

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 318 of 2015

STATE

V

AMINISITAI NAVUNIVESI

Counsel : Ms. Shyamala Alagendra with Ms. Susan Serukai for the State
Mr. Lisiate Qetaki for the Accused

Dates of Trial : 10-14 & 17-20 September 2018

Summing Up : 21 September 2018

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

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 opinion. You must take all evidence into consideration, before you proceed to form your opinion. 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 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 he or 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, MA, was 8 years old at the time of the alleged incident in 2012 (Count 1), and 11 years old between 1 June 2015 and 31 August 2015 (Counts 2-8); and was 14 years of age 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 is, however, 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] You heard in this case the evidence of Ane Radovi, the paternal grandmother of the complainant. She testified that in August 2015, on inquiring from the complainant, the complainant had told her about the alleged incidents. You should consider whether this could be regarded as a complaint made by the complainant of the alleged incidents. If so you should also consider whether she made that complaint without delay and whether she sufficiently complained of the offences the accused is charged with. Also bear in mind the reasons given by the complainant for not informing her parents or anyone else about the incidents (other than for the allegation referred to in Count 1), prior to informing her grandmother.
- [18] The complainant need not specifically disclose all of the ingredients of the offences and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that the complainant made a prompt and a proper complaint, then you may consider that her credibility is strengthened in view of that recent complaint.
- [19] It must be borne in mind that the complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [20] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her 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.
- [21] 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 his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.

- [22] 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.
- [23] 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.
- [24] 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.
- [25] 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.
- [26] 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.
- [27] 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.

- [28] 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.
- [29] 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.
- [30] 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.
- [31] 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?
- [32] 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 offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [33] 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.
- [34] 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.
- [35] I must also explain to you as to the reason for the use of screen, 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 a screen is placed, the complainant is relieved of any mental pressure to describe the often unpleasant

incidents. 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.

- [36] The same applies for permitting a closed court proceedings and also for permitting a support person to sit beside her when the complainant gave evidence in this case.
- [37] Let us now look at the charges contained in the Amended Information filed by the Director of Public Prosecutions (DPP).
- [38] There are eight charges preferred by the DPP, against the accused:

FIRST COUNT

Representative Count

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: Contrary to Section 213 (1) of the Crimes Act 2009:

Particulars of Offence

AMINISITAI NAVUNIVESI, between the 1st day of January 2012 and the 31st day of December 2012, at Naiqarakoka Settlement, Tailevu in the Central Division, with intent to insult the modesty of **M.A.**, exposed his penis.

SECOND COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

AMINISITAI NAVUNIVESI, between the 1st day of June 2015 to the 31st of August 2015, at Naiqarakoka Settlement, Tailevu in the Central Division, had carnal knowledge of **M.A.**, a child under the age of 13 years.

THIRD COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

AMINISITAI NAVUNIVESI, between the 1st day of June 2015 to the 31st of August 2015, at Nāiqarakoka Settlement, Tailevu in the Central Division, penetrated the vagina of M.A., a child under the age of 13 years, with his fingers.

FOURTH COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

AMINISITAI NAVUNIVESI, on an occasion other than that referred to in Count Two, between the 1st day of June 2015 to the 31st of August 2015, at Nāiqarakoka Settlement, Tailevu in the Central Division, had carnal knowledge of M.A., a child under the age of 13 years.

FIFTH COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

AMINISITAI NAVUNIVESI, on an occasion other than that referred to in Count Three, between the 1st day of June 2015 to the 31st of August 2015, at Nāiqarakoka Settlement, Tailevu in the Central Division, penetrated the vagina of M.A., a child under the age of 13 years, with his fingers.

SIXTH COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

AMINISITAI NAVUNIVESI, between the 1st day of June 2015 to the 31st of August 2015, at Nāiqarakoka Settlement, Tailevu in the Central Division, penetrated the vagina of M.A., a child under the age of 13 years, with his tongue.

SEVENTH COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

AMINISITAI NAVUNIVESI, on an occasion other than that referred to in Count Two and Count Four, between the 1st day of June 2015 to the 31st of August 2015, at Naiqarakoka Settlement, Tailevu in the Central Division, had carnal knowledge of **M.A.**, a child under the age of 13 years.

EIGHTH COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

AMINISITAI NAVUNIVESI between the 1st day of June 2015 to the 31st of August 2015, at Naiqarakoka Settlement, Tailevu in the Central Division, unlawfully and indecently assaulted **M.A.**, by forcefully putting her hand on his penis.

[39] As you may observe there are a total of eight counts. These include one count of Indecently Annoying Any Person, six counts of Rape and one count of Sexual Assault.

[40] As you are aware the accused has already pleaded guilty to count six. As such, you do not have to make any determination in respect of the said count. However, please bear in mind that although the accused has pleaded guilty to count six, that does not automatically make him guilty of the remaining seven counts. The accused is presumed to be innocent. He may be convicted of the remaining counts only if the prosecution establishes that he is guilty of the said offences charged. It is not his task to prove his innocence in respect of the said charges.

[41] Section 213 of the Crimes Act No. 44 of 2009 (Crimes Act) reads as follows:

(1) A person commits a summary offence if he or she, intending to insult the modesty of any person —

(a) utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by the other person; or

(b) intrudes upon the privacy of another person by doing an act of a nature likely to offend his or her modesty.

[42] Therefore, in order for the prosecution to prove the first count of Indecently Annoying Any Person, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this case between the 1 January 2012 and the 31 December 2012);
- (iii) At Naiqarakoka Settlement, Tailevu, in the Central Division;
- (iv) Exposed his penis, with the intention of insulting the modesty of the complainant, MA.

[43] 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.

[44] The second element relates to the specific time 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.

[45] The fourth element for the prosecution to prove is that the accused exposed his penis and did so with the intention of insulting the modesty of MA. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of the accused in exposing his penis to the complainant insulted her modesty and that the accused did so with the intention of insulting her modesty and thereby it amounts to Indecently Annoying the complainant.

[46] As you would notice the accused has been charged with three counts of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act (the second, fourth and seventh counts); and three counts of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act (the third, fifth and sixth counts). As I told you before, you no longer have to make any determination in respect of the sixth count.

[47] Let me now explain the elements of counts two, four and seven together, which are counts of Rape contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act.

[48] Section 207(1) of the Crimes Act reads as follows:

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

[49] 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;

[50] 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.

[51] 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.

[52] Section 207(3) of the Crimes Act provides that *"For this section, a child under the age of 13 years is incapable of giving consent."*

[53] Therefore, 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 time period (in this case between the 1 June 2015 and the 31 August 2015);
- (iii) At Naiqarakoka Settlement, Tailevu, in the Central Division;
- (iv) Penetrated the vagina of MA with his penis; and
- (v) At the time MA was a child under 13 years of age.

[54] Similarly, in order for the prosecution to prove the fourth count of Rape, they must establish beyond any reasonable doubt that:

- (i) The accused;
- (ii) During the specified time period (in this case between the 1 June 2015 and the 31 August 2015), but on an occasion other than that referred to in Count Two;
- (iii) At Naiqarakoka Settlement, Tailevu, in the Central Division;
- (iv) Penetrated the vagina of MA with his penis; and
- (v) At the time MA was a child under 13 years of age.

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

- (i) The accused;
- (ii) During the specified time period (in this case between the 1 June 2015 and the 31 August 2015), but on an occasion other than that referred to in Count Two and Count Four;

- (iii) At Naiqarakoka Settlement, Tailevu, in the Central Division;
- (iv) Penetrated the vagina of MA with his penis; and
- (v) At the time MA was a child under 13 years of age.

[56] Let me now elaborate on these elements together in respect of counts two, four and seven.

[57] 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.

[58] The second element relates to the specific time 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.

[59] The fourth element involves the penetration of the complainant's vagina; with the accused's 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.

[60] The final element is that at the time of the incident MA was a child under 13 years of age.

[61] The issue of consent will not arise in this case. 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 11 years of age at the time of the alleged incidents, and therefore, she had no mental capacity to consent.

[62] Let me now explain the elements of counts three and five together, which are both counts of Rape contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act.

[63] Section 207(1) of the Crimes Act reads as follows:

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

[64] Section 207(2) (b) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a) or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent,

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

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

(2) A person rapes another person if —

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

[66] Section 207(2) (b) refers to a person penetrating the vulva, vagina or anus of the other person, to any extent, with a thing or a part of the person's body that is not a penis.

[67] Section 207(3) of the Crimes Act provides that *"For this section, a child under the age of 13 years is incapable of giving consent."*

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

- (i) The accused;
- (ii) During the specified time period (in this case between the 1 June 2015 and the 31 August 2015);
- (iii) At Naiqarakoka Settlement, Tailevu, in the Central Division;
- (iv) Penetrated the vagina of MA with his fingers; and
- (v) At the time MA was a child under 13 years of age.

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

- (i) The accused;
- (ii) During the specified time period (in this case between the 1 June 2015 and the 31 August 2015), but on an occasion other than that referred to in Count Three;
- (iii) At Naiqarakoka Settlement, Tailevu, in the Central Division;
- (iv) Penetrated the vagina of MA with his fingers; and
- (v) At the time MA was a child under 13 years of age

[70] Let me now elaborate on these elements together in respect of counts three and five.

- [71] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [72] The second element relates to the specific date on 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.
- [73] The fourth element involves the penetration of the complainant's vagina, with his fingers. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. The element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the complainant's vagina, with his fingers, to any extent.
- [74] The final element is that at the time of the incident MA was a child under 13 years of age.
- [75] The issue of consent will not arise in this case. A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As I mentioned before, the complainant in this case was 11 years of age at the time of the alleged incidents, and therefore, she had no mental capacity to consent.
- [76] Let me explain the elements of count eight, Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act.
- [77] Section 210 (1) (a) of the Crimes Act reads as follows:
- (1) A person commits an indictable offence (which is triable summarily) if he or she—
- (a) unlawfully and indecently assaults another person;
- [78] Therefore, in order for the prosecution to prove the eighth count of Sexual Assault, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) During the specified time period (in this case between the 1 June 2015 and the 31 August 2015);
 - (iii) At Naiqarakoka Settlement, Tailevu, in the Central Division;
 - (iv) Unlawfully and indecently assaulted MA, by forcefully putting her hand on his penis.

- [79] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [80] The second element relates to the specific date on 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.
- [81] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of forcefully putting the complainant's hand on his penis is an indecent act and thereby amounts to Sexual Assault.
- [82] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence. Rape and Sexual Assault are obviously considered as Sexual Offences. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.
- [83] It is also my duty to mention another relevant legal requirement concerning all the charges against the accused. All the counts are titled as a representative count. These representative counts of Indecently Annoying Any Person, Rape and Sexual Assault against the accused are based on an act or series of acts done during a specified time period (In this instance between 1 January 2012 and 31 December 2012, for the count of Indecently Annoying Any Person and between the 1 June 2015 and 31 August 2015, for the remaining counts of Rape and Sexual Assault). Such a charge is described generally as a representative count in legal terminology. The prosecution is expected to prove just one incident of Indecently Annoying Any Person, Rape or Sexual Assault which falls within this period in respect of each of those counts. They need not prove a continuous or a series of incidents of Indecently Annoying Any Person, Rape or Sexual Assault in support of a representative count.
- [84] If you are satisfied beyond any reasonable doubt that the accused, between the 1 January 2012 and the 31 December 2012, at Naiqarakoka Settlement, Tailevu, exposed his penis, with the intention of insulting the modesty of the complainant, then you must find him guilty of the count of Indecently Annoying Any Person.
- [85] If you find that the prosecution has failed to establish any of these elements in relation to count one, then you must find him not guilty of Indecently Annoying Any Person.
- [86] If you are satisfied beyond any reasonable doubt that the accused, between the 1 June 2015 and the 31 August 2015, at Naiqarakoka Settlement, Tailevu, penetrated the complainant's vagina with his penis, then you must find him guilty of the second count of Rape.

- [87] 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.
- [88] If you are satisfied beyond any reasonable doubt that the accused, between the 1 June 2015 and the 31 August 2015, at Naiqarakoka Settlement, Tailevu, penetrated the complainant's vagina with his fingers, then you must find him guilty of the third count of Rape.
- [89] If you find that the prosecution has failed to establish any of these elements in relation to the third count of Rape, then you must find him not guilty of Rape.
- [90] If you are satisfied beyond any reasonable doubt that the accused, between the 1 June 2015 and the 31 August 2015, but on an occasion other than that referred to in Count Two, at Naiqarakoka Settlement, Tailevu, penetrated the complainant's vagina with his penis, then you must find him guilty of the fourth count of Rape.
- [91] If you find that the prosecution has failed to establish any of these elements in relation to the fourth count of Rape, then you must find him not guilty of Rape.
- [92] If you are satisfied beyond any reasonable doubt that the accused, between the 1 June 2015 and the 31 August 2015, but on an occasion other than that referred to in Count Three, at Naiqarakoka Settlement, Tailevu, penetrated the complainant's vagina with his fingers, then you must find him guilty of the fifth count of Rape.
- [93] If you find that the prosecution has failed to establish any of these elements in relation to the fifth count of Rape, then you must find him not guilty of Rape.
- [94] If you are satisfied beyond any reasonable doubt that the accused, between the 1 June 2015 and the 31 August 2015, but on an occasion other than that referred to in Count Two and Count Four, at Naiqarakoka Settlement, Tailevu, penetrated the complainant's vagina with his penis, then you must find him guilty of the seventh count of Rape.
- [95] If you find that the prosecution has failed to establish any of these elements in relation to the seventh count of Rape, then you must find him not guilty of Rape.
- [96] If you are satisfied beyond any reasonable doubt that the accused, between the 1 June 2015 and the 31 August 2015, at Naiqarakoka Settlement, Tailevu, unlawfully and indecently assaulted MA by forcefully putting her hand on his penis, then you must find him guilty of the eighth count of Sexual Assault.
- [97] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the eighth count of Sexual Assault.
- [98] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[99] 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 Accused in this matter is one AMINISITAI NAVUNIVESI aged 65 years at the time of the alleged offence.
2. THAT the Accused is the paternal grandfather of the complainant.
3. THAT the Complainant was medically examined on the 27th of August 2015 at the CWM Hospital by Dr. Miliakere Dewanakau Baleilevuka.

[100] Since the prosecution and the defence have consented to treat the above facts as "Agreed Facts" without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[100] The prosecution, in support of their case, called the complainant, MA, and her paternal grandmother, Ane Radovi. The prosecution also tendered the following document as a prosecution exhibit:

Prosecution Exhibit PE1- Birth Certificate of the complainant.

[101] Evidence of the complainant MA

- (i) *The complainant testified that she is currently 14 years old. Her date of birth is 8 December 2003.*
- (ii) *The Birth Certificate of the complainant was tendered to Court as Prosecution Exhibit PE1.*
- (iii) *The complainant is now in class 8.*
- (iv) *She testified to the time she was in class 2. She was studying at Nallega District School. She said she was in class 2 in the year 2012 and that she was 7 years old. At the time she was at Naiqarakoka. She was living with her father and her mother. She has 3 siblings who are all sisters.*
- (v) *The complainant testified that the accused was her grandfather and that his house was also in Naiqarakoka. She said that the accused house was down below. From her house to the accused house it was about 10 footsteps.*

- (vi) *The complainant testified to what happened between 1 January 2012 to 31 December 2012. She said that in the morning she went to have her bath at the river below. She fetched water from the creek, which is located about 12 footsteps from her house.*
- (vii) *She saw her grandfather coming down to the creek. She said she felt scared because he will do something to her. The accused had told her to touch his male private part. When he said this she felt scared. The accused had held her hand and said to touch his private part. The witness demonstrated in court as to how the accused held her hand. The complainant said that she had run home and informed her father of what the accused did to her.*
- (viii) *The witness said at the time the accused was wearing short trousers. She was able to see his male private part when the accused had taken off his shorts. She said "it's long" in reference to the accused's private part.*
- (ix) *After arriving home the complainant had informed her father of what the accused had done to her. Later her father had asked the accused about what happened. However, the accused had not said anything. Thereafter, her father, the accused and herself, had gone to Nayavu to report the matter to the Police. They had reported the matter at the Korovou Police Station. However, nothing had happened with regard to this report. Thereafter, they had returned to Naiqarakoka.*
- (x) *Thereafter, the witness testified to the incidents which took place in 2015, specifically to between 1 June 2015 and 31 August 2015. She said she was in Class 5 at the time.*
- (xi) *She testified that one Friday afternoon after school she had gone to fetch some water. She had been sitting under the trees and singing. She had heard a sound inside her grandfather's house. She said the door was open and her grandfather was waving at her. She demonstrated how her grandfather was waving at her. She had run inside her house and remained in her house because she was scared.*
- (xii) *That same afternoon she recalls going for a bath at the creek. Her parents were on the main road selling vegetables at the time. When she was about to have her bath her grandfather had come to the creek. There was no one else at the creek at the time.*
- (xiii) *After the accused had come to the creek he had held her hand. The witness demonstrated as to how the accused held her hand. The accused had held her hand and taken her to his house. His house is about 12 footsteps from the creek. After taking her home, he had taken off her pants. Then he had*

laid her down on his bed. The accused had then taken off his pants and his t-shirt. He had then spat on his hand and sat on her waist. The witness was lying facing upwards while the accused laid on top of her. He had then gone up and down. The witness said she felt pain in her private part when the accused was going up and down.

- (xiv) The complainant said when the accused had taken off his pants and t-shirt she had seen his private part. It was long. He had spat on his hand and put it on his private part. He had then put his private part in her private part. The witness said in Itaukei that "he put his libu into her libu". When his private part was inside her private part, the accused was going up and down. It was painful. She said the accused was going up and down for a long time.*
- (xv) Thereafter, the accused told the complainant to put on her pants. She had put on her pants and gone for a bath. The witness testified that she did not tell anyone about what happened because she was scared.*
- (xvi) The witness next testified to an incident which took place one morning when she had sent her sisters Kawa and Mere to go and fetch water. She had been following them with a silver bucket. She was about to fill the silver bucket and about to have her bath when the accused had come there.*
- (xvii) The accused had then taken her to the plantation/to the farm. This was about 5 footsteps away from the creek. He had held her hand and taken her to the plantation. The witness demonstrated in Court as to how the accused had taken her by her hand.*
- (xviii) At the plantation the accused had taken off her pants. He then took off his pants as well. Then he lied down and had told the witness to sit on top of him. She had been sitting on his hips. The accused had been holding on to her hips and was moving her up and down. The witness had told the accused "that's enough". The accused had said just for a while. At the time she was going up and down she could feel pain in her private part. When asked the question: "When you were sitting on top of him, where was his libu?" The witness answered "It was inside my libu".*
- (xix) The witness testified that she did not tell her parents about the incident because she was afraid.*
- (xx) The witness testifies to another incident which took place on a Friday, between 1 June 2015 to 31 August 2015. The accused had offered her 50 cents. The witness explained that when she had gone to fetch water at the creek, her grandfather had told her to go up and they will meet at the*

coconut plantation. The accused had told her that he will give her 50 cents. However, the witness testified that she had not gone to the coconut plantation that day.

(xxi) The witness next testified to an incident which took place around 4 in the afternoon during the period 1 June 2015 to 31 August 2015. She had gone towards the back of her grandfather's house. As she reached the back of the house, her grandfather was under the house and waving his hand at her. The witness demonstrated how the accused was waving at her.

(xxii) Later that same afternoon the complainant had gone to look for coconuts. Her grandfather had held her by her left hand. They were both under the accused's house at the time. The accused had taken off her pants and also taken off his pants. He held his two fingers. The witness demonstrated by showing her index finger and middle finger. The accused had then put it up towards her private part. "He held his hand and inserted in my private part/libu". The complainant said that she felt pain in her private part. She said that she was in a standing position at the time and that the accused was beside her.

(xxiii) The witness stated that after the accused has inserted his two fingers into her private part he had also inserted his tongue.

(xxiv) The witness testified to another incident which took place one morning when she had gone looking for a pencil to her grandfather's house. At the time she entered his house her grandfather was reading his bible by the door. She had then asked the accused for a pencil.

(xxv) The accused had then waved at her and took off her pants. Then he went down to a squatting position and had inserted his tongue inside her private part. After inserting his tongue he had inserted his fingers in her private part. Again the witness demonstrated in court by showing her middle and index fingers. The witness testified that the fingers were inserted in her private part for a long time and then she had felt pain.

(xxvi) The complainant again testified that she did not inform anyone about the incidents because she was scared.

(xxvii) The witness next testifies to an incident which took place sometimes in the month of August 2015. It was a Sunday she had gone to the toilet. It was a common toilet for both her house and her grandfather's house.

(xxviii) When she went to the toilet her grandfather was already in the toilet. He held her by her hand and inserted two fingers into her private part. The witness demonstrated again by showing the index finger and the middle

finger of her right hand. She had been in a standing position at that time and the accused was beside her. When asked what happened thereafter, the witness said "he did his tongue". The accused had inserted his tongue in her private part.

(xxix) The witness testified to another incident which took place that same Sunday. She had returned home after collecting coconuts. The complainant had then gone back to collect more coconuts with her sister Kawa. The accused had been underneath his house at that time. The accused had asked Kawa to take the lead to collect coconuts. The accused had then held her hands and put it on his private part.

(xxx) The witness was asked the following further questions in evidence in chief:

Q. Would you be able to recall whether at the time he had held your hand and put on his private part, at the time if had clothes on his private part?

A. I don't know.

Q. What else did he do after that?

A. He forcefully put his hand to my private part.

(xxxi) Thereafter, the witness testify as to how she travelled to Suva by bus with her sister Mere and met her grandmother, Ane Radovi. This is her father's mother. The complainant said that she had told her grandmother what the accused had done to her.

(xxxii) The complainant also testified to an incident where the accused had asked her to come to him to take some roti for her and her sisters. On this day too, the accused had put two fingers into her private part.

(xxxiii) The witness was cross examined at length by the counsel for the defence. The accused denies all of the allegations against him except for the allegations contain in count six which he had pleaded guilty to.

(xxxiv) The following suggestions were put to the witness in cross examination:

Q. I suggest to you that Aminisitai never once tried to expose his penis to you back in 2012? Would you agree?

A. He showed it.

Q. I further suggest to you that Aminisitai never once had carnal knowledge with you?

A. He had carnal knowledge.

Q. And I suggest this because if this really did happened you would have told your parents?

A. Yes.

Q. I also suggest to you that Aminisitai never once used his fingers to penetrate your vagina?

A. He used it.

Q. And the reason I suggest this is if it did happen you would have told your parents?

A. Yes.

Q. And I finally suggest that Aminisitai never once forced your hand on his penis?

A. He forcefully did it.

Q. I suggest this because if it did happen you would have told your parents?

A. Yes.

[102] Evidence of Ane Radovi

- (i) She is currently residing at Raiwai.*
- (ii) She is the paternal grandmother of the complainant. The accused is her ex-husband. She has been separated from the accused for the past 40 years.*
- (iii) She testified that the first time she met the complainant was in August 2015. She had received a call on 15 August 2015. The complainant and her sister Mere were wanting to come and spend the two weeks holiday with her.*
- (iv) The two of them had arrived on 17 August 2015. She had met them at the Nabua bus stop. She testified that this was the first time she was meeting her granddaughters.*
- (v) The witness said that the complainant was feeling weak, was vomiting and was having a headache. When she went to urinate she urinated blood*

with her urine. When she enquired from the complainant as to why this was happening the complainant had informed her of what the accused had done to her over a period of time.

(vi) The witness had then taken the complainant to the Raiwaga Health Centre. From there the matter had been reported to the Police. She had given her statement to the Police on 2 September 2015.

[103] 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

[104] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, MA, and her paternal grandmother, Ane Radovi, to prove its case.

[105] As I have informed you earlier, the burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

[106] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.

[107] 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.

[108] The accused is totally denying all of the allegations against him except for the allegations contain in count six which he had pleaded guilty to. However, I must reiterate that although the accused has pleaded guilty to count six that does not automatically make him guilty of the remaining seven counts. The accused is presumed to be innocent. He may be convicted of the remaining counts only if the prosecution establishes that he is guilty of the said offences charged. It is not his task to prove his innocence in respect of the said charges.

[109] The defence also showed an omission in the evidence given by the complainant during her testimony in Court in comparison to her statement made to the Police (That it was

not recorded in her statement that the accused had shown her his penis). 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.

[110] 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.

[111] 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 charges, 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, beyond any reasonable doubt.

[112] 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 counts as well.

[113] 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;*
- ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider, whether the elements of the charges have been established beyond any reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[114] Any re directions the parties may request?

[115] 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 charges 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.

[116] Your possible opinions should be as follows:

Count One

Indecently Annoying Any Person- Guilty or Not Guilty

Count Two

Rape-Guilty or Not Guilty

Count Three

Rape-Guilty or Not Guilty

Count Four

Rape-Guilty or Not Guilty

Count Five

Rape-Guilty or Not Guilty

Count Seven

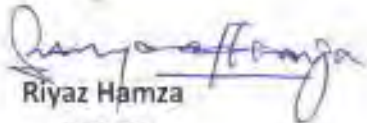
Rape-Guilty or Not Guilty

Count Eight

Sexual Assault- Guilty or Not Guilty

[117] I thank you for your patient hearing.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 21st Day of September 2018

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