

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 199 of 2016

STATE

V

AK

Counsel : Ms. Lavenia Bogitini for the State
Ms. Swarvana Prakash with Mr. Krisheel Chang for the Accused

Dates of Trial : 10-13, 16-17, 19-20 & 23 July 2018

Summing Up : 24 July 2018

Judgment : 25 July 2018

The name of the accused and the complainant are suppressed. Accordingly, the accused will be referred to as "AK" and the complainant will be referred to as "LWN".

JUDGMENT

[1] According to the Amended Information filed by the Director of Public Prosecutions (DPP), the accused AK is charged with the following offences:

COUNT ONE

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

AK on the 23rd of December 2015, at Beqa Island, in the Central Division, penetrated the vagina of LWN, a child under the age of 13 years, with his tongue.

COUNT TWO

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act 2009.

Particulars of Offence

AK on the 24th of December 2015, at Beqa Island, in the Central Division, penetrated the mouth of LWN, a child under the age of 13 years, with his penis.

COUNT THREE

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

AK on the 24th of December 2015, at Beqa Island, in the Central Division, penetrated the vagina of LWN, a child under the age of 13 years, with his tongue.

COUNT FOUR

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

AK on the 24th of December 2015, at Beqa Island, in the Central Division, unlawfully and indecently assaulted LWN, by fondling and sucking the breasts of the said LWN.

- [2] The accused pleaded not guilty to the four charges and the ensuing trial was held over 9 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found the accused guilty of count one.

However, by a majority decision, the Assessors found the accused not guilty of counts two, three and four.

- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the salient provisions of Section 207 (1), (2) (b) and (2) (c) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act). I also explained to the Assessors the salient provisions of Section 210 (1) of the Crimes Act, which deals with the offence of Sexual Assault.
- [6] Accordingly, I directed the Assessors that in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified date (in this case the 23 December 2015);
 - (iii) At Beqa Island, in the Central Division;
 - (iv) Penetrated the vagina of LWN, with his tongue; and
 - (v) At the time LWN was a child under 13 years of age.
- [7] I directed the Assessors that in order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified date (in this case the 24 December 2015);
 - (iii) At Beqa island, in the Central Division;
 - (iv) Penetrated the mouth of LWN, with his penis; and
 - (v) At the time LWN was a child under 13 years of age.

[8] Similarly, the Assessors were informed that in order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified date (in this case the 24 December 2015);
- (iii) At Beqa Island, in the Central Division;
- (iv) Penetrated the vagina of LWN, with his tongue; and
- (v) At the time LWN was a child under 13 years of age.

[9] And finally the Assessors were directed that in in order for the prosecution to prove the fourth count of Sexual Assault, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case 24 December 2015);
- (iii) At Beqa Island, in the Central Division;
- (iv) Unlawfully and indecently assaulted LWN, by fondling and sucking her breasts.

[10] All the above individual elements were further elaborated upon in my summing up.

[11] The prosecution, in support of their case, called the complainant, LWN, her aunt, Arieta Naikabisa, a Medical Officer, Dr. Sainimili Bulabu and four police witnesses; namely DC 4349 Tevita Naiteqe, Sergeant 2030 Tuaci Isaac Rasoqosoqo, WPC 4567 Maria Fane and PC 3633 Ravin Naicker.

The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit PE1- Birth Certificate of the complainant.

Prosecution Exhibit PE2A-PE2D- Letters/Notes written by the complainant.

Prosecution Exhibit PE3- Medical Examination Report of the complainant.

Prosecution Exhibit PE4- The caution interview statement of the accused.

[12] The accused gave evidence in support of his case. He also called witness Maikeli Tuwai.

[13] 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 "*Final Agreed Facts*" without placing necessary evidence to prove them:

1. The complainant in this matter is LWN.
2. The accused is AK.
3. The accused is originally from Soliyaqa Village, Beqa Island.
4. The complainant was at Soliyaqa Village, Beqa Island on the 23rd and 24th of December 2015 where she was spending her Christmas and New Year's holidays.
5. The complainant was medically examined by Dr. Sainimili Bulabu, on the 5th of March 2016.
6. The accused was interviewed under caution on the 5th of May 2016 by DC Tevita Naiteqe.
7. The accused was charged on the 5th of May 2016 by D/CPL 2030 Tuaci.

[14] Since the prosecution and the defence have consented to treat the above facts as "*Final Agreed Facts*", without placing necessary evidence to prove them, these facts are considered as proved beyond reasonable doubt.

[15] The complainant testified that she is now 12 years of age. Her date of birth is 23 December 2005. Therefore, on 23 December 2015, she would have been celebrating her 10th birthday.

[16] The complainant testified that she spent the Christmas holidays in December 2015 in Soliyaga Village in Beqa Island. She had travelled to Beqa with her grandmother and her brother Avaitia Bavotua (who is now 15 years old). Whilst in Beqa she had stayed at her grandmother's residence.

[17] She testified that on 23 December 2015, she was at her grandmother's home. Her grandmother had told her to get something from outside. When she was standing outside, she saw the accused, whom she refers to as Amena calling her from besides his home.

- [18] When she saw Amena calling her from his house, she had gone to his house. Amena had told her to go to the bush near his house. It had been between 1.00 and 2.00 in the afternoon. She said she knew the time as she was wearing a small watch.
- [19] The complainant testified that after going into the bush, Amena had first kissed her mouth. Then he had taken off her shorts and her panty and licked her vagina. The accused had used his tongue to lick her vagina. She said that she had been standing at the time and that the accused had been sitting on a rock holding onto her legs so that she couldn't move.
- [20] The complainant then testified to the incidents which took place on 24 December 2015. Amena had called her again. She had gone to him. Then he told her to go into the bush, and she had complied. This was the same bush that she went to with Amena the previous day. The time had been between 1.00 and 2.00 p.m.
- [21] At the bush Amena had kissed her mouth, taken off her shorts and panty and licked her vagina. Then he had sucked her breasts. At the time Amena was licking her vagina, she had been standing on the soil. Amena had been sitting down on a rock. He had used his tongue to lick her vagina. When Amena was licking her vagina, his face was pointing towards her vagina. Amena's hand were holding her legs. She had felt Amena's tongue go inside her vagina, and felt wet. Amena had also been licking her vagina for about 5 minutes. Prior to sucking her breasts, Amena had pulled her top skirt up. Amena had used his tongue to suck her breasts. He had been sucking her breasts for about 2 minutes.
- [22] After sucking her breasts, Amena had told her to wear her clothes and told her to wait. Thereafter, he had turned towards the sea, and taken out his penis. He had then forcefully put his penis into her mouth. Thereafter, a white chemical had come out of his penis. The witness testified that Amena's penis went inside her mouth. It had been inside her mouth for 2 minutes. Whilst his penis was in her mouth, Amena was pushing her head towards his penis.
- [23] The witness clearly testified as to the reasons why she did not tell anyone of the incidents which took place on 23 December 2015 and 24 December 2015.
- [24] After spending Christmas and New Year at Soliyaga, the complainant had come back to Nadi. She testified that after returning to Nadi, she wrote a letter about what Amena did

to her and kept the letter under her mattress. Her aunt, Arieta Naikabisa, had found the letter and had inquired from her about it.

- [25] Arieta Naikabisa testified that on 4 March 2016, she was cleaning the bedroom of the complainant and her brother, when she had found the said letter. There were a total of 4 letters/notes written by the complainant. On the next day, which was a Saturday, Arieta had asked the complainant about the letters/notes and the contents thereof.
- [26] Thereafter, the matter had been reported to the Nadi Police, the same day.
- [27] In this case the prosecution is also relying on the admissions made by the accused in his caution interview statement. However, it must be emphasized, that in the said caution interview statement the accused has only admitted to the incidents which took place on 23 December 2015. He has not admitted or confessed to the incidents which took place on 24 December 2015.
- [28] The accused testified in Court and totally denies all the allegations against him. The accused is also taking up the defence of *alibi*, in respect of the incidents which took place on 24 December 2015. For this purpose he relied on the evidence of Maikeli Tuwai, who is his nephew.
- [29] The Assessors have found the evidence of prosecution as truthful and reliable in respect of count one, as they have by a unanimous decision found the accused guilty of the said charge. Therefore, it is clear that they have rejected the version put forward by the accused in respect of count one.
- [30] In my view, the Assessor's opinion was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of count one.
- [31] In respect of counts 2, 3 and 4, it seems that a majority of the Assessors have believed the *alibi* taken up by the defence and that he was not present at the crime scene at the relevant time.
- [32] Section 125 of the Criminal Procedure Act No 43 of 2009 ("Criminal Procedure Act") sets out the "Rules as to Alibi". Section 125 (1) and (2) provides as follows:

"125. — (1) On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.

(2) A notice under this section shall be given —

(a) within 21 days of an order being made for transfer of the matter to the High Court (if such an order is made); or

(b) in writing to the prosecution, complainant and the court at least 21 days before the date set for the trial of the matter, in any other case."

- [33] Therefore, it is clear, in criminal proceedings the accused person shall not without the leave of the Court, be permitted to adduce evidence in support of an alibi, unless the accused person has given notice in accordance with this Section.
- [34] In terms of Section 125 (2) (a), for proceedings in the High Court, this notice must be given within 21 days of an order being made by the Magistrate for transfer of the matter to the High Court. Section 125 (2) (b) is applicable for proceedings in the Magistrate's Court, whereby the said notice must be given in writing to the prosecution, complainant and the Court at least 21 days before the date set for the trial of the matter.
- [35] In this case the matter had been transferred from the Magistrate's Court Navua to the High Court on 27 May 2016. There is no material on record to indicate that the accused had been informed of his right to provide alibi notice within 21 days of the transfer of the case to the High Court.
- [36] The matter was first called in the High Court on 10 June 2016. The accused had informed Court that he wishes to file Alibi Notice only on 22 September 2016. Pursuant to been granted leave, the Alibi Notice had been filed in Court on 20 October 2016.
- [37] The *alibi* witness is Maikeli Tuwai. He is 27 years of age. He is a nephew of the accused. He testified that he resides in Soliyaga Village in Beqa Island. He does farming for a living. He confirmed that in December 2015, he was in Soliyaga Village in Beqa Island.
- [38] He testified that on 24 December 2015, he had woken up in the morning, had his breakfast, and left the village at around 8.00 in the morning to go to his farm. His uncle, AK had accompanied him. It had taken about one hour to go to the farm. The witness

testified that he had been in his farm the whole day and had returned to the village only in the evening. He testified that the accused had been with him at his farm the whole day.

[39] In cross examination the following questions were put to the witness:

Q. *Due to your relationship with your uncle, you would obviously want to assist him in this case?*

A. *No. I came to confirm of what happened on 24th that we were in the forest.*

Q. *You agree that you always accompany AK to the farm?*

A. *Yes. We only went together on that day to the farm.*

Q. *Apart from the day, you would agree that you always accompany AK to the farm?*

A. *No. On that day we went together.*

Q. *Do you remember giving a statement to the Police?*

A. *Yes.*

Q. *This was on 14 February 2017?*

A. *Yes.*

Q. *You would agree that in that statement you have stated that you always accompany AK to the farm?*

A. *Not always. Only on that day we went together.*

Q. *It is stated (3rd paragraph of his Police statement) that you always accompany him to the farm?*

A. *The statement I gave to the Police when they came into the village – I did not tell them that I always accompany him to the farm. I told them that only on that day we went together to the farm.*

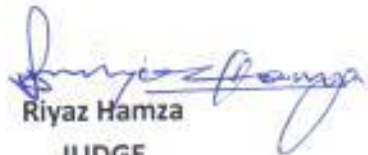
Q. *I suggest to you that you did in fact inform the Police that you always accompany your uncle to the farm?*

A. *When I gave them my statement, I gave them in i-Taukei and it was written in i-Taulkei.*

[40] Witness Maikeli Tuwai has testified that the accused had accompanied him to his farm only on 24 December 2015. I am not inclined to believe the evidence of this witness. In

my considered view his evidence is not truthful and reliable. For the same reasons I do not consider the evidence given by the accused in this case to be truthful and reliable.

- [41] Therefore, I find that the majority decision of the Assessors in finding the accused not guilty in respect of counts 2, 3 and 4 to be perverse. Therefore, I cannot agree with the majority decision of the Assessors in respect of counts 2, 3 and 4.
- [42] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offences of Rape and Sexual Assault with which the accused is charged in respect of counts 1, 2, 3 and 4.
- [43] In the circumstances, I find the accused guilty of Rape and Sexual Assault as charged, in respect of counts 1, 2, 3 and 4.
- [44] Accordingly, I convict the accused for the offences of Rape and Sexual Assault as charged, in respect of counts 1, 2, 3 and 4.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Solicitors for the State

Solicitors for the Accused

: Office of the Director of Public Prosecutions, Suva.

: Office of the Legal Aid Commission, Suva.