

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 159 of 2018

STATE

V

ONISIVORO BAREWA

Counsel : Ms. Shirley Tivao for the State
Ms. Namrata Mishra for the Accused

Dates of Trial : 19 and 21-22 May 2020

Summing Up : 25 May 2020

Judgment : 28 May 2020

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

JUDGMENT

[1] According to the Amended Information filed by the Director of Public Prosecution (DPP), the accused, Onisivoro Barewa, was charged with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

ONISIVORO BAREWA, on the 12th day of April 2018, at Lami, in the Central Division, had carnal knowledge of **LD**, without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

ONISIVORO BAREWA, on an occasion other than that referred to in Count One, on the 12th day of April 2018, at Lami, in the Central Division, had carnal knowledge of **LD**, without her consent.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

ONISIVORO BAREWA, on an occasion other than that referred to in Count One and Count 2, on the 12th day of April 2018, at Lami, in the Central Division, had carnal knowledge of **LD**, without her consent.

- [2] The accused pleaded not guilty to the three charges and the ensuing trial was held over 3 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the Assessors found the accused not guilty of the three charges of Rape. Furthermore, by their unanimous decision the Assessors found the accused not guilty of the lesser or the alternative charge of Defilement of a Young Person between 13 and 16 Years of Age, in respect of all three counts.
- [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 unanimous opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the salient provisions of Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] The Assessors were directed 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 day (in this case the 12 April 2018);
 - (iii) at Lami, in the Central Division;

- (iv) penetrated the complainant's vagina, 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.

[7] Similarly, the assessors were directed 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 day (in this case the 12 April 2018), but on an occasion other than that mentioned in Count One;
- (iii) at Lami, in the Central Division;
- (iv) penetrated the complainant's vagina, 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.

[8] The Assessors were also directed 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 day (in this case the 12 April 2018), but on an occasion other than that mentioned in Counts One and Two;
- (iii) at Lami, in the Central Division;
- (iv) penetrated the complainant's vagina, 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.

[9] Each of the above individual elements were further elaborated upon in my summing up in respect of all three counts.

[10] The Assessors were further directed that in the event they have a reasonable doubt as to whether the prosecution has proven the two elements based on consent, which I had explained to them, beyond reasonable doubt and therefore the offence of Rape, in either of the three counts is not established, that as an alternative, they 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 three counts, though the accused is not formally charged in the Amended Information for that offence.

[11] In support of their case, the prosecution called the complainant, LD, and Medical Officer, Dr. Nikotimo Bakani. The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit **PE1**- Birth Certificate of the complainant.

Prosecution Exhibit **PE2**- Medical Examination Report of the complainant.

[12] The accused testified on his own behalf.

[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 “*Amended Admitted Facts*” without placing necessary evidence to prove them:

1. Onisivoro Barewa is a 26 year old Security Guard at Aqua Safe, Walu Bay.
2. Onisivoro Barewa agrees that on 12 April 2018, he and the complainant, LD, had met at the car park besides the building of his work place, thereafter Mr Barewa took the complainant to his work place.
3. The complainant and Mr Barewa were together at his work place until the next morning.
4. The identification of Mr Barewa is not in dispute he is known to the complainant.

[14] I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as “*Admitted Facts*” without placing necessary evidence to prove them, they must therefore, treat the above facts as proved beyond reasonable doubt.

[15] I have summarized the evidence of the complainant during the course of my summing up. The complainant was 15 years and 11 months old at the time of the alleged incident, and was 18 years old when she testified in Court (Her date of birth being 30 April 2002).

[16] She testified as to how she went and met the accused in the evening of 12 April 2018, at the car park besides the building of his workplace. She later explained that the place where she had met the accused was at the car park where the Gas Station in Wailada in Lami is located. The two of them had been seated in the front talking.

[17] Later, the accused had told her that the two of them go to the back of the building where the cars had parked. There was no one else present at the back of the building. There the accused had spread a carton on the ground for the two of them to sit down on.

- [18] The witness then testified as to how the accused had put his male private part into her female private part, without her consent, on three occasions (the witness used the term 'yaya vatagane' for male private part and 'yaya vayalewa' for female private part in the iTaukei language). She later explained that by male private part she meant penis and female private part she meant vagina.
- [19] Thereafter, the complainant testified that she had remained with the accused until the next morning talking (yarning). She also explained as to the reasons why she did not leave on her own.
- [20] In this case, the accused testified on his own behalf. He totally denied the three charges against him. He totally denied that he penetrated the complainant's vagina with his penis on the three occasions as alleged by the complainant. He submitted that nothing happened between the complainant and himself while they were together on the evening of 12 April 2018. He said that he and the complainant were only talking or yarning until 7.00 the next morning.
- [21] At the conclusion of the evidence and after the directions given in my summing up, the three Assessors by their unanimous opinions have found the accused not guilty of the charges of Rape. Furthermore, by their unanimous decision the Assessors have found the accused not guilty of the lesser or the alternative charge of Defilement of a Young Person between 13 and 16 Years of Age, in respect of all three counts.
- [22] In my view, the Assessors' opinion is justified. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the unanimous opinions of the Assessors.
- [23] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove the charges of Rape against the accused beyond reasonable doubt.
- [24] In the circumstances, I find the accused not guilty of the three charges and accordingly acquit him of the three charges.



A handwritten signature in black ink, appearing to read 'Riyaz Hamza', is written over a horizontal line.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 28th Day of May 2020

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