

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 93 of 2016

STATE

V

KAMELI DIANI

Counsel : Ms. Shyamala Alagendra with Ms. Mehzabeen Khan for the State
Mr. Lisiate Qetaki with Ms. Lavinia David for the Accused

Dates of Trial : 22-25 January 2019

Summing Up : 28 January 2019

Judgment : 30 January 2019

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

JUDGMENT

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

COUNT 1

Statement of Offence (a)

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

Particulars of Offence (b)

KAMELI DIANI, at an unknown date between the 1st day of January 2014 and the 17th day of April 2014, at Colo-I-Suva, in the Central Division, penetrated the anus of **TV**, a child under the age of 13 years, with his penis.

COUNT 2

Statement of Offence (a)

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

Particulars of Offence (b)

KAMELI DIANI, at an unknown date between the 1st day of January 2014 and the 17th day of April 2014, at a separate incident from Count 1, at Colo-I-Suva, in the Central Division, penetrated the anus of **TV**, a child under the age of 13 years, with his penis.

COUNT 3

Statement of Offence (a)

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

Particulars of Offence (b)

KAMELI DIANI, at an unknown date between the 1st day of January 2014 and the 17th day of April 2014, at Colo-I-Suva, in the Central Division, penetrated the mouth of **TV**, a child under the age of 13 years, with his penis.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 4 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 the three charges.
- [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) (a), (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [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) During the specified time period (in this case between the 1 January 2014 and the 17 April 2014);
 - (iii) At Colo-I-Suva, in the Central Division;
 - (iv) Penetrated the anus of TV with his penis; and
 - (v) At the time TV was a child under 13 years of age.
- [7] Similarly, 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) During the specified time period (in this case between the 1 January 2014 and the 17 April 2014), but on a separate occasion to count 1;
 - (iii) At Colo-I-Suva, in the Central Division;
 - (iv) Penetrated the anus of TV with his penis; and
 - (v) At the time TV was a child under 13 years of age.
- [8] I directed the Assessors 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) During the specified period (in this case between the 1 January 2014 and the 17 April 2014);
 - (iii) At Colo-I-Suva, in the Central Division;
 - (iv) Penetrated the mouth of TV with his penis; and
 - (v) At the time TV was a child under 13 years of age.

[9] The above individual elements were further elaborated upon in my summing up in respect of each count.

[10] The prosecution, in support of their case, called the complainant, TV, his grandfather, Tu Cebu Kuruvaki, and his uncle, Inia Rasaku.

The prosecution also tendered the following document as a prosecution exhibit:

Prosecution Exhibit PE1- Birth Certificate of the complainant.

[11] The accused opted to remain silent.

[12] 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. TV is the complainant in this matter.
2. The complainant was residing with Kameli Diani and other family members at Naisoqo Settlement, Colo-I-Suva in the year 2014.
3. On the 4th day of April 2014, the complainant was at home with Kameli Diani at Naisoqo Settlement, Colo-I-Suva.

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

[14] The complainant testified that he is now 14 years of age. As per his birth certificate tendered to Court as Prosecution Exhibit PE1, his date of birth is 10 April 2004. Therefore, at the time of the alleged incidents as set out in the Amended Information, which was said to be between the 1 January 2014 and the 17 April 2014, the complainant would have been 9 years old (turning 10).

[15] The complainant said that he goes to the Suva Special School and he is a senior. Prior to that he had attended Nausori Special School. However, he does not remember when he attended Nausori Special School nor when he started at Suva Special School.

- [16] The complainant had been living with his grandfather, Tu Cebu Kuruvaki, at Colo-i-Suva, but does not remember for how long he was living at his grandfather's house. He said it was a "long time".
- [17] The complainant testified that Tu Cebu's children were also staying at Tu Cebu's place. He said that in 2014, he was living in Colo-i-Suva with Kameli Diani. He knew Kameli Diani because they stayed together at Tu Cebu's house.
- [18] The complainant described as to how on one occasion Kameli Diani had taken off his pants and put his penis into the complainant's anus. He said that this incident happened during the day time and during this time he had been attending Nausori Special School.
- [19] The complainant testified to another similar incident which took place when his grandfather had gone to Krest Chicken to sell food. During this time too he had been attending Nausori Special School.
- [20] The complainant also testified to an incident which happened in the night, when he was sleeping. He said that Kameli Diani had opened his mouth and put his penis into the complainant's mouth. Even at the time this incident took place the complainant said that he had been attending Nausori Special School.
- [21] Tu Cebu Kuruvaki, the grandfather of the complainant and the father of Kameli Diani, said that the complainant had been residing with him at Colo-i-Suva since 2007. He confirmed that the complainant was attending Nausori Special School in the year 2014. The witness testified that the complainant did not attend the Special School in Nausori for too long. "After a while, he stopped because I gave him to his mother". The witness did not remember the month the complainant started schooling at the Nausori Special School or the month he had stopped. His evidence was that the complainant was attending the Special School in Nausori for a month. Thereafter, he had handed over the complainant to his mother.
- [22] Witness Inia Rasaku testified that the complainant is like his nephew and that Kameli Diani is his cousin. The witness said the complainant had told him "That Kameli Diani used to pull down his pants, put out his male private part and used to harass him". "He said that he used to lay him down and lie on top of him". "To insert it. He used to hold his male private part and insert on his back (backside)".

- [23] The witness testified that the complainant told this to him on 14 April 2014, when they met between the witness's house and the house where the complainant was residing. The witness said that he had taken the complainant to the Police on the same day to report the matter.
- [24] The accused is totally denying all of the allegations against him.
- [25] The defence also took up the position that at no point during the trial did the prosecution identify the accused in the dock, as the accused Kameli Diani that the prosecution witnesses were referring to. It is true that no dock identification of the accused was made by the prosecution in this case. It would have been plain and simple if that was done.
- [26] However, when assessing the totality of the evidence adduced in this case, it is abundantly clear that the Kameli Diani that the prosecution witnesses were referring to is the accused in this case. The complainant said that he knew Kameli Diani because they stayed together at Tu Cebu's house in Colo-i-Suva. Tu Cebu Kuruvaki has said that Kameli Diani is his eldest child and is about 29 years old. He had raised Kameli Diani, and Kameli was also staying with him at Naisoqo Settlement in Colo-i-Suva. Witness, Inia Rasaku has stated that Kameli Diani is his cousin and confirms that the complainant was residing with Tu Cebu Kuruvaki, at Colo-i-Suva.
- [27] Furthermore, in the admitted facts it is stated that the complainant was residing with Kameli Diani and other family members at Naisoqo Settlement, Colo-I-Suva in the year 2014.
- [28] The Assessors have found the evidence of prosecution as truthful and reliable as they have by an unanimous decision found the accused guilty of the three charges. Therefore, it is clear that they have rejected the version put forward by the accused.
- [29] 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 all three charges.
- [30] 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 with which the accused is charged in Counts 1, 2 and 3.

[31] In the circumstances, I find the accused guilty of all three counts of Rape.

[32] Accordingly, I convict the accused of the three counts of Rape as charged.



Riyaz Hamza

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT SUVA

Dated this 30th Day of January 2019

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