

IN THE MAGISTRATES' COURT OF FIJI  
AT TAVUA  
CRIMINAL JURISDICTION

Criminal Case No: 53 - 2017

STATE

-v-

WATISONI SALAGI

For the Prosecution : IP Lenaitasi S. and SGT Priya P. [ Police Prosecution ]  
For the Defendants : Ms. Henao G. and Mr. Samy A. [ LAC ]  
Trial – Prosecutions' Case : 18<sup>th</sup> August 2020  
No Case To Answer Ruling : 16<sup>th</sup> February 2021  
Judgment : 28<sup>th</sup> February 2022

**JUDGMENT**

**BACKGROUND**

1. **WATISONI SALAGI**, most of the background regarding this matter can be gleaned from your No Case To Answer ruling. I do not wish to repeat them here.
2. Except for emphasising that I have acquitted you of the charge of rape contrary to section 149 and 150 of the **Penal Code Cap 17** at the No Case To Answer stage but I found that there was a case for you to answer in relation to indecent assault contrary to section 154(1) of the **Penal Code Cap 17**.
3. It is alleged that you committed the offence of indecent assault on the female victim on the 16<sup>th</sup> of January 2010 at Tavua where you punched the alleged female victim on her rib, biting her neck, pulling down her shorts and applying fluid to her vagina.
4. The prosecution led evidence that around 8.30am the adult female victim who would have been around 33 years old at the time, had gone to the farm which is about a 2 hour walk away from her home.
5. The sun was hot and when working on the farm, the victim decided to rest at a nearby tree. She had her lunch and fell off to sleep. This was around 11am.

6. She then felt someone near her. She sat up and saw that you were near her feet. According to the alleged victim, you were wearing a black t/shirt and you had a piece of cloth over your head and forehead. The victim has known you for about 5 years. You are her husband's cousin.
7. You punched the left side of the victim's ribs. The victim described it to be a strong punch. As a result of your punch, she became unconscious. The victim was wearing shorts at the time.
8. When she regained consciousness, she saw that her shorts were down to her knees. It felt like there was saliva on her vagina which the victim said was sperm. There was a bite mark or 'love bite' ['hicky'] on her neck. She does not know how all these transpired as she was unconscious.
9. The victim made her way home and asked 2 villagers about you as she wanted the villagers to be her witnesses.
10. She told her husband later in the afternoon that same day about what happened.
11. She was also medically examined the following day. The medical officer observed there to be a hematoma or hicky on the victim's neck.
12. A fellow villager Ms Lina gave evidence too that she met you on the day in question. No specific time was mentioned by this witness. The witness said that she met you on the road and you were holding a cane knife and sack and you were riding a horse. The witness cannot remember what clothes you were wearing on that day.
13. Although you were not required to, you gave evidence and called your father primarily as an alibi witness in your defence.
14. You accepted that you went to the farm in the morning on that day in question and you had gone to your farm around 8am after getting your horse. You were wearing long trousers with a t/shirt that had blue and white stripes. You admitted meeting Ms. Lina on the road. You accept that your farm is not far from the victim's farm. You had returned home from the farm around 9.30am. You denied ever seeing or meeting the alleged victim on that day. You denied doing any of the alleged acts to the victim. When you returned home, only your father was at home. You never left home again. There are others in the village that have the same skin colour as you.
15. Your father who is now 77 years old, attests that you returned from the farm around 9.30am and he knows this as he had saw the time. He does not have any eyesight problems. He told you to cook cassava which you did. You two had lunch and stayed home the whole

day. He loves you a lot. He cannot remember what clothes you were wearing. He says that he was listening to the radio. You did not disappear from home. You two were at home until your mother returned in the afternoon.

### **BURDEN AND STANDARD OF PROOF**

16. I remind myself that you are presumed innocent until proven guilty [section 14 (2) (a) of the **2013 Constitution; Woolmington v DPP [1935] A.C 462**].
17. The prosecution carries the burden of rebutting this presumption.
18. The prosecution can rebut the presumption of innocence, when the prosecution prove their case beyond a reasonable doubt or make the court sure that you committed the offence [section 58 (1) of the **Crimes Act 2009**].
19. You and your father have given evidence.
20. Even if I reject your evidence and or that of your father's, that does not necessarily mean that the prosecution has proven their case.

### **ELEMENTS OF THE OFFENCE**

21. The elements of indecent assault contrary to section 154(1) of the **Penal Code Cap 17** all of which the prosecution must prove beyond a reasonable doubt are:
  - i. **You the defendant;**
  - ii. **Unlawfully and indecently;**
  - iii. **Assaulted;**
  - iv. **The alleged female victim.**
22. Unlawful is anything that is without legal justification.

23. 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 ].
24. 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.
25. 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].
26. It is not necessary that I find all the acts or results alleged, to be proven beyond a reasonable doubt. The victim's shorts being seemingly pulled to her knee or a 'love bite' to her neck or sperm or fluid on her vagina. One act or result or a combination or all of these could be sufficient for there to be an indecent assault.
27. 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.*
28. Section 129 of the Criminal Procedure Act 2009 prescribes that the alleged victim's evidence need not be corroborated if you are being tried for an offence of a sexual nature.
29. It is inevitable in many cases that there would be circumstantial evidence.
30. 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 you having committed the act or your guilt but that also the facts must negative any other reasonable conclusion that may exonerate you. At the end of the day, the court must be satisfied beyond a reasonable doubt of your guilt [ Varasiko Tuwai v. The State Criminal Appeal Number CAV 13 of 2015 ( 26<sup>th</sup> August 2016 ) at paragraph 51 to 53.

31. **WATISONI SALAGI**, the case against you rests wholly or substantially on the identification made by the alleged victim which is asserted to be wrong. I must carefully assess the identification evidence.
32. I remind myself that the alleged victim, although being an honest witness, can still be mistaken.
33. The criteria outlined in the House of Lords decision of **R v Turnbull** (1976) 63 Crim App R and which is accepted and is part of the law in our jurisdiction must be considered [see for example **Wainiqolo v The State** [2006] FJCA 70; AAU0027.2006 ( 24 November 2006 )].
34. I will and have to consider the following:
  - a. How long did she have you under observation?
  - b. At what distance?
  - c. In what light?
  - d. Was the observation impeded in any way, as for example by passing traffic or a press of people?
  - e. Had she ever seen you before?
  - f. How often?
  - g. If only occasionally, had she any special reason for remembering you?
  - h. How long elapsed between the original observation and the subsequent identification to the police?
  - i. Are there any material discrepancies between the description of you given to the police by her when first seen and your actual appearance?
  - j. Are there any specific weaknesses appearing in the identification evidence?
  - k. The circumstances in which the identification came to be made are crucial. For instance, seen at the scene of offence or somewhere else?
35. Not all of the factors above maybe available in a particular case or evidence led during the trial may not touch on all of the criteria above. Still, they are worth considering and I have considered them.
36. I have borne the above principles in mind when assessing your case.

**ANALYSIS**

37. I have no trouble accepting and believing the alleged victim that she was punched on the ribs [not on her abdomen]. She became unconscious as a result.
38. She was compelling, convincing and believable as a witness and I have no reason to reject her evidence regarding this point.
39. I do not need her evidence being corroborated by medical opinion for example, in-order that I believe her.
40. For the same reason I believe her that her shorts was down to her knees. I am sure it was pulled down as there is no other reasonable explanation based on the evidence as to how it could have gotten there other than being pulled down.
41. There was a bite to her neck. Her vagina was wet.
42. I am not sure though whether the saliva consistency on her vagina is sperm. This is conjecture by her. There is no justification led in evidence as to how she reached the conclusion that it was sperm and *ip so facto* nor should I.
43. Although one act or result could be sufficient, I am satisfied that all these acts occurred. The punching of her ribs, her pants retracted to her knees, love bite on her neck and her wet vagina are all strong circumstantial evidence that it was sexual.
44. All the above was done without her consent. Her being unconscious and reporting to her husband and subsequently to police is strong circumstantial evidence in my mind of the lack of consent.
45. I reject any notion that the victim is fabricating her ordeal.
46. Any right thinking person would consider that this is indecent and unlawful.
47. The time she was punched and falling unconscious to the time she regained consciousness to see her pants down to her knees, her neck bitten, her vagina wet, I find to be close in time and is strong circumstantial evidence that makes me sure that it was caused by the same individual who punched her.
48. I find the elements ii. to iv. of the alleged offence proven by the prosecution beyond a reasonable doubt.
49. The remaining question is whether it was you who committed these acts.

50. My interpretation of the evidence makes me sure that the victim had little notice before she was punched on the ribs. It was a surprise or it was sudden. She just woke up from sleeping.
51. I believe and accept her evidence that the person who did this had a black t/shirt and had his head and forehead covered with a cloth.
52. This person was close or as the victim describes, close to her feet which means that she was lying down at the time.
53. She did sit up.
54. There was no obstacle in the way.
55. It was a fine day. It was after 11am or around lunch time.
56. According to the alleged victim, she knows you and has known you for 5 years. You are related to her husband.
57. You accepted that you did go to the farm that morning. You met Ms Lina a fellow villager on the road which is consistent with Ms. Lina's evidence.
58. Importantly, you and your father gave convincing evidence although you have no legal burden to prove your innocence.
59. I believed you two although my belief or acceptance of one of your alibi evidence either you or your father's evidence can be sufficient.
60. Both of you were believable, compelling and appeared to me to be forthright.
61. I am sure that your father loves you and I have borne this in mind when considering his evidence but I am still convinced your father is telling the truth and is not mistaken. For his age, he appeared to be well kempt and healthy. I believe him he has no eye problems and is able to discern the time when you returned from the farm.
62. The timeline suggests that the victim was indecently assaulted after 11am but around lunch time.
63. You were at home by then as you had returned home by 9.30am and you did not leave the house again after that. You had lunch with your father at home.
64. The victim accepted that she did speak to villagers that same day about you.

65. This to me is significant and I am sure that she was trying to find out who the person was that had done those things to her and it suggests to me that she was not sure.
66. Although I accept her reasoning or explanation that she wanted these villagers to be her witnesses, the primary enquiry by her with the villagers was to find out who the person was and to reassure herself that maybe it was you.
67. This also suggests and which I do find, that she did not instantly recognise who the person was that punched her on the ribs.
68. As she explained, she had just woken up and I am sure that she was just getting her bearings when suddenly she was punched causing her to lose consciousness again.
69. I believe you that you were wearing a t-shirt with blue and white stripes. This is not consistent with the black t-shirt described by the victim to have been worn by the person who punched her.
70. There is no evidence of a horse or cane knife or sack seen with or close to the person who had punched the victim which may provide further reinforcement that it was you who had punched the victim.
71. I am sure that the victim was and is mistaken and I believe you and your father that you were at home at the material time. I accept your alibi.
72. I am not sure or I am not satisfied beyond a reasonable doubt that it was you.
73. Element i. of the offence is not proven beyond a reasonable doubt.

### **CONCLUSION**

74. For the reasons above, I do not find you guilty and I acquit you of the allegation of indecent assault.
75. In this case, I discharge you off your bail obligations.



At Tavua this 28<sup>th</sup> day of February, 2022

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