYSIS**

- 127.** It is undisputed by the defendant in his own evidence and I also find it proven beyond reasonable doubt that the parties are acquainted with each other. They have known each other for years. The defendant knows PW1's husband for close to 2 decades. PW1 and the defendant have known each other for at least 5 years. The defendant would visit the couple frequently at their former residence before the couple moved into town. PW1 treats the defendant as a father or an uncle. Both PW1 and the defendant describe the relationship of the parties with affection when giving oral evidence.
- 128.** Similarly it is undisputed and I am sure that the defendant was at PW1's home in town on the day in question. It was around mid-day.
- 129.** I believe and accept PW1's evidence that she was cleaning the house. The couple was in the process of or on the verge of moving in.
- 130.** PW1's husband was not at home at the time.
- 131.** It was only PW1 and the defendant.
- 132.** A point was raised by counsel for the defendant during the cross-examination of PW1 whether PW1 made tea or coffee for the defendant during the visit.
- 133.** PW1 in her evidence accepts that she may have told police that she made tea and that is why it is in her police statement. PW1 explained that she was frightened at the time.
- 134.** The defendant also accepts interchangeably in his evidence that it was tea or coffee.
- 135.** It is also accepted by PW1 that the defendant swearing at her saying bajaran or prostitute and her telling her aunty about what the defendant did, is absent in PW1's police statement.
- 136.** I do not expect witnesses to give oral evidence consistent with their earlier out of court statement. Police statements and a defendant's police caution interviews are examples of out of court statements.
- 137.** Omissions and inconsistencies between an out of court statement and oral evidence in court can depend on the state of the person psychologically and or physically at the time of giving the out of court statement and the state when giving oral evidence, the lapse of time between the incident and the date on which the statement is given, the sensitivity of the incident being described, the ability of the person to recollect, the ability of the person to

describe the incident, the skill of the person recording the statement, amongst other factors.

138. In some cases, when a witness gives evidence 'so in tune' with their earlier out of court statement, that might be a cause for concern rather than confidence as it is possible that the witness has fabricated the narrative.
139. In this case regarding PW1, I do not see any inconsistency about coffee or tea or omission in her police statement reflecting telling her aunty or the defendant swearing at her, as material to the extent that I must disregard or treat PW1's evidence with caution.
140. As PW1 explained and which I accept, she was afraid at the time of giving her police statement.
141. The statement was not recorded by her but by a police officer. She was relating an allegation that was sexual in nature. She was relating to a stranger or a police officer an incident or allegation that was sexual in nature which happened to her earlier the same day which I am sure still had a psychological bearing on her state of mind.
142. I do not find it odd taking into account PW1's evidence and her background, that she did not inform her husband immediately.
143. PW1 I am sure is financially dependent on her husband. PW1 does domestic duties. The defendant was a friend of the family. She purportedly experienced an encounter with the defendant of a sexual nature. The defendant is someone which PW1's describes to be equivalent to a father or an uncle.
144. This comfortably explains and I am sure why PW1 was not comfortable raising the incident immediately with her husband.
145. I also do not expect PW1 to be revealing the incident to a stranger or a person in a nearby shop. Remember, they had just moved in or were about to.
146. In her case, I find it normal and I believe PW1 that she spoke to her aunty about it who then advised her to report the matter to the police which PW1 did.
147. I found PW1 to be a reticent witness when giving oral evidence.
148. I do not find this to be an impediment to her credibility as a witness.
149. It is just her nature.

150. In fact, it only reinforces my belief of her evidence.
151. The sexual nature of her allegation against the defendant who is a good friend of her husband is sufficient in my mind to have her reserved when giving oral evidence in the presence of her husband.
152. This would apply to most of other witnesses who come before the court to give evidence in a case of a sexual nature whether accompanied by a family member or not.
153. More so, I found PW1 to be forthright and compelling in her evidence.
154. I did not find any reason to dismiss her evidence.
155. The assertion or implication that PW1 is making up the allegation against the defendant because of \$30 is incredible and extraordinary.
156. PW1 denies asking for money from the defendant. I believe her.
157. It is extraordinary too in this context or the circumstance of this case, that PW1 will subject her seemingly respectful relationship with the defendant and the good relationship of her husband with the defendant for the sake of \$30.
158. Importantly to bear in mind, PW1 was not the one who initiated the contact on that day.
159. It was the defendant who had come over to the home.
160. PW1's husband was out of the house at the time.
161. PW1 in her naïve but unfortunate nature, invited the defendant into the house, provided him a drink and biscuit.
162. This are not the actions of a deceitful or vengeful person.
163. Even the defendant in his oral evidence, he does not clearly express whether he refused or agreed to give PW1 \$30 which the defendant claims that PW1 asked for in-order to go to Nausori.
164. The defendant's narrative of the events appears fabricated and incomplete.
165. The version of PW1 is not only credible but it is more reliable.

166. I accept PW1's evidence that the defendant came to her in the kitchen and squeezed her left breast.
167. PW1 did not consent.
168. She shouted.
169. She told the defendant to leave or she will call the police.
170. The defendant did not leave immediately.
171. I believe and accept that the defendant swore at her saying baju.
172. The defendant then left.
173. PW1's reporting the matter to police on the same day is contemporaneous and further supports her version and reliability.
174. I reject the defendant's evidence where it is inconsistent with the defendant's evidence.
175. Any right thinking person would consider that what the defendant did, that is squeezing the breast of PW1 without her consent is indecent and unlawful.
176. I do not see any defence succeeding here.

### CONCLUSION

177. I find all the elements of the allegation proven by the prosecution beyond a reasonable doubt. They have discharged their burden.
178. I find the defendant guilty and convict him of the charge of indecent assault pursuant to section 212 of the Crimes Act 2009.
179. I will take further evidence or information in relation to sentence after this from the parties before I pronounce sentence.



At Tavua this 23<sup>rd</sup> day of February, 2021

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