

IN THE MAGISTRATES' COURT
AT BA
CRIMINAL JURISDICTION

Criminal Case No. 59/2019

BETWEEN: **STATE**

PROSECUTION

AND: **SANDEEP SINGH**

ACCUSED

Counsel: Inspector Nitesh Kumar for Police Prosecution
 Mr. A. Dayal for the Accused.

Date of Trial: 20, 24 29 May 2024

Date of Judgment: 8 November 2024

JUDGMENT

Introduction

1. Mr. Sandeep Singh ("the Accused") was produced in Court on 6 February 2019 and charged with 1 count of Defilement of Young Person between Thirteen and Sixteen Years of Age contrary to section 215(1) of the Crimes Act 2009.
2. The Accused pleaded Not Guilty to the above charge on 23 August 2019. Various dates had been given and the matter finally proceeded to Trial on 20 May 2024. On the date of Trial, 20 May 2024, Prosecution filed an Amended Charge amending the charge to 1 count of Sexual Assault. The particulars of the offence are:

Statement of Offence

Sexual Assault: *Contrary to Section 210 (1)(a) of the Crimes Act 2009.*

Particulars of Offence

Sandeep Singh on the 2nd day of February, 2019 at Ba in the Western Division unlawfully and indecently assaulted **Maraia Adisenitoa**.

3. As the offence was indictable triable summarily, the Accused elected the Magistrates' Court to hear the matter. The Accused then proceeded to enter a Not Guilty plea and thereafter Prosecution called 4 witnesses. Prosecution concluded its case on 29 May 2024. The learned counsel for the Accused conceded that there was a case to answer and informed that the Accused would give evidence only. The Accused then gave evidence on 29 May 2024 and thereafter, Defence closed its case.
4. The counsel for the Accused filed Closing Submissions on 26 June 2024 whilst Prosecution informed the Court that they would rely on the Court record.
5. Having read the submissions filed and considered the evidence of Prosecution and Defence, I now pronounce my Judgment.

Burden of Proof

6. It is imperative to highlight that as a matter of law, the onus or burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no burden on an accused to prove his or her innocence as an accused is presumed to be innocent until proven guilty.
7. It is for the prosecution to prove the accused's guilt beyond a reasonable doubt. If there is doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in the court's mind on any of the ingredients or on the evidence led by prosecution, the accused must be found not guilty of the charges and accordingly acquitted.

Summary of Evidence

8. It is expected that to arrive at a proper conclusion, the matter ought to be considered in its logical progression with formulated reasons for the ultimate conclusion with the general rule being that a judgment should set out the relevant events and the material evidence in the correct sequence in narrative form with the identifying number of each pertinent witness being incorporated at the appropriate places – vide *Pal v R* [1974] 20 FLR 1 (17 January 1974) as referred to in *Wang v State* Criminal Petition No. CAV 0013 of 2021 (26 October 2023) and *State v Wang* Criminal Appeal No. HAA 30 of 2019 (19 February 2021).
9. On 2 February 2019, the Complainant, who had been living with her friend Sai, had gone to town with Sai's husband – Edward and his friend. They had gone to the barber shop to have Edward's hair cut then they went to the billiard shop. It was at the billiard shop that she met the Accused, who was a Facebook friend. Edward and his friend had left the billiard shop and the Complainant remained. Later, she and the Accused left the billiard shop to drink juice and then went to the Accused's car. They then picked a friend of the Accused's from Namosau and dropped him at Tauvegavega. Afterwards, the Complainant was dropped off at Sai's home in Namosau.
10. It was after 9pm that the Accused came and picked the Complainant, Sai and Edward from Sai's home and they went to smoke in the park. Afterwards Sai and Edward were dropped off by the Accused and the Complainant remained with the Accused. Sainiana ('Sai'), who was Prosecution's second witness and Edward, who was Prosecution's third witness, both confirmed that they and the Complainant had been picked by the Accused and had gone to the shop to buy cigarettes and juice. Thereafter, Sai and Edward also confirmed that they had been dropped off by the Accused and the Complainant remained with the Accused.
11. The Complainant and the Accused then went to Peters Pool, where they both remained in the car. The Accused started kissing the Complainant and taking off his clothes and the Complainant also removed her clothes. The Accused tried to have sex with the Complainant and she agreed to have sex with him. The Accused then penetrated his penis into her vagina. Due to the Complainant feeling hurt and pain, she bit the Accused's left arm. The Accused and the Complainant then put their clothes back on and the Accused dropped the Complainant's to Sai's home.
12. Prosecution's last witness was the Doctor who medically examined the Accused on 5 February 2019 regarding the injury on his left shoulder which he had informed her that he had received after he had fallen forward and landed on something which the Doctor stated was not consistent with her findings.
13. The Accused categorically denies sexually assaulting the Complainant. He maintains that after drinking juice at the park, he had dropped off Edward and Sai at their home and

thereafter dropped the Complainant at the store and then gone home on the evening of 2 February 2019. He maintained that he received his injury on his left shoulder whilst he was working in Construction and had fallen and also when he was diving at Namosau and he hurt his shoulder when he fell from the wood.

Evaluation of Evidence

14. For a proper analysis of the evidence for the offence of Sexual Assault, it is imperative for the Court to turn its mind to the elements of the offending, which are:

- i. the accused
- ii. unlawfully and indecently
- iii. assaulted the Complainant.

15. From the outset there is no issue with the identification of the Accused as there is evidence that on 2 February 2019, the Accused was present with the Complainant, Sai - the second Prosecution witness and Edward – the third Prosecution witness at the park where they had drunk juice together before the alleged offending took place.

16. The dispute that arises is what transpired after they had drunk juice at the park. Thus, the Court will need to ascertain whether the Accused had unlawfully and indecently assaulted the Complainant on 2 February 2019.

17. In **State v Prasad** Criminal Case No. HAC 72 of 2021 (20 June 2024) His Lordship Justice Rajasinghe referred to the *Liberato* principle as expounded in **Liberato and Others v The Queen** [1985] HCA 66; 159 CLR 507 at 515 where Brennan J held that:

"When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification."

18. **Prasad** [supra] also made reference to the case of **Naidu v State** [2022] FJCA 166; AAU0158.2016 (24 November 2022) where His Lordship Prematilaka highlighted the importance of modifying the *Liberato* principle and held:

[29] On the other hand Liberato has not uttered the final word on this issue. In Johnson v Western Australia [2008] WASCA 164; (2008) 186 A Crim R 531 at 535 [14]-[15] Wheeler JA identified one possible shortcoming in using Brennan J's statement in Liberato as a template for the direction: a jury may completely reject the accused's evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a 'reasonable doubt' on that issue.

*[30] For that reason, it was usefully held in Anderson [2001] NSWCCA 488; (2001) 127 A Crim R 116 at 121 [26] that **it is preferable that a Liberato direction be framed along the following lines (i) if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; (ii) if you do not accept that evidence (account) but you consider that it might be***

true, you must acquit; and (iii) if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

19. His Lordship Justice Rajasinghe in Prasad [supra] further stated "if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. Even if the Court rejects the Accused version, that does not automatically imply that the Prosecution has established that the Accused is guilty of the crime. The Prosecution must satisfy that it has established, on the evidence accepted by the Court, beyond a reasonable doubt, that the Accused committed these offences as charged in the information".
20. Thus, the Court will need to evaluate the evidence by Prosecution whilst keeping in mind the evidence presented by the Accused insofar as they relate to the issue it is considering. The evidence presented by the parties will be evaluated to determine the testimonial trustworthiness of the evidence which will be done by evaluating the credibility – the correctness or veracity of the evidence and the reliability of evidence – the accuracy of the evidence - vide State v Prasad Criminal Case No. HAC 72 of 2021 (20 June 2024). In doing this, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide State v Moroci Criminal Case No. HAC 161 of 2023 (26 April 2024)).
21. The Accused testified that on 2 February 2019, in the afternoon, he had gone to pick the Complainant, Edward and Sai and thereafter they had gone to the shop where he bought cigarettes. They then went to the park which was in front of the shop and drank juice. It was around 7-8pm at the time. Afterwards, the Accused dropped Edward and Sai home whilst the Complainant stayed with him. He then dropped the Complainant at the shop and then had gone home.
22. When considering the Accused's evidence, the Court is mindful that there was nothing suggested or pointed out by the Accused why the Complainant made such a complaint especially if there had been an ulterior motive. There was also nothing to suggest an ulterior motive with respect to the evidence of Sai as well as Edward – the Accused's best friend.
23. Further, the Court is also mindful that the Accused stated that he had dropped the Complainant to the shop after he had dropped Edward and Sai to their home on 2 February 2019 after drinking juice in the park. This version was never suggested by the Accused's counsel, rather the suggestion that had been put across to the Complainant was that she had been dropped off with Edward and Sai at their residence. This version was also never put to Prosecution's second and third witnesses namely Sai and Edward.
24. Moreover, regarding the injury the Accused had sustained, the Accused in his evidence stated "I was working in construction and that's where I got hurt and I was diving at Namosau and I hurt my shoulder. I fell from the wood". It was in cross examination that the Accused confirmed that he had injured the same left shoulder on the same exact spot where the injury had been noted by the Doctor but at 2 different times.
25. Considering this evidence, the Court is mindful that this version was never put across by the Accused's counsel to Dr. Vasiti when she had given evidence. The suggestion that had

been put across was that the Accused was working in a construction site and injured while bathing in the river.

26. The Court finds that the Accused's evidence has not created a reasonable doubt with respect to what transpired between him and the Complainant on 2 February 2019 and as such will not rely upon it.
27. I now turn my mind to Prosecution's case.
28. The evidence led by Prosecution is that on 2 February 2019, the Complainant, who had been living with her friend Sainiana ('Sai'), had gone to town with Sai's husband – Edward and his friend. At the billiard shop that she met the Accused, who was a Facebook friend. Edward and his friend had left the billiard shop and the Complainant remained. Later, she and the Accused left the billiard shop to drink juice and then went to the Accused's car. They then picked a friend of the Accused's from Namosau and dropped him at Tauvegavega. Afterwards, the Complainant was dropped off at Sai's home in Namosau.
29. On the same date but after 9pm, the Accused came and picked the Complainant, Sai and Edward from Sai's home and they went to smoke in the park. Afterwards Sai and Edward were dropped off by the Accused and the Complainant remained with the Accused. Sai, who was Prosecution's second witness and Edward, who was Prosecution's third witness, both confirmed that they and the Complainant had been picked by the Accused and had gone to the shop to buy cigarettes and juice. Thereafter, Sai and Edward also confirmed that they had been dropped off by the Accused and the Complainant remained with the Accused.
30. The Complainant stated that she and the Accused then went to Peters Pool, where they both remained in the car. The Accused started kissing the Complainant and taking off his clothes and the Complainant also removed her clothes. The Accused asked to have sex with the Complainant and she agreed to have sex with him. The Complainant explained that she was afraid at the time but that the Accused had asked her to have sex and she agreed.
31. The Accused then penetrated his penis into her vagina. Due to the Complainant feeling hurt and pain, she bit the Accused's right arm which she then clarified in cross examination that she had bit the Accused's left arm. The Accused and the Complainant then put their clothes back on and the Accused dropped the Complainant's to Sai's home. The matter was reported by the Complainant's mother at the Police Station a few days later.
32. In cross examination, although the Complainant had stated that she couldn't do anything when the Accused started kissing her, she then stated that when the Accused undressed, she also undressed herself. She explained that she couldn't do anything as the Accused was a huge man and she was small at the time. However, when asked why she had undressed herself, she stated because she agreed to have sex. The Complainant also stated that before the Accused had sex with her, he put on a condom and then came on top of her. The Complainant had stated in her evidence that the Accused had been aggressive and when questioned regarding what she meant during cross examination she explained that she meant that when he had inserted his penis, she felt pain then asked the Accused to move away and when he didn't she then pushed him away.
33. Regarding the bite by the Complainant on the Accused's left arm, Prosecution led the evidence of Dr. Vasiti, who had medically examined the Accused on 5 February 2019. Although the Accused had informed Dr. Vasiti that he had received the said injury from falling forward and landing on something, Dr. Vasiti stated that this was not consistent with her findings because if anyone fell forward the reflexes would be to protect the chest or face

which would be the first thing to land on if falling forward. She further explained that if the Accused had fallen then there would have been other bruises, scratches or abrasions on his hands.

34. The Court finds that the evidence of Sai and Edward's is consistent with the Complainant's evidence that she - the Complainant had gone with the Accused after they had dropped Sai and Edward to their residence. Further, the evidence of Dr. Vasiti is consistent with the Complainant's evidence that she had bit the Accused's left shoulder especially as Dr. Vasiti stated that her finding was a small bruise on the left shoulder of the Accused and that it was in the shape of a bite mark, which seemed liked a human bite.
35. When considering the evidence led by Prosecution regarding the alleged sexual assault, the Court is mindful of the case of **State v Waqabaca** Criminal Case No. HAC 5 of 2022 (16 January 2023) where His Lordship Justice Kulatunga, when directing his mind to the elements of Sexual Assault, stated at paragraphs 6 and 7 of the Judgment:
- "Sexual assault is an aggravated form of indecent assault. The prosecution must prove the above elements against the accused beyond reasonable doubt. "Assault" is to apply unlawful force to the person of another without his or her consent. The "assault" must be considered "indecent" by right thinking members of society. The test is basically objective.***
- The ingredients of Sexual assault under the 1st limb of section 210 and indecent assault as defined under section 212 of the crimes Act are the same except for the distinction in the titles of the respective sections. It appears that sexual assault is an aggravated form of indecent assault as it carries a higher sentence. Thus, considering the use of the word 'sexual' in the title of section 210, I am of the view that, sexual assault should necessarily be involuntary contact of a 'sexual' nature that occurs through the Accused's use of force, coercion or the victim's incapacitation.***
36. The Court finds that the alleged sexual assault Prosecution is alleging was not perpetrated by the Accused by use of force or coercion as it is evident from the Complainant's evidence that the Accused asked her to have sex and she had agreed to the same and that thereafter she had undressed herself to have sex with the Accused.
37. With respect to whether the Complainant was incapacitated, the Complainant's actions prior to her and the Accused having sex does not allude to her being incapacitated in any manner – the Accused kissed her, the Accused asked her to have sex, she agreed, they both took off their clothes, the Accused put on a condom and then got on top of her and inserted his penis. Also, the Complainant's evidence that when the Accused inserted his penis, she had felt pain as such she bit his shoulder, pushed him away then they got dressed, left Peters Pool together in the Accused's car and thereafter the Accused dropped her off. This does not show that the Complainant was so incapacitated that the alleged sexual assault perpetrated was done involuntarily.
38. Thus, when considering the Complainant's evidence in totality, the Court has a reasonable doubt as to whether the alleged act of sexual assault had been perpetrated involuntarily or that the Accused had used force, coercion or even that the Complainant had been incapacitated at the time.

Determination

39. I find that Prosecution has not discharged its burden in proving all the elements for Sexual Assault beyond reasonable doubt.

40. I, therefore, find the Accused, Sandeep Singh, not guilty as charged for Sexual Assault and hereby acquit him forthwith.

41. Any party aggrieved with the Court's decision has 28 days to appeal to the High Court.



A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

N. Mishra
Resident Magistrate