

IN THE MAGISTRATE'S COURT, SUVA
CRIMINAL JURISDICTION

Criminal Case No: 174 of 2020

STATE -v- MOHAMMED NOUZAB FAREED

For the State: Ms. Shameem and Mr. Nasa

For the Accused: Mr. Nagin and Mr. Singh

JUDGMENT

The Accused is charged with the following offence: -

CHARGE

(COMPLAINT BY A PUBLIC OFFICER)

Statement of Offence

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

Particulars of Offence

MOHAMMED NOUZAB FAREED on the 15th day of May 2019, at Suva in the Central Division unlawfully and indecently assaulted **LFS** by hugging her and sniffing and kissing her neck whilst rubbing her back

The Accused has entered a not guilty plea to the charge and the matter was fixed for trial from 15th to the 19th of March 2021.

At the commencement of the trial the State sought special arrangements for vulnerable witnesses as provided for at section 295 and 296 of the Criminal Procedure Act and sought the said orders for this case CF 174/20 and another related case CF 173/20. Counsel for the Accused had no objections to the same provided the same applied to the Accused when he testified.

The Court therefore made the following orders: -

1. The complainants in both cases shall testify in closed Court meaning that only State counsel, counsel for the Accused and the Court Officials shall be allowed to remain in Court as they give evidence. All other persons are not allowed to remain in Court as the complainants testify.
2. The complainants are also granted name suppression and all official records of these proceedings will refer to them only by their initials. No other personal information may be published that could reveal their identity. Members of the media are not allowed to take their photograph as they enter and leave the Court or publish any other details in their reportage that may lead to the identities of the complainants.
3. Additionally if the Accused person is required to give evidence, then he shall do so in closed Court and only those persons as set out in order 1 shall be allowed to remain in Court.
4. The rest of the proceedings are open to the public.

The State then proceeded with its cases and called the following witnesses: -

- a) PW1 – D/Sergeant Gasio Rokodulu
- b) PW2 – LFS – the complainant
- c) PW3 – Penijamini Naweilulu

In addition the State tendered the following document into evidence: -

- Exhibit P1 – Photographic booklet of the scene at FHL Headquarters

In the course of the cross examination of the complainant counsel tendered the following documents for the Accused: -

- Exhibit D1 – Program for 25th to 27th March 2019 for the Brazilian ambassador
- Exhibit D2 – Photo of the complainant and the Brazilian ambassador
- Exhibit D3 – Bundle of 8 photos of the Accused accompanying the Brazilian ambassador and meeting dignitaries
- Exhibit D4 – photo of the Accused and the complainant
- Exhibit D5 – email from the complainant to the Accused dated 28th March enclosing CV
- Exhibit D6 – Facebook story from Lynda Tabua regarding complaint against the Accused dated 6th December 2019.

The evidence for the State

In summary the State's main evidence with respect to the charge was led by the complainant (PW2) and PW3 – Penijamini Naweilulu.

The first witness Sergeant Gasio Rokodulu was the police photographer from the Forensic Department of the Fiji Police and he was requested by the investigating officer to take photographs of the Ra Marama House, the headquarters of Fijian Holdings. He compiled a photo booklet and tendered the same in evidence.

Under cross examination he agreed that he took the photographs one year after the alleged incident occurred.

In her evidence the complainant LFS testified that in 2019 she was employed by the Foreign Affairs Ministry as a Foreign Services Assistant. Part of her duties included facilitating foreign ambassadors and planning their itinerary and meetings when they arrived in Fiji. She recalled in March 2019 she was tasked to be the protocol officer for the non-resident Brazilian ambassador. That was when she met the Accused as he was also facilitating the ambassador's meetings and itinerary while in Suva. They developed a good rapport there and he engaged her in discussions relating to her job and he asked whether she would consider applying for a position with Fijian Holdings. She emailed her CV and expression of interest and she was then invited for an interview along with other candidates. She was interviewed twice and then offered a training position. In her evidence she testified that after considering the requirements of the position she felt that she was not qualified to do the job as it was not her field of studies. She reported for work for one day only and after that she stopped coming to work. Despite numerous calls and follow up from her supervisor at FHL she did not return.

The Accused then called her to reconsider her position and they arranged to meet at his office at Level 7 Ra Marama House at 8pm on the 15th of May 2019. On this night the complainant had a work function at the GPH so she called her boyfriend, PW3 to accompany her from GPH to Ra Marama House as she was afraid of walking there on her own. They met at Albert Park and went to Ra Marama House and they went up to Level 7 by elevator. As they got out of the elevator the Accused was there to meet them. The

Accused and the complainant then went inside a room while PW3 waited in the lobby area of Level 7.

The complainant testified that they talked for a while and she maintained that she would not return as she felt that the work was outside of her area of study. After the meeting was over the Accused then asked her for a hug and he approached her with his arms apart. As they hugged he hugged her tightly and smelled and kissed her neck and also rubbed her back. She stated that she felt uncomfortable and felt that her privacy had been invaded so she was upset and angry. She then left with her boyfriend and she was walking very fast and he then asked her what was wrong at first she did not tell him however when he insisted she then told him what the Accused did to her in the room. She did not report the matter straight away and it was not until December that she gathered the courage to report the matter to the police.

Under cross examination she conceded that the Accused had hugged her once when the Brazilian ambassador was in Suva. She stated that she respected the Accused as a senior colleague and was excited when he offered her a position with Fijian Holdings. She denied talking-to security at the lobby of Ra Marama House or signing a register to get into the elevator. She confirmed that she did not resist the Accused by pushing him away or resisting in any other manner.

She also confirmed that when she applied for a position at Fijian Holdings, attended interviews and worked for one day at Fijian Holdings, she was still employed by the Ministry of Foreign Affairs. She denied that this proved that she was dishonest. She denied that she had been influenced by a Facebook article by Lynda Tabuya and she used those facts to complain in this matter. She maintained that the Accused did these things to her in his office and that is why she reported the matter to the police. She denied counsel's assertion that she had concocted this report after the Accused had failed to offer her a job with a higher salary than her current post at the Ministry of Foreign Affairs.

PW3 testified that he had accompanied the complainant to Ra Marama House on the 15th of May 2019 and he had waited outside in the lobby of level 7 while the complainant and the Accused went into a room. When they returned after about 3 to 5 minutes he noticed a change in the complainant. They then left Ra Marama House and walked towards Albert

Park. He asked her what had happened and at first she refused to tell him what happened. Later after he persisted she told him what the Accused did inside the room that night – that he hugged her tightly and smelled and kissed her hair while rubbing her back. He told her to report however after she was reluctant to do so he did not push it. Later after she reported the matter to the police he was visited by police to give his statement which he did.

Under cross examination he maintained that he was telling the truth and he was not put up to this by the complainant. He admitted that he was talking to the complainant during a break in his testimony as the Court adjourned for lunch, however he maintained that he was telling the truth.

No case to answer submission

That was the evidence for the State and at the close of the State's case counsel for the Accused made a submission of no case to answer. He filed written submissions and also made oral arguments.

The State also filed written submissions and responded to the application for no case to answer.

On the 23rd March 2021 the Court found that the Accused has a case to answer and he was therefore put to his defence.

The Accused then advised the Court that he would testify under oath and he would also be calling witnesses.

The Accused began the Defence case on the 23rd of March and he completed his testimony and the Court also heard from the two defence witnesses on the same day.

The evidence for the Accused

In his evidence the Accused testified that he first came to Fiji in 2004 to be the Chief Financial Officer for the Fijian Holdings Company. He testified as to the various courses and qualifications that he attained in the course of his employment with Fijian Holdings. He also rose through the ranks within the company until he was appointed as the CEO of

Fijian Holdings in 2019. He testified as to his role within the organisation as well as to his charity and communal pursuits as well as other roles that were bestowed on him.

One of these roles was as the Honorary Consul for the Republic of Brazil and he was appointed to the post in 2017 after he was accredited in March 2017. As the Honorary Consul for Brazil he liaised with Ministers, Permanent Secretaries and other officials if they required anything from Brazil especially in the areas of soccer and agriculture – coffee and cocoa. He was also responsible for Brazilian nationals in the country and in 2019 there were 42 Brazilian nationals in Fiji.

He recalled that the non-resident Brazilian Ambassador came to Fiji in March 2019, his first visit since his appointment. He came to Fiji to present his credentials to the President. A program for his visit was developed by the Ministry of Foreign Affairs and the Accused and he liaised closely with the Permanent Secretary in this regard. The program was finalised and when the Ambassador arrived, the complainant was assigned to be the liaison officer from the Ministry of Foreign Affairs.

From the 25th to 28th March he accompanied the Ambassador on all of his official meetings. On the 25th of March he met the Ambassador at 8 pm when he arrived. When the Ambassador arrived he was met by 4 officials and he was also transported to his hotel in a government vehicle.

The next morning he was at the hotel before 8am to accompany the Ambassador to Government House. At Government House the Ambassador inspected a Guard of Honour and he also presented his credentials to the President. It was at Government House that the Accused first met the complainant, the protocol officer who was assigned by the Ministry of Foreign Affairs. After leaving Government House they accompanied the Ambassador to meet the Permanent Secretary of Agriculture at 12 pm. That day the Ambassador was accompanied by the official driver, the Accused and the complainant as the liaison officer.

The Ambassador was a jovial person and they laughed and joked as they accompanied him around on his official engagements. In addition to the official engagements they also had dinner with him and on one occasion he hosted a dinner for the Ambassador and all

the support staff including the complainant. In their interactions the Ambassador would hug him as well as the other officials including the complainant. He would also hug the others including the complainant and she would not object. The Accused described how he would hug her and he described it as a normal hug (holding her close to him.) At the time she did not object or complain to him about it. They interacted as a senior and junior colleague and the Ambassador was very happy with the success of his visit and as a token he gave each of them a farewell gift. They spent three days together with the Ambassador and initially on the first day she referred to him as Sir however by the third day she was calling him Fareed.

He developed a good rapport with the complainant and they discussed various things including job and career opportunities at the Fijian Holdings Group. She was knowledgeable about Fijian Holdings and she also told him that she saw his pictures everywhere. She expressed an interest in working for him and he advised her what she needed to do. When they were discussing work he asked her what she was getting as her salary and she informed him that she received \$12, 000 to \$13,000 per annum. She was keen to go to work for FHL as she preferred the benefits and conditions for work offered there.

He explained that since Fijian Holdings was formed as an economic initiative to help iTaukei, it was his mandate from the Board to try and recruit as many young iTaukei and he conducts two recruiting drives per year. They then assess these applications and select a few applicants to undergo a training program.

The complainant indicated that she was interested and she sent him her CV and he forwarded it to the HR. their procedure at FHL is that 6-8 people go through the CVs and reduce the numbers to 30 or 40 applicants. A group of managers between 5-6 people will then sit down and interview these people. They then screen the applicants and shortlist 12 to 18 people. They then assign a date, seek an interview date with him and he interviews each of the shortlisted applicants. That was done in this cases as well and the complainant was shortlisted and she was part of the final 6 to 10 Applicants. After he interviewed these Applicants they selected 2, one of whom was the complainant. The successful Applicants were supposed to report to work on the 23rd of April to commence their

training. At that time his younger son had some medical issues so he was not at work for some time. When the complainant did not turn up, officers from FHL followed up with her and he also called her to ask why she was not reporting to FHL. The complainant then advised that she wanted to see him and they made arrangements to meet at his office at 8pm on the 15th of May 2019. They could not meet earlier than that as he had a series of meetings the whole day and she was also involved with a workshop in Suva so that was the most convenient time to meet in his office at that time.

When he had meetings in his office after hours the security guards would meet and record the details of all persons coming into the building in the lobby and they would need to use their card in the elevators to enable the visitors to access the upper levels where his office was located. Normally the elevators were locked for the upper levels and could only be accessed with special access cards.

On the 15th of May she agreed to see him at 8pm so he informed his PA that the complainant was coming to see him. He explained the layout of his room in relation to the building and stated that it was located at the East Wing of the Building. This part of the building housed 4 or 5 Accounts staff and if anyone came to see him they would be able to see them as well. When he was in the office his secretary told him that there were two people who wanted to meet him, a boy and a girl. When they came up he gave her a hug and shook hands with the man and introduced himself.

He then opened the glass door to his office and as they went in, the complainant came closer to him and said “Fareed you promised a lot, why this pay?” She had expected to be paid a higher salary and she did not like what FHL offered to her as initial salary. He explained to her that every trainee started off at a salary between \$12, 000 to \$13, 000 per annum. The complaint had expected that on starting she would receive between \$18 to \$20, 000. He explained to her that this was not possible, that all trainees would start low but depending on their progress and how they worked then this could be increased and in fact the highest salary for a person who was not a CEO was \$200, 000. He stressed however that this was not achieved overnight and in fact it took 14 years and it was not about the time you spend but what you contribute to the business. He told her that he

could not and would not increase the salary offered to her and that they would evaluate yearly or 6 monthly.

He told her to follow the process and then they finished the meeting. All this time she was very close to him and she was agitated and he feared that she might try to assault him however they managed to talk some more and she calmed down. They finished the meeting, hugged and he opened the door. They hugged near the glass door and he hugged her normally. They were visible to anyone outside and also to cameras that were there. When he hugged her she did not struggle or shout. They left and he did not hear from her again, she also did not return to work. After they left, Ilaitia came behind him as it was his job to stay behind whenever he worked late and he only left when he left work.

He heard nothing more of this matter until the 24th of December 2019 when he was interviewed by IP Manoa and these allegations were put to him. He was shocked and he saw her statement in the disclosures. He checked the dates of the statement and this was around the time that a Facebook post had been put out by Lynda Tabua about another woman and which was shared by Tanya Waqanika. He also noted that the complainant was mutual friends with them and she liked the post. He noticed a similarity with the complaint on Facebook and the allegations in this case. He stated that that the complainant followed him on Twitter, Instagram and Facebook however before this matter arose she was no longer following him.

He maintained that on the 15th of May 2019 he never hugged the complainant tightly, he never sniffed her hair, kiss her neck or rub her back.

Under cross examination he confirmed that as the CEO of FHL employees would not refuse him. He denied any allegations that he did what he did because he thought no one would challenge him. He also denied allegations that the complainant was a shy person who could not have confronted him in the manner that she did. He confirmed that his PA's office was behind his office but he denied allegations that the PA could not hear or see anything happening in his office. He admitted that he did not know whether his PA went to the Gym that day, 15th May 2019. He maintained that the complainant confronted him and he was alarmed that she might assault him. It was put to him that the complainant had no reason to make up these allegations, he denied these allegations.

The second witness called by the Accused was Mereti Cokanasiga the Manager Operations for FHL. She confirmed that FHL and their stakeholders expect that the company would recruit more iTaukei staff and this was carried out by the group CEO and other managers. She confirmed calling the complainant for an interview and she was interviewed with 70 other persons. They were interviewed on the 14th August 2019 and from the initial 70 applicants 21 were shortlisted. They were all interviewed and the final selection of 7 included the complainant. She called her the same day and informed her to report for training the following week. The next week the successful applicants reported but the complainant was there for only half a day. When she talked to her, the complainant then informed her that she had not resigned from her current position at the Ministry of Foreign Affairs and she had seen the offer letter which set out her salary. The complainant stopped coming after that and despite the witness following up with her and emailing her, she did not come back.

The third witness called for the defence was Ilaitia Tuilawaki Manager HR for Serendipity Investments.

He testified that in 2019 he worked as the Personal Assistant to the Accused as Group CEO for FHL. His responsibilities included scheduling his meetings, book his meetings and driving him around. He also took minutes of his meetings. His office was located at Level 7 Ra Marama House and the Accused also had his office at this level. The office was opened till 5pm and after 5 pm all visitors to the building had to report to the security officers at the lobby. Any persons meeting with Mr. Fareed after 5pm had to make prior arrangements with him or Mr. Fareed himself. The elevators in the building are programmed and so after 5pm, only someone with an access card can access level 7.

He testified that on the 15th of May 2019 two people came to see Mr. Fareed. He saw the woman and he saw Mr. Fareed give her a hug then they went to the office. A few minutes later he saw them leaving with someone and when they left they said good night to each other. The person who was with her looked ok and Mr. Fareed said good night. He testified that he has seen Mr. Fareed hugging people before and he has also hugged other staff.

Under cross examination he maintained his evidence.

That was the evidence for the defence.

Written submissions have also been filed by the State as well as the Defence to supplement the evidence before the Court and the Court is grateful for the helpful submissions filed. The matter is now adjourned for judgment.

Analysis

The Accused is charged with Indecent Assault contrary to section 212 (1) of the Crimes Act.

The State bears the burden of establishing the following elements of the offence: -

- **Mohammed Nouzab Fareed** on the 15th of May 2019 at Level 7 Ra Marama House, Suva
- unlawfully and indecently assaulted LFS
- by hugging her and sniffing and kissing her neck whilst rubbing her back

The burden of proof lay at all times with the State and the standard of proof is that the charge must be proved beyond a reasonable doubt.

In the case of State -v- Vuibau [2019] FJHC 623; HBC 291/2017 (14th June 2019) in summing up the case the High Court provided as follows: -

“The accused would be guilty of Indecent Assault, if he unlawfully and indecently assaulted the complainants. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent.”

The test is both objective and subjective so the State has to establish that the offending acts – hugging, sniffing and kissing the complainant’s neck and rubbing her back were committed by the Accused.

Once that has been established, the Court will have to evaluate whether the actions were such that any right minded person would consider the alleged acts indecent.

The Accused has entered a not guilty plea and he has also testified in his own defence and called two additional witnesses. His position is may be summarised as follows: -

- (i) There has been undue delay in lodging the complaint that it may appear to be allegations concocted by the complainant after seeing another complaint posted on Facebook.
- (ii) The complainant's credibility is an issue as she was self-serving and she was upset with the Accused for what she perceived as a false promise to offer her higher salary to join FHL
- (iii) The Accused did not deny that he met her on the night of the 15th of May 2019 and that he hugged her when they finished their meeting. He testified that this was a "normal hug" and she did not resist or complain at any time.

The delay in reporting

The complainant has given evidence why she delayed in reporting the matter soon after the incident occurred. She has stated that she was frightened and disheartened and felt that no one would believe her. It was put to her that she concocted the report after reading the Facebook post of Lynda Tabua setting out another woman's similar allegations against the Accused.

The State relies on the authority of Penaia Valevesi –v- The State Criminal Appeal No. AAU 039 of 2016 where the Court of Appeal cited the case of Tuyford 186 N. W. 2d at 548 and the following observations on delay: -

“The mere lapse of time occurring after the injury and the time of complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of the circumstances test, what should be examined is whether the complaint was made at the first available opportunity within a reasonable time or whether there was an explanation for the delay.”

The Accused relies on the authority of The State –v- Serelevu Criminal Appeal No. AAU 141 of 2014 which cited the Indian Supreme Court in Thulia Kali –v- State of Tamil Nadu 1973 AIR 501; 1972 SCR (3) 622: -

“A prompt first information statement serves a purpose. Delay can lead to embellishment or afterthought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The Court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene or occurrence or the residence of the victim of the offence, physical and mental condition of the persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well-wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station and other relevant circumstances to be considered.”

The Accused submits that the explanations given by the complainant for the delay in lodging a police report is not credible and this lack of credibility affects the rest of her testimony so that her testimony should be disregarded by the Court. Another attack on her credibility was the fact that she applied for another job and accepted a post with FHL without resigning from her first job. This indicated her character and the fact that she was actively deceiving her first employer.

The second issue raised by the Accused is that the whole complaint was concocted by the complainant after she had the opportunity of reading Lynda Tabuya’s Facebook Post and basing her complaint on the details revealed in that post.

The State submits that the evidence of PW1 as to what transpired that night was to some extent corroborated by PW2 in terms of how this affected her. PW2 at that time was her boyfriend and on some terms of intimacy with her therefore he noticed the change in her demeanour and asked her about it. The complainant herself testified that seeing another woman describing what the Accused did to her in fact gave her the courage to report this matter to the Police.

These two issues are interlinked – the delay and the allegation of concoction of the complaint.

The two authorities cited above are clear enough, the Court should not only look at the length of time between the alleged offending and the reporting of the same. The Court must also look at the totality of the circumstances, the consistency of the testimony, demeanour of the witness on the witness box, and other relevant factors which may affect credibility.

A pertinent question was put to the Accused under cross examination namely “what would the complainant have to gain from lodging this complaint?”

At all relevant times the Accused was the Group CEO of one of Fiji’s biggest companies, well known and established in the community. The complainant was a junior civil servant, a recent graduate in her first job. She has testified that she was frightened and discouraged from reporting as the Accused was such a powerful man. She has testified that she only gained courage to report when she read the Facebook Post showing her that she was not alone and this had also happened to someone else.

The fact that all of this is now on the record in the Court’s view bolsters the complainant’s position. It is now on the record that she applied for and got a job with another entity while still being employed by her employer, incidentally the same employer she is with at the date of this trial. The Court finds that the delay in lodging the report does not detract from the evidence of the complainant.

The Accused does not deny that he hugged the complainant on two occasions that night at his office on Level 7 Ra Marama House, Suva. The first time was when they met outside the office and the second time was inside the office after they had finished their meeting.

The Accused maintains that he hugged her normally and he denies stroking her back or sniffing her neck and kissing her neck.

The complainant has testified that he asked her for a hug after they had finished talking in the office and she felt him hugging her tightly and stroking her back and kissing and sniffing her neck.

The acts if you accept either version of what transpired that night, would it constitute Indecent Assault to a so called “right minded person?”

In deciding this, the Court needs to look at the context of the alleged act. The time was after 8 pm in a largely deserted office building.

The only two parties involved in that hug are a CEO of a big company and a young junior civil servant. The power imbalance implicit in that scenario would lead this Court to accept the version of events set out by the complainant whom I found to be a witness of truth.

That being the case the Court finds that the State has met its burden of establishing the charge beyond a reasonable doubt.

Mohammed Nouzab Fareed the Court finds you guilty as charged of one count of Indecent Assault.

U. Ratuveli

Chief Magistrate

1st November 2021