

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 20 of 2020

STATE

v

NIMATI QIONIMUA

Counsel : Mr. Saif Shah for the State
Ms. Litiana Ratidara for the Accused

Dates of Trial : 25-27 January 2021

Summing Up : 28 January 2021

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

SUMMING UP

Madam Assessors and Gentleman Assessor,

- [1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge 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 charge 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 and the admissions made by the parties by way of agreed 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 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 submissions 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, a matter which will be of primary 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 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, TT, would have been 13 years of age at the time she said the alleged incidents took place (the complainant said she was in class 7 in 1990), although she was 44 years old when she testified in Court [It is an agreed fact that her date of birth is 7 December 1976]. 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 offence the accused is charged with.

- [16] Furthermore, the experience of the Courts is that victims of sexual offences react to the incident in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, may not complain or go to the authorities for some time. There is, in other words, no classic or typical response by victims of sexual offences.
- [17] 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 perceive (or know) in any other way 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.
- [18] Madam Assessors and Gentleman Assessor, 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.
- [19] 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.
- [20] 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 to the charge. 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.
- [21] 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 offence charged.
- [22] 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.

- [23] 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. This is also referred to as circumstantial 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.
- [24] 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 of this Court room. 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.
- [25] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [26] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [27] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [28] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [29] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond a reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond a reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.

- [30] It is for you to decide whether you are satisfied beyond a reasonable doubt that the prosecution has proved the elements of the offence, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [31] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant in this case 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 also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [32] I must also explain to you as to the reason for 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 which she alleged took place. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [33] The same applies for permitting a closed court proceedings when the complainant gave evidence in this case. I wish to reiterate once again 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.
- [34] Let us now look at the charge contained in the Amended Information.
- [35] There is one charge preferred by the Director of Public Prosecutions (DPP), against the accused:

COUNT ONE

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 149 and 150 of the Penal Code.

Particulars of Offence

NIMATI QIONIMUA, between the 1st day of January 1987 and 28th day of January 1994, at Waibau, Naitasiri, in the Eastern Division, penetrated the vagina of **TT**, with his penis, without her consent.

[36] Let me now explain the elements of the count of Rape contrary to Section 149 of the Penal Code.

[37] Section 149 of the Penal Code read as follows:

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.

[38] Section 150 of the Penal Code is reproduced below.

Any person who commits the offence of rape is liable to imprisonment for life, with or without corporal punishment.

[39] In layman's terms, having carnal knowledge with a woman or a girl, as stated in Section 149 of the Penal Code, means having penile sexual intercourse with that woman or girl or having sexual intercourse whereby the male penetrates his penis into the vagina of the woman or girl.

[40] Therefore, in order for the prosecution to prove the 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 1987 and 28 January 1994);
- (iii) At Waibau, Naitasiri, in the Eastern Division;
- (iv) Penetrated the vagina of the complainant TT, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[41] Let me now elaborate on these elements together in respect of the said charge.

[42] 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.

[43] 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 a reasonable doubt.

[44] The fourth element involves the penetration of the complainant's vagina with the accused's penis. Usually in law 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 a reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

[45] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.

[46] You should bear in mind that consent means, consent freely and voluntarily given by a person. Section 149 of the Penal Code provides that if the consent is obtained

by force or by means of threat or intimidation of any kind, or

by fear of bodily harm, or

by means of false representations as to the nature of the act, or

in the case of a married woman, by personating her husband,

the accused would still be guilty of the offence of Rape.

[47] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove the charge beyond a reasonable doubt.

[48] It is also my duty to mention another relevant legal requirement concerning this charge of Rape. The charge is titled as a representative count. This representative count of Rape against the accused is based on an act or series of acts done during a specified time period (In this instance between 1 January 1987 and 28 January 1994). Such a charge is described generally as a representative count in legal terminology. The prosecution is expected to prove just one incident of Rape, which falls within this period in respect of the charge. They need not prove a continuous or a series of incidents of Rape in support of a representative count.

[49] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape is obviously considered as a Sexual Offence. Corroborative

evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

- [50] If you are satisfied beyond any reasonable doubt that the accused, between the 1 January 1987 and 28 January 1994, at Waibau, Naitasiri, penetrated the complainant's vagina with his penis, without her consent, and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the Count of Rape.
- [51] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of the Count of Rape.
- [52] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [53] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Agreed Facts*" without placing necessary evidence to prove them:
1. THAT the complainant in the matter is TT.
 2. THAT TT was born on 7th December 1976.
 3. THAT NIMATI QIONIMUA was charged with one representative count of Rape contrary to Section 149 and 150 of the Penal Code.
 4. THAT NIMATI QIONIMUA is the step father of TT.
- [54] 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

[55] The prosecution, in support of their case, called the complainant TT.

[56] Evidence of the complainant TT

- (i) *The complainant testified that she is currently residing at Rokoroko in Rakiraki.*
- (ii) *She was born on 7 December 1976. This is an agreed fact as well. Therefore, the complainant is now 44 years of age.*
- (iii) *The complainant testified that she grew up or was brought up in Waibau, Vatudavila in Naitasiri.*
- (iv) *When asked how many were in her family, she said it was her parents and 7 siblings, including herself. The names of her parents were Nanise Takape, her mum and Nimati Qionimua, who is her stepfather.*

- (v) *Between 1987 and 1994, she said she was residing at Waibau, Vatudavila with her parents (her mum and dad). As dad she was referring to Nimati, her stepfather.*
- (vi) *The complainant said her relationship with her mother and father were good.*
- (vii) *The following questions were then asked from the complainant and she answered as follows:*

Q. *I will take you to when you were in Class 7. Do you recall that?*

A. *I can vaguely remember.*

Q. *Which year were you in Class 7?*

A. *1989. Later the witness said 1990.*

Q. *What year did you enter school?*

A. *I can't recall.*

Q. *Is there anything in particular that you remember (that happened) when you were in Form 7?*

A. *Like what.*

Q. *Do you remember anything that happened to you at home during the year you were in Class 7?*

A. *Yes.*

Q. *What do you remember?*

A. *All the statements I made is with the Prosecution.*

Q. *Can you tell the Court what you had stated in the statement?*

A. *The statements I gave the police is about what had happened. All that had happened is true but it happened long time ago. We have reconciled with our families and when the police came to investigate, I had asked them if I can withdraw the case.*

Q. *Can you tell the Court what had happened just as you have explained in your statement?*

A. *At that time I was innocent.*

Q. *What happened when you were innocent?*

A. *At that time when I am at home my stepfather used to do something to me.*

Q. *What did your stepfather do to you?*

A. *For us to be together.*

- Q. *What do you mean for us to be together?*
A. *To have carnal knowledge or to have sex. [The witness used the iTaukei term 'Veiyacovi' to mean man and woman having sexual intercourse].*

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Q. *When you say to have carnal knowledge or sex what did Nimati do to you?*

A. *I was at home one day. And he came and asked me and told me that he liked me. I did not say anything because I was scared and innocent.*

Q. *What happened after he said that to you?*

A. *After that we were together.*

Q. *What do you mean by 'we were together'?*

A. *To have sex.*

Q. *Where did this happen?*

A. *At home.*

Q. *What time of the day did this happen? Was it morning or night time?*

A. *Sometimes in the morning and sometimes in the evening.*

Q. *When he would have sex with you, sometimes in the morning and sometimes in the evening, who all would be in the house?*

A. *That is when the house is empty.*

Q. *How would this take place? Would he undress you or what would happen each time?*

A. *Yes he used to undress me and then have sex.*

Q. *How would he have sex with you?*

A. *I would lie down, and he would lie on top of me.*

Q. *And after he would lie on top of you what would he do next?*

A. *Then we would have sex.*

Q. *How would he have sex with you? What would he do?*

A. *Like to have sex like we used to do.*

Q. *How would you have sex? What would he do?*

A. *I would not do anything when I am lying down. He will do everything/ he will do the work.*

- Q. *What would he do while you were lying down?*
A. *When I am lying down, then he will lie on me and he will use his thing to insert.*
- Q. *What do you mean he would use his thing?*
A. *His male private part.*
- Q. *Where will he insert his male private part?*
A. *Into my female private part.*
- Q. *When you say his male private part, what are you referring to?*
A. *His balls (polo) or what's that.*
- Q. *Can you tell this Court what other name do you know for the male private part?*
A. *I don't know what else to describe it.*
- Q. *Would you be able to tell us what you call this male private part in English?*
A. *Private part.*
- Q. *What do you mean when you say female private part?*
A. *I know it as a female private part.*
- Q. *Can you tell this Court if you know any other name for this female private part?*
A. *No.*
- Q. *When he would do these things to you how would you feel at that time?*
A. *I used to be scared.*
- Q. *Why would you be scared?*
A. *Because he is old and I am very young.*
- Q. *In a week how many times would this happen?*
A. *Maybe twice or 3 times – depends on when the house is empty.*
- Q. *How long did this continue for?*
A. *For a long time and we had 2 kids together.*
- Q. *How do you know that those were his kids?*
A. *Because there were no other men I went out with.*

Q. You said he used his polo – can you tell this Court what does he usually use this for?

A. He just used his male private part to have sex with me.

Q. What do men usually use their polo for apart from sex?

A. I just know that it is used for sex.

Q. What does this polo look like? Can you describe?

A. It's long.

Q. Where is this polo located in a man's body?

A. It is in front – witness points to her groin area.

Q. What do you use your female private part for?

A. To urinate.

Q. Where is this located?

A. It is in front – witness points to her groin area.

Q. What do males use to urinate?

A. The male private part.

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Q. In your evidence you stated this used to happen 2 to 3 times a week. How did you feel when Nimati would do this to you?

A. I used to be scared.

Q. Why would you be scared?

A. Because he is old and I am still young and innocent.

Q. Each time he would do this to you, did you agree to this?

A. No.

Q. When this used to happen to you, did you tell anybody about this at that time?

A. No.

Q. Why not?

A. I was scared to say it.

Q. You mentioned that you had 2 children from these incidents and you also mentioned that you know these were Nimati's children as he was the only

one you went out with? When you say he was the only person you went out with, what do you mean?

A. *Because he is the only one we were together and there is no other guy.*

Q. *When you say you were together can you elaborate further?*

A. *That we had sex.*

Q. *Is there anything else you would like to tell this Court this morning?*

A. *Like I had requested yesterday for the case to be withdrawn.*

Q. *And why do you want the case to be withdrawn?*

A. *Because my children with him are both grownups now and are both married with children; and I am also married with children, and we have moved on with our lives.*

(viii) *The complainant testified further that the names of her children were Lajjia Cama and Nanise Takape. She confirmed that Lajjia Cama was born on 28 January 1994; and that Nanise Takape was born on 27 October 1995.*

(ix) *The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.*

(x) *It was suggested to the witness that not long after she was having sexual intercourse with Nimati that she had conceived Lajjia Cama, her eldest child. The witness answered: "It was sometime then I conceived Lajjia Cama."*

(xi) *The complainant agreed that Lajjia Cama would have been conceived around April 1993 and that at that time she would have been around 16 – 17 years old.*

(xii) *It was also suggested to the complainant that it was sometimes around 1993 that Nimati started having sexual intercourse with her. She answered as follows: "I was in Class 5 or 6 when we started being together."*

(xiii) *The complainant agreed that she did not tell her mother or her siblings about what happened between her and Nimati or that she was pregnant with Lajjia Cama and later with Nanise Takape. She further agreed that she had first informed Nimati on both occasions that she was pregnant- first with Lajjia Cama and later with Nanise Takape. She also agreed that it was Nimati who had informed her mother that she was pregnant on both occasions.*

(xiv) *The following further suggestions were, inter-alia, put to the complainant in cross examination and she answered as follows:*

Q. *I am putting it to you that the sexual intercourse that you had with Nimati was consensual or that you had agreed to have sex with him?*

A. *Only sometimes.*

Q. *I am also putting it to you that every time you had sexual intercourse with Nimati that you did not push him away or indicate to him in any manner that you are saying no?*

A. *Only sometimes.*

Q. *What do you mean only sometimes?*

A. *Only sometimes when he wants to be with me I agree and sometimes I don't.*

Q. *It is those times that you agreed that you two had sexual intercourse?*

A. *Yes.*

Q. *Those times you wouldn't want to have sexual intercourse with him there was no sexual intercourse?*

A. *Yes.*

(xv) *In re-examination, the State Counsel clarified from the complainant the answers given by her in cross examination, especially with regard to the suggestions made by the defence.*

(xvi) *The following clarifications were sought from the complainant in re-examination and she answered as follows:*

Q. *Why would you agree to have sex with him (Nimati) only sometimes?*

A. *Because that's what I want as well.*

Q. *Why would you want sexual intercourse with Nimati only sometimes?*

A. *Because sometimes when he wanted it, my heart will also want it.*

[57] That was the case for the prosecution. At the end of the prosecution case, this Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could give sworn evidence from the witness box and/or call witnesses on his behalf. He could also address Court by himself or his counsel. 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 offer evidence under oath in support of his case.

Case for the Defence

[58] The accused gave evidence in support of his case.

[59] Evidence of the accused Nimati Qionimua

- (i) The accused testified that he is currently residing at Waibau in Naitasiri. He is 63 years of age. He is a Farmer by occupation.*
- (ii) The witness testified that he is married. His wife's name is Nanise Takape. He couldn't recall which year he married Nanise. He has no children with his wife. However, Nanise has 7 children. The complainant is one of his wife's children.*
- (iii) The witness said that he lived with his wife and children in Waibau. When he got married the children were small at that time. They were still in primary school. The house they were residing in was a lean-to house and it was partitioned into two.*
- (iv) The accused testified that he has 2 children with the complainant. The older child was Laijia Cama and the younger child was Nanise Takape.*
- (v) He stated that he started having sexual intercourse with the complainant a short time before Laijia was born. He did not agree to what the complainant had testified to, that he had been having sexual intercourse with her since she was in Class 5 or Class 7.*
- (vi) The accused said that when the complainant found out that she was pregnant with Laijia Cama, she had informed him. He in turn had informed his wife. His wife had been angry with both of them.*
- (vii) However, he testified that even after his wife had found out that the complainant was pregnant with his child, his relationship with the complainant had not changed. The witness said: "We still love each other." When asked to explain further the witness said as follows: "I am referring to the family members – because of what happened, they managed to solve it within the family."*
- (ix) The following questions were put to the accused in examination in chief and he answered as follows:*

Q. Can you recall at any time you had sexual intercourse with TT did you threaten her?

A. No.

Q. From what you can recall how would you approach her to have sex with you?

A. I just go and see her.

Q. If you can recall, when you go and see her what would you say to her?

A. I'll ask her if we can be together.

Q. What do you mean by 'we can be together'?

A. To have sex.

Q. What was her response when you asked her?

A. If she agrees then we will do it, if she doesn't then we won't.

Q. Did you ever threaten her not to tell anyone about your relationship?

A. No.

- (x) The witness was cross examined by the State Counsel. The prosecution also put several suggestions to the witness.
- (xi) The witness agreed that he was the sole breadwinner of the family and that he had control of the children in the family. However, he denied that due to this control that he took advantage of the complainant when she was in Class 7.
- (xii) The witness denied that he was having sexual intercourse with the complainant from the time she was in Class 7. He said: "We did not start when she was in Class 7."
- (xiii) It was put to the accused that the complainant never consented to have sexual intercourse with him at any time. However, the witness did not agree to this suggestion.
- (xiv) It was further suggested that he had groomed the complainant to have sexual intercourse with him from the time she was in Class 7 and committed these acts on her. The witness denied this suggestion.
- (xv) The witness also denied that he took advantage of the complainant's age and innocence and committed these acts on her from the time she was in Class 7.
- (xvi) It was further suggested to the witness that as the stepfather of the complainant, instead of protecting her that he took advantage of her innocence. The witness answered: "Like I said we talked."

Analysis

- [60] The above is a summary of the evidence led at this trial. The prosecution led the evidence of the complainant, TT. The defence relied on the evidence of the accused himself.
- [61] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt.
- [62] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [63] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt.

- [64] Based on the said agreed facts it is confirmed that the accused is the step father of the complainant. It is also confirmed that the complainant's date of birth was on 7 December 1976. Therefore, at the time she said the alleged incidents took place she was 13 years of age (as the complainant has testified that she was in class 7 in 1990).
- [65] The main issue of contention in this case is the issue of consent. The accused has testified in Court and totally denies the charge of Rape against him. He submits that all acts of sexual intercourse with the complainant took place with her consent.
- [66] The position taken up by the prosecution is that the complainant did not consent to have sexual intercourse with him and that the accused used his authority and control over the complainant (or that he took advantage of the complainant's young age and innocence) to have sexual intercourse with her.
- [67] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, 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 charge, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution is both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence, beyond a reasonable doubt.
- [68] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider his evidence also for its consistency and also the probability of its version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case.
- [69] If you neither believe the evidence adduced by the defence nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charge.
- [70] However, I must caution you that even if you reject the evidence of the defence as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.
- [71] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you believe the evidence of the defence, then you must find the accused not guilty of the charge of Rape;*
 - ii. *If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charge of Rape;*

- iii. *If you reject the version of the defence, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Rape;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Rape has been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[72] Any re directions the parties may request?

[73] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately on the charge of Rape 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.

[74] Your possible opinions should be as follows:

Count One

Rape- Guilty or Not Guilty

[75] I thank you for your patient hearing.



Riyaz Hamza
Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 28th Day of January 2021

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