

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 124 of 2014

STATE

V

KENI BURENIVALU

Counsel : Mr. A. Singh for the State.
: Ms. V. Narara with Ms. V. Diroiroi for the
Accused.

Dates of Hearing : 13, 14, 15 September, 2017
Closing Speeches : 18 September, 2017
Date of Summing Up : 19 September, 2017
Date of Judgment : 21 September, 2017

JUDGMENT

(The name of the complainant is suppressed the complainant will be referred to as "SL").

[1] The Director of Public Prosecutions charged the accused by filing the following information:

COUNT ONE

Statement of Offence

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

Particulars of Offence

KENI BURENIVALU between the 1st day of June, 2014 and the 30th day of June, 2014 at Yasawa in the Western Division penetrated the anus of "SL" with his penis, without the consent of "SL".

- [2] The three assessors had returned with unanimous opinion that the accused was not guilty for the count of rape as charged.
- [3] I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
- [4] The prosecution called seven (7) witnesses while the defence called two (2) witnesses.
- [5] The complainant "SL" in the year 2014 was 16 years of age educated up to class 3. On 29th June, 2014 at about 10am he walked to the Octopus Resort from Nalauwaki Village taking with him lunch for his uncle Kafoa.
- [6] After 2pm the complainant left the Resort on his way back to the village he was called by his uncle Keni the accused. The complainant knows the accused from a longtime, however, his relationship with the accused was not good because the accused used to verbally abuse him by swearing at him.
- [7] The accused gave his phone to the complainant to watch a pornographic movie both the complainant and the accused watched the movie for 10 minutes. There was no one else present when they were watching the movie.
- [8] After watching the movie the accused took off the shorts of the complainant took out his penis and inserted it inside the anus of the complainant. The complainant did not consent he shouted but the accused told him not to shout.
- [9] According to the complainant the accused had inserted his penis into his anus for about 10 minutes when the accused was inserting his penis the

complainant felt weak. After the accused had finished he told the complainant not to tell anyone in the village and then left.

- [10] A few days after the incident the village Nurse came to see the complainant she took him to a room where he showed her the injuries on his anus. The complainant was thereafter brought to the Lautoka Hospital for medical examination.
- [11] The complainant informed his aunt Taina Nalesu about what the accused had done to him. The complainant agreed although he was not in a good relationship with the accused and hated him for a longtime he told the truth about the incident. The complainant was bleeding and could not walk properly.
- [12] Furthermore the complainant also agreed that before his medical examination in June, 2014 he was swimming in the village river with Manoa, Jone and some other boys from the village. These boys had punched him and used a stick to beat him and also inserted the stick into his anus for 2 minutes which was painful. The stick was about one foot long he received injuries but was not bleeding.
- [13] The complainant maintained the accused had raped him after what Manoa, Jone and the other boys had done to him in the river he denied fabricating a story against the accused.
- [14] Taina Tuvou informed the court that the complainant was her nephew according to this witness the complainant attended primary school up to class 1 at Ratu Naivalu Primary School then went to Special School in Lautoka for 2 years. The reason why the complainant went to the Special School was because he did not know how to read or write was a slow learner who could not identify simple objects such as kitchen

utensils. He did not improve at the Special School so he returned to the village and stayed home with his father.

- [15] The witness was very close to the complainant who was not normal like the others, things had to be repeated to him 3 or 4 times then he would react, he would not really know what he was told, he does not know dates and time. The complainant and the accused had a good relationship the witness was related to the accused.
- [16] In June, 2014 something unusual happened to the complainant he told the witness that when he was coming to the village from the Resort on the way the accused called him and showed movies on his phone.
- [17] After that the accused took off the complainant's pants took out his penis and inserted it in his anus. The complainant told her this about 2 days after the incident in June, 2014 and that the incident happened on a Sunday when Tai Vuni had come to the village to preach. The witness stated that Tai Vuni had come to the village on 22nd June. After hearing this the witness informed the village Headman (Turaga ni Koro) and asked him to come and see the complainant.
- [18] The complainant was examined by a Nurse after almost a week of the incident. The complainant did not tell her anything about Manoa and Jone doing something to him.
- [19] On 2nd July, 2014 Sheemal Sharma the Staff Nurse visited Nalauwaki village as part of her scheduled trip. At the request of the Turaga ni Koro the witness went to Taina's house to see the complainant she knows Taina who was the complainant's aunty.

- [20] At the house of Taina she saw the complainant lying on his stomach he spoke in the Itaukei language about the incident which was translated by Taina to the witness.
- [21] When the witness approached the complainant she could smell infection as a result of infected wound she saw the complainant had difficulty in sitting and walking around.
- [22] Upon examination of the injury the witness saw multiple anal tears also there were abrasions or scratches in the inner part of his buttocks caused by friction. Upon advice of her superiors the complainant was brought to Lautoka Police Station and then taken to Lautoka Hospital.
- [23] According to the witness the complainant's anal tears were not possible by falling or sitting on something the injuries were consistent with the story the complainant had told her which was that the accused had penetrated the complainant's anus with his penis.
- [24] The witness agreed that it was possible to get lacerations, injuries and tears of the kind seen on the complainant if a stick was inserted into his anus.
- [25] Muni Goundar the Head Chef at the Octopus Resort informed the court that on 22nd June, 2014 he was at work doing the morning shift from 6am to 2.30pm the accused was also doing the same shift. The witness did not meet the accused after the accused had finished his shift furthermore no staff was allowed to stay at the Resort premises after the shift had ended.
- [26] The witness stated that on 22nd June he had not directed the accused to defrost the meat and clean the deep freezers he was not able to remember if the accused had on 29th June sustained injury at work or had come to give him a sick sheet.

- [27] Paulini Lewasea informed the court she knows the complainant who calls her grandmother. On 22nd June, 2014 the witness was working at the Resort she started her shift at 6am and finished at 3pm. On her way home at the pig pen she met the accused who is her cousin. According to the witness the accused had left the Resort before her at 3pm when she met him he was sweating and he told the witness that he had sprained his ankle that was the reason why he was still there although he had left the Resort earlier than her. When the witness had seen the accused earlier in the day he was not injured.
- [28] The witness stated that she did not see the complainant when she met the accused.
- [29] On 3rd July 2014 Dr. Nabaro had examined the complainant at the Lautoka Hospital.
- [30] The specific medical findings of the Doctor at D (12) of the Medical Examination Form were as follows:
- (a) patient says he has pain when passing Bowl;*
 - (b) also has PR bleeding, when he passes stool;*
 - (c) soft tissue injury around the anus, tears and abrasions and anal mucosa foul smelling discharge noted, nil active bleeding.”*
- [31] The professional opinion of the Doctor at D (14) was:
- “injury sustained appears to match history of assault given by patient”*
- [32] In the opinion of the Doctor the history related by the complainant and his findings were consistent. The Doctor explained that forceful penile penetration into anus will cause soft tissue injury and abrasions.
- [33] According to the Doctor the cause of the foul smell by the infection was possibly by the forceful intercourse by penis.

- [34] According to the Doctor's findings the injuries were possibly a few days old because there was no active bleeding seen therefore it was possible the injuries would have begun to heal.
- [35] The Doctor agreed that the injury caused to the anal region could also have been caused by a stick and it was possible the insertion of the stick could have caused the foul smell and discharge.
- [36] The Doctor also stated that regardless of whether the injuries were sustained on the 22nd or the 29th it was possible that the injuries would have been the same due to infection.
- [37] The final witness for the prosecution was Cpl. 3692 Asenaca Taufu who was the investigating officer she received a report on 3rd July, 2014 in respect of this case. The report was lodged by the Staff Nurse Sheemal of Nalauwaki village.
- [38] The witness went to Nalauwaki village and talked to the people of the village during this inquiry she was able to get other statements recorded and managed to get the exact date of the offence.
- [39] There was no report of any other boys assaulting the victim. According to the villagers the date of the incident was 22nd June which was a Sunday since one Tai Vuni from another village had come to preach on that day at Nalauwaki Village. This date was then confirmed to the witness by the complainant, however, this was not documented.
- [40] The accused informed the court that he knows the complainant who used to call him uncle the relationship between the two was good until the middle of 2014. On 22nd June, 2014 the accused was working at the Octopus Resort he started his shift at 6am which finished at 2.30pm. On this day he knocked off at 3pm. The reason for extra half an hour was

that he cleaned the deep freezers as told by one of the chef's in the morning shift.

- [41] The accused left the Resort at about 3.15pm and that Paulini was doing morning shift that day.
- [42] On 29th June, 2014 the accused was not at work he was supposed to start work at 2pm but he did not since he had sprained his leg. He went to Yalobi to see the Nurse in respect of his injury on his return the accused went to the Chef to give him his sick sheet. Before going home from the Resort the accused informed one of the staff to call someone in the village and to inform his wife to come and wait for him on the road so that they could walk home together because of the pain he was experiencing from his injury.
- [43] The accused walked home with Wativote midway between the Hotel and the village he met his wife by this time Wativote had gone ahead whilst going home with his wife the accused did not meet the complainant.
- [44] The accused agreed that the complainant was related to him and that the complainant was not a normal boy like the others he was a slow learner who did not speak or write English. The accused knew that the complainant was bullied by the boys in the village but he denied bullying him.
- [45] The accused denied penetrating the anus of the complainant with his penis he stated that this allegation was brought about by the complainant because one day he punched the complainant for what he had done to his elder brother's child. The accused also informed the court that he was the one telling the truth in court and not the prosecution witnesses.

- [46] The second defence witness was Wativote Ratu he informed the court that in 2014 he was staying in Nalauwaki village with his grandmother and uncle. In 2014 the witness was working at the Octopus Resort he knows the accused his father was the accused cousin.
- [47] On 29th June, 2014 he went to work in the morning shift from 6am to 2pm. After 3pm he left the Resort and met the accused at the beach. From there they walked together about midway between the Resort and the village the accused called his wife when she arrived he went ahead of them. He did not meet the complainant on the way.
- [48] The witness stated that he knew the accused from his childhood days and apart from being related the witness and the accused were good friends. In the year 2014 the accused had a mobile phone which was an Alcatel one touch phone which would play videos.
- [49] I have observed the demeanour of all the witnesses in court. I accept the evidence of the complainant and the prosecution witnesses as truthful and reliable. I noticed the complainant was slow in answering questions and giving evidence, however this attribute of the complainant did not affect his evidence in court.
- [50] I accept that the complainant told the truth in court. He was honest in admitting whatever Manoa, Jone and other boys had done to him when he was swimming with them in the village river before this incident.
- [51] The complainant was able to recall what had happened to him three years ago. He was also able to withstand cross examination and he answered questions without been evasive. I reject the suggestion of the defence that the complainant had fabricated a story against the accused since the accused had one day punched the complainant for what he had done to the accused's elder brother's child. The date of the incident

whether it was the 22nd June or the 29th June does not make any difference to what the complainant told the court.

[52] The complainant's demeanour was consistent with his honesty. I also accept the evidence of the other prosecution witnesses as truthful and reliable as well. Taina is related to the accused and there was no suggestion made by the defence that she had any ulterior motive to implicate the accused. As for Paulini I note that during cross examination the accused had stated that Paulini had wanted to save her brother who was with the group of boys that had assaulted and inserted a stick into the complainant's anus to be without any basis since this proposition was never put to Paulini in cross examination.

[53] Moreover it was never suggested to Paulini that on 22nd June, 2014 at the scene of the alleged offence she did not meet the accused because she had left the Resort to go home early before the accused finished his shift.

[54] I also accept the evidence of the Doctor, the Staff Nurse and the Investigating Officer Cpl 3692 Asenaca Taufu as reliable.

[55] On the other hand I reject the evidence of the accused as untruthful and unreliable. The accused in his evidence was not forthright his demeanour in court did not appear to be honest it was obvious to me that the accused was not telling the truth.

[56] The accused also stated that he did not have a mobile phone in the year 2014 yet his own witness Wativote Ratu confirmed that the accused had a mobile phone which would play videos.

[57] I accept the evidence of Wativote Ratu only to the extent that the accused had an Alcatel mobile phone in the year 2014 which would play videos. It was quite obvious to me that he was in court to assist his nephew and a

good friend from trouble of any sought therefore I reject his evidence apart from the above.

[58] Even though the complainant admitted his anus was penetrated by some boys in the village in June, 2014 it does not in my view create any doubt on the complainant's allegation of what the accused had done to him between 1st June, 2014 and 30th June, 2014.

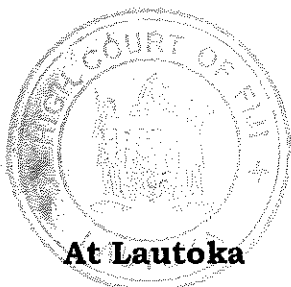
[59] I am satisfied beyond reasonable doubt that it was the accused between the 1st day of June, 2014 and the 30th day of June, 2014 at Yasawa in the Western Division penetrated the anus of "SL" with his penis, without the consent of "SL".

[60] I also accept that the accused knew or believed the complainant was not consenting or didn't care if he was not consenting at the time .


[61] In view of the above and for the reasons mentioned I overturn the unanimous opinion of the assessors.

[62] I find the accused guilty as charged for one count of rape and I convict him accordingly.

[63] This is the judgment of the court.



21 September, 2017


Sunil Sharma
Judge

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.