

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 81 of 2016

STATE

V

EMOSI LECAVI

Counsel : Mr. Taitusi Tuenuku for the State
Ms. Sokoveti Daunivesi with Ms. Swarvana Prakash for the Accused

Dates of Trial : 21-24 May 2018

Summing Up : 25 May 2018

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "KC"

SUMMING UP

Madam Assessor and Gentlemen Assessors,

- [1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the document tendered as a prosecution exhibit (PE 1) and any admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibit put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-

examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, another matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15] According to the evidence you heard in this case, the complainant, KC, was 13 years old at the time of the alleged incidents (to be precise, 13 years and 8 months, in August 2015 and two months older in October 2015), and was 16 years old when she testified in Court. Experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case, however, is a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

- [16] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [17] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [18] However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of her evidence is inaccurate. In the alternative, you may accept the reason she provided for the inconsistency and consider her to be reliable as a witness.
- [19] Lady and Gentlemen Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [20] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [21] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not guilty of the charges. I have used the term "*question of fact*". A question of fact is

generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.

- [22] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [23] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [24] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [25] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary facts and the inferences that could be drawn from them.
- [26] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [27] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. It is not his task to prove his innocence.

- [28] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [29] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [30] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [31] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [32] I must also explain to you as to the reason for permitting a closed court proceedings when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when you have a closed court proceedings, it makes it more comfortable for the complainant to describe the often unpleasant incidents that she has to testify to. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [33] Let us now look at the charges contained in the Amended Information.
- [34] There are two charges preferred by the Director of Public Prosecutions (DPP), against the accused:

COUNT 1

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

EMOSI LCAVI, between the 1st day of August 2015 and 31st day of August 2015, at Waikete Village, Nausori in the Central Division, had carnal knowledge of KC without her consent.

COUNT 2

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

EMOSI LCAVI, between the 1st day of October 2015 and 31st day of October 2015, at Waikete Village, Nausori in the Central Division, had carnal knowledge of KC without her consent.

[35] Section 207(1) of the Crimes Act No. 44 of 2009 (Crimes Act) reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

[36] Section 207(2) (a) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

[37] Therefore, when Section 207(1) is read with Section 207(2) (a) it would read as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent.

[38] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207(2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

[39] Therefore, in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this case 1 August 2015-31 August 2015);
- (iii) At Waikete Village, Nausori, in the Central Division;
- (iv) Penetrated the vagina of KC with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[40] Similarly, in order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this case 1 October 2015-31 October 2015);
- (iii) At Waikete Village, Nausori, in the Central Division;
- (iv) Penetrated the vagina of KC with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[41] I will now elaborate upon each of these elements together, in respect of both counts 1 and 2.

[42] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

[43] The second element relates to the specific period during which the offence was committed. The third element relates to the place at which the offence was

committed. The prosecution should prove these elements beyond any reasonable doubt.

- [44] The fourth element involves the penetration of the complainant's vagina; with his penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.
- [45] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.
- [46] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:
- (a) by force; or
 - (b) by threat or intimidation; or
 - (c) by fear of bodily harm; or
 - (d) by exercise of authority; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.
- [47] Apart from proving that the complainant did not consent for the accused to insert his penis, into her vagina, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

- [48] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was over the age of 13 years at the time of the incident, and therefore, she had the mental capacity to consent.
- [49] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape is obviously considered a Sexual Offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.
- [50] If you are satisfied beyond any reasonable doubt that the accused, during the period 1 August 2015-31 August 2015, at Waikete Village, in Nausori, penetrated the vagina of KC with his penis, without the consent of the complainant and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the first count of Rape.
- [51] If you find that the prosecution has failed to establish any of these elements in relation to the first count of Rape, then you must find him not guilty of Rape.
- [52] If you are satisfied beyond any reasonable doubt that the accused, during the period 1 October 2015-31 October 2015, at Waikete Village, in Nausori, penetrated the vagina of KC with his penis, without the consent of the complainant and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the second count of Rape.
- [53] If you find that the prosecution has failed to establish any of these elements in relation to the second count of Rape, then you must find him not guilty of Rape.
- [54] However, in the event you have a reasonable doubt as to whether the prosecution has proven the two elements based on consent, which I explained earlier, beyond reasonable doubt and therefore the offence of Rape, in counts one and two is not established, as an alternative, you may consider whether the accused is guilty or not guilty of the lesser offence of Defilement of a Young Person between 13 and 16 Years of Age, in respect of the said counts, though the accused is not formally charged in the Information for that offence.
- [55] In terms of Section 215(1) of the Crimes Act:

“A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years”.

- [56] As I have mentioned before, in layman's terms, having carnal knowledge with or of any person, means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.
- [57] Therefore, for the prosecution to prove the offence of Defilement of a Young Person between 13 and 16 Years of Age, the prosecution must establish beyond reasonable doubt that the accused, during the relevant time periods, at Waikete Village, in Nausori, penetrated the vagina of the complainant, who is between the age of 13 and 16, with his penis.
- [58] It is a defence to this offence if it appears to you that the accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years at the time.
- [59] No issue of consent comes into play under Section 215(1) of the Crimes Act, as it is said it is no defence to any charge under this Section to prove that the person consented to the act.
- [60] I wish to remind you once again that you need to go in this direction ONLY if you find that the prosecution has failed to establish the two elements based on consent beyond reasonable doubt in counts one and two. If you are satisfied that the prosecution has established all the elements constituting the offences of Rape beyond reasonable doubt, then you must find the accused guilty of Rape as charged in respect of the said counts two counts.
- [61] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [62] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Agreed Facts*" without placing necessary evidence to prove them:
1. That the Complainant in this matter is KC.
 2. That KC was under the age of 16 in 2015.
 3. That Emosi Levaci is the accused in this matter.
 4. That Emosi Levaci and KC are related.
 5. That Emosi Levaci and KC were both residing in Waikete Village, Tailevu in 2015.
- [63] You must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[64] The prosecution, in support of their case, called the complainant, KC, her aunt Venina Rakau Wati and Dr. Bandana Priya Dharshani Prasad. The prosecution also tendered the following document as a prosecution exhibit:

Prosecution Exhibit PE1 - The Medical Examination Report of the complainant.

[65] Evidence of the complainant KC

- (i) *The complainant testified that she is currently residing at Waikete Village with her mother and father. Her mother's name is Vani Vakasuka and father's is Jone Sauca. She has been living at Waikete Village since she was born.*
- (ii) *Her date of birth is 23 December 2001.*
- (iii) *Apart from her mother and father, her two siblings namely, Mereoni Rau'ala (22 years) and Vani Raditoro (13 years), and her uncle and aunty were also residing with them.*
- (iv) *In August 2015, the complainant was attending Nausori District School and was in class 8.*
- (v) *The complainant testified that her neighbours were her aunty, named Kanisia and the accused. The accused's house was about 10 foot-steps away. The accused is her grandfather.*
- (vi) *In August 2015, during the 2nd term school holidays she was staying at the same Waikete Village. She was 13 years of age at the time. It was around 4.00 in the evening. Only her younger sister Vani was at home with her. Her mum, dad, uncle and aunty had gone to the river for fishing.*
- (vii) *She told her sister to clean the house, and that she will go and feed the pigs. The complainant testified that her father had assigned her the task of feeding the pigs. Thus she had filled the pig's food in the bucket and also filled the water. She saw the accused peeping through the window – the window that is at the back of his house. The accused was showing her \$5. She had ignored him. Then she went to feed the pigs.*
- (viii) *When asked as to the reason the accused was showing her the \$5, the complainant said because he wanted to do something to her. Later she said that "he wanted to harass me to touch my body".*
- (ix) *She had gone to the pig pen. The pig pen is in the forest. She described the distance to the pig pen from her house as 50-60 steps walking*

distance. In her estimation it would take 10 minutes to walk to the pig pen from her house. There are other pig pens in the vicinity belonging to her aunty, uncle and her father's younger brother. However, at the time no one else was present at the other pig pens.

- (x) KC had poured the pigs' food into the container. She had then seen the accused standing at the opposite side. He was standing about 5 foot-steps in front of her. He was showing her the money. She thought he was wanting to give the money to her.
- (xi) The witness said that the accused was standing straight and was calling her to come to him. He was showing the money and telling her to come and take it from him. Thus she had gone and taken the money from him. At that stage the accused had pulled her right hand. The witness described in Court how the accused pulled her hand. It had been painful. The accused had pulled her hand hard and told her "it will be fast".
- (xii) Thereafter, the accused started to touch her body. He had touched her breasts. She felt disgusted and did not like it.
- (xiii) When asked as to why she did not try to push him off or run away, she said, "He was holding onto my hand hard. He told me this will be fast and it's not bad".
- (xiv) When asked as to why she did not try and shout for help, the complainant said "He told me to keep quiet. He will do something to me it won't be painful and it will be fast".
- (xv) The accused had then asked her to lie down. She had refused. The accused had then told to lie down because she had taken the money. He had then forced her to lie down. The accused had spoken harshly to her and told her to lie down saying "because no one has come yet to see us". Because the accused had forced her, she had laid down.
- (xvi) The accused had then tried to open both her thighs. She tried to stand up. But he was pressing on her thighs. Later she testified that the accused's hands were pressing down on her elbows (not on her thighs).
- (xvii) While one hand was still pressing her down, the accused had then taken off his other hand and taken off her clothes. The complainant said she was wearing tights inside and a skirt outside at the time. The accused pulled up her skirt and tried to pull down her tights and panty. The witness was pressing both her thighs together as she did not want the accused to take off her tights.
- (xviii) However, the accused had taken off/pulled down both her tights and her panty. The witness had been pressing both her thighs (together).

The accused tried to open (separate) her thighs. The accused had used the same hand that he used to take off her clothes for this purpose. The accused had been telling her to open her thighs because she had taken the money. He had forced her to open her thighs. Then she had opened it.

- (xix) The accused had then moved in front to open the zip of his trousers. He had then put his balls (polo) out. The accused moved closer to her to insert it (his polo) into her private parts. She had told him to stop so that she could get up and go home and for him to take back the money. The accused had told her to hold onto the money "what he will do to me, it will be fast".
- (xx) At that stage, the complainant had felt that the accused had inserted his polo into her private part. She had felt that it went inside and it was very painful. When she felt pain, she had told the accused to stop and that she wants to go home. The accused had said "it is about to finish". The accused kept on inserting his balls into her private part. The accused was pressing her down with one hand and was also trying to pull up her t-shirt using his other hand. The witness had tried to slap away his hand so that he does not pull up her t-shirt.
- (xxi) The accused had then told her to get up and that it has finished. He had told her to wear her clothes. She had worn her clothes. The accused had then told her to follow the same path that she used when she came to the pig pen and that he will go back on the path that he came. The accused had also threatened her not to say what happened to anyone. He had said "if I say it to anyone he will chop me with a knife".
- (xxii) The witness had then returned home. She had been afraid to tell anything to her father and mother, as the accused had threatened her that he will chop her with a knife if she reveals the incident to anyone.
- (xxiii) The witness was also asked the following questions:

Q. What other names you know about this polo?

A. Soresore (testicles).

Q. What other names do you know?

A. No.

Q. To your knowledge, what do males use their polo or soresore for?

A. To insert it to female.

Q. Female's what?

A. Their pipi,

Q. What do males use to urinate to your knowledge?

A. Their polo (balls).

Q. When you are saying female pipi, what are you referring to?

A. Their private part.

(xxiv) The complainant then testified to the incident which took place in October 2015, during the 2nd last week of school.

(xxv) She said she was at home. Both her sisters were also at home at the time. Her older sister, Mereoni had then told her to go and feed the pigs. She says this was in the afternoon, but cannot recall the specific time.

(xxvi) The complainant had then filled up the pig's food and gone to the pig pen to feed the pigs. This was the same pig pen she had referred to earlier in her evidence. On reaching the pig pen, she had poured the pigs' food. Then she saw the accused again. He was standing at the same place he was standing before. She had asked him "what do you want?" The accused had been standing there looking at her. He had told her "bear in mind what I told you".

(xxvii) The witness had then turned around to go back home. The accused had then called her again. The accused had said "Either you come or do you want that thing to be done to you?" The complainant felt scared.

(xxviii) KC testified that she was standing still. The accused came towards her. He came to her and told her to lie down. She had told him that she wanted to go home. The accused had forced her to wait. She said, "If I go he will chop me with a knife".

(xxix) The accused had then forced her to lie down. She had laid down. He then told her to take off her pants. She did not want to take it off. The accused kept on forcing her to take off her pants. So she took off her pants. Then the accused had taken off her panty. He had opened her thighs and inserted his balls into her private parts. The witness had started to feel pain. The accused had been telling her "Close your mouth, it is about to finish".

(xxx) After he had finished, they both stood up. The accused was telling her to kiss each other by (on) the mouth. She had felt disgusted and did not want to kiss him. She had turned away from him and worn her clothes. She had then taken the bucket and went home. When

she had turned around, the accused had called out to her and told her "Bear in mind, if you do not want to do this I will kill you".

(xxxii) When she had reached home, her older sister was there. However, she had been afraid to tell her what happened because her sister will tell her mother who will then tell her father, and her father will whack her.

(xxxiii) The complainant testified that her older sister had heard about the incident from outside, and informed her mother. Her mother had asked her (what happened). The time her mother had asked her, the witness had started to cry. Her mother had asked her whether the story (about Emosi and the complainant having sex) is true or whether it's a lie. The witness had told her mother that the story is true. Later her aunty Venina, (her father's sister) had also asked her about the incident. The complainant had admitted that the incident was true. Her aunty, Venina had gone and reported the matter to the Police.

(xxxiv) The complainant was cross examined at length by the defence. The position of the defence is that these incidents never took place and that the witness is lying.

(xxxv) The following suggestions were put to the witness:

Q. It is my instructions and I put it to you that you never met my client at the pig pen in the month of August and October?

A. No.

Q. (by Court) - What do you mean?

A. He comes and we usually meet at the pig pen.

Q. I put it to you that he never pulled your hand at any time in August or October at the pig pen?

A. No.

Q. (by Court) - What do you mean by No?

A. He pulled my hand, the first time he wanted to harass me.

Q. I put it to you that Emosi never showed you the money at the pig pen in August?

A. No.

Q. (by Court) - What do you mean by No?

A. The time when he saw me he showed me the money.

Q. *I put it to you that Emosi never showed you the money from his house in August?*

A. *No.*

Q. *(by Court) - What do you mean by No?*

A. *I was filling the pig's food and he was looking at me and showing me the money.*

Q. *I put to you that in the month of August Emosi did not have sexual intercourse with you at the pig pen?*

A. *No.*

Q. *(by Court) - What do you mean by No?*

A. *I had sex with Emosi.*

Q. *I put it to you that Emosi did not have sexual intercourse with you at the pig pen in October?*

A. *No.*

Q. *(by Court) - What do you mean by No?*

A. *We had sex besides the pig pen.*

Q. *I put it to you that you have given false information about the incidents in August and October?*

A. *No.*

Q. *I put to you that Emosi did not threaten you as stated by you in your evidence?*

A. *No.*

Q. *(by Court) - What do you mean by No?*

A. *Emosi threatened me after we had sex.*

(xxxv) The Defence showed two inconsistencies made by the complainant in her statement to the Police, compared to her testimony in Court.

1. *(In relation to the incident in August 2015) - "He then moved closer to me and took off my skirt and panty and told me to lie down on the ground". The witness answered "Yes".*

2. *(In relation to the incident in October 2015) - "I was wearing a grey skirt". The witness answered "Yes".*

(xxxvi) The Defence also showed several omissions in the complainant's statement to the Police in comparison to the evidence the witness gave in Court.

[66] Evidence of Venina Rakau Wati

- (i) She resides at Visa, Vugalei, Tailevu.
- (ii) She testified that the accused is her uncle and the complainant is her niece. The complainant's father is older than her. Therefore, she is the biological sister of the complainant's father.
- (iii) On 9 January 2016, she had been at the Nausori Market. She had got to know about what the accused had done to the complainant.
- (iv) She had then gone and met the complainant at her house in Waikete. The witness was asked as to what exactly she asked the complainant. "I asked her that it was said that she was raped by the accused". The complainant admitted that it was done twice to her.
- (v) The complainant had said that the accused used to show her the money and he followed her to the pig pen. She said that he made her lie down and that he did an unclean act. When asked to be more specific on what the complainant had told her, the witness answered as follows: "That he made her lie down on the soil and he raped her".
- (vi) The witness testified that the reason she went to report the matter to the Police, about her own uncle was because the complainant had said, "If she says it he will kill her".

[67] Evidence of Dr. Bandana Priya Dharshani Prasad

- (i) The Doctor graduated from the Fiji School of Medicine in 2013, with the MBBS Degree. She is practising as a Medical Officer for the past 4 years. Currently she is attached to the Nausori Hospital and has been working there since 2016.
- (ii) She testified to the medical examination conducted on KC on 19 January 2016, at 17:30 Hours, at the Nausori Hospital. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE 1.
- (iii) She further testified to the specific medical findings as found in column D12 of the Report. An instrument called the "Speculum" which is a medical tool that is used to examine the vagina, had been used by her to examine the internal part of the complainant's vagina. Her findings

were that the cervix (the lower part of uterus) appeared normal. There was no bleeding, no laceration or bruises on it. A slight whitish discharge and swab taken.

- (iv) The Doctor said that the complainant's hymen wasn't intact. This meant that she is sexually active or that she has had sexual intercourse before.
- (v) Although the Doctor has noted in her report Nil Hymenal Injuries, she clarified that the injuries she is talking about was on the vulva or the external female genitalia. There were Nil bruises/lacerations externally. She testified that she should have noted "Nil Vulval Injuries".
- (vi) The Doctor stated that the Speculum will not be used in instances where the girl (patient) is a virgin. This is due to the fact that the hymen wouldn't allow the instrument, which is quite big in size (2-3 centimetres in diameter) to enter.
- (vii) The witness testified that in this case the only positive finding for sexual abuse was the hymen not being intact. However, she could not give a specific age of the torn hymen. If there was a fresh tear in the hymen and there was active bleeding, it may have been possible to give the specific age of the torn hymen.
- (viii) She was asked if the vagina of the complainant was penetrated by a man in August 2015, what would be her medical findings? The Doctor responded by saying "The medical findings would be the same".
- (ix) Similarly, she was asked if the vagina of the complainant was penetrated by a man in October 2015, what would be her medical findings? The Doctor responded by saying "The medical findings would be the same".

[68] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

Analysis

- [69] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, KC, her aunt Venina Wati and Dr. Bandana Prasad, to prove its case.
- [70] The prosecution is relying on the evidence of the Medical Officer, Dr. Bandana Prasad. This kind of evidence is given to help you with scientific matters by a witness who has expertise in his or her particular field of study. Experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [71] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [72] As I have informed you earlier, the burden of proving each ingredient of the two charges of Rape rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [73] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [74] In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt. Based on the said agreed facts the identity of the accused is proved, as it has been agreed 'That Emosi Lecavi is the accused in this matter'.
- [75] The prosecution must prove the other elements of the offences of Rape beyond reasonable doubt. That the accused during the period 1 August 2015-31 August 2015 (for count 1) and during the period 1 October 2015-31 October 2015 (for count 2); at Waikete Village, in Nausori; penetrated the vagina of KC with his penis without her consent; and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [76] The accused is totally denying that the incidents took place. The accused position is that the complainant is lying. The reasons given by the defence for such a proposition is that the complainant's mouth was not covered. However, she never shouted out or screamed for help. If she had screamed for help her siblings who were at home may have heard her. The defence also took up the position that the complainant had many opportunities to run away but she did not. Furthermore, that after the incidents occurred she had not told her family members about the incident.

- [77] You have heard the explanation given by the complainant as to why she did not scream or shout or run away during the time of the incidents. You have also heard her explanation as to why she did not inform any of her family members of the incident, until her aunt, Venina questioned her on 9 January 2016. It is for you to decide on the totality of the evidence whether the prosecution evidence can be believed and accepted or not.
- [78] Although the incident took place in the months of August and October 2015, the very first time the complainant reported the matter to anybody was on 9 January 2016, when she was questioned by her aunty Venina Wati. The complaint to the Police was made only thereafter. You have heard from the complainant the reasons given by her as to the delay in reporting the incident. It is for you to decide whether you accept the explanation offered by the complainant or not.
- [79] The defence also showed certain inconsistencies and omissions in the evidence given by the complainant and her aunt, Venina Wati, during their testimony in Court. I have already directed you on how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected. However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question.
- [80] To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
- [81] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the two counts of Rape, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offences of Rape, beyond any reasonable doubt.
- [82] You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the other count as well.
- [83] In summary and before I conclude my summing up let me repeat some important points in following form:

- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charges of Rape;*
- ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of Rape has been established beyond any reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
- iii. *As an alternative to Rape in counts one and two, you may consider whether the accused is guilty or not guilty of Defilement of Young Person between 13 and 16 Years of Age in respect of the said two counts.*

[84] Any re directions the parties may request?

The Learned State Counsel brought to the notice of Court that my directions in the first sentence of paragraph 78 needs to be amended. Accordingly, I direct the Assessors as follows:

Although the incident took place in the months of August and October 2015, the very first time the complainant reported the matter to anybody was to her mother (the complainant could not recall when this was) and thereafter, on 9 January 2016, when she was questioned by her aunty Venina Wati.

[85] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the two counts of Rape separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[86] Your possible opinions should be as follows:

Count 1

Rape- Guilty or Not Guilty

If not guilty,

In the alternative

Defilement of Young Person between 13 and 16 Years of Age- Guilty or Not Guilty

Count 2

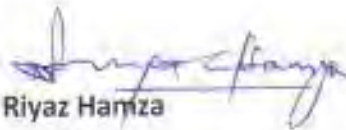
Rape- Guilty or Not Guilty

If not guilty,

In the alternative

Defilement of Young Person between 13 and 16 Years of Age- Guilty or Not Guilty

[87] I thank you for your patient hearing.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Dated this 25th Day of May 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.