

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

Hearing : 11 September 2018

Ruling : 12 September 2018

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

RULING

- [1] This is an application made by the State pursuant to Section 134 (1) of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act").
- [2] As per the Information filed by the Director of Public Prosecutions (DPP), on 4 November 2015, the Accused was charged with the following two offences:

FIRST COUNT
Representative Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

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

SECOND COUNT
Representative Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

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

- [3] Since the Accused had pleaded not guilty to the two charges, this matter was fixed for trial from 10 September 2018-21 September 2018.
- [4] On 10 September 2018, both the prosecution and the defence were ready to commence the trial. Accordingly, three Assessors were selected from those summoned to serve as Assessors, in terms of section 224 of the Criminal Procedure Act. The three Assessors were then sworn in. The trial proper was fixed for the following day.
- [5] On the following day, the 11 September 2018, the Learned ADPP, Ms. Alagendra, made an application in terms of Section 134 (1) of the Criminal Procedure Act, for the written

statement made by the complainant (MA) to the police, to be made admissible as evidence to the like extent of her oral testimony.

- [6] The basis for this application was that the child complainant, who is currently 14 years of age (her date of birth being 8 December 2003), has been subjected to multiple acts of violations from the age of 8. From her recent interactions with the complainant, the ADPP could see for herself the damage and trauma that had been caused to the complainant. Furthermore, the Counsellor from the Fiji Women's Crisis Centre has also advised that it would not be in the best interest of the complainant for her to be testifying in Court and thereby having to relive or narrate all over again the unfortunate incidents or experiences she was subjected to. In the opinion of the ADPP the child victim would be 're-traumatized' if her evidence-in-chief were to be led in Court.
- [7] The Learned ADPP submits that all the conditions stipulated in Section 134 (2) of the Criminal Procedure Act have been fulfilled by the State, and if the defence so wishes, the complainant could be subjected to cross-examination, in terms of Section 134 (5) of the Criminal Procedure Act. As such, no prejudice would be caused to the Accused.
- [8] The Learned Defence Counsel, Mr. Qetaki, submits that the defence has been taken 'off-guard' by this application made by the State and thus objects to same.

Legal Provisions and Analysis

- [9] Section 134 of the Criminal Procedure Act is titled "Statements in Criminal Proceedings". For ease of reference, the entire Section is re-produced below:

"134. — (1) In any criminal proceedings, a written statement by any person shall, if such of the conditions mentioned in sub-section (2) as are applicable are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person.

(2) The conditions referred to in sub-section (1) shall be that —

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his or her knowledge and belief and that he or she made the statement knowing that, if it were tendered in evidence, he or she would be liable to prosecution for any statement in it which he or she knew to be false or did not believe to be true;

(c) at least 28 clear days before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(d) none of the other parties or their lawyers within 14 days from the service of the copy of the statement serves a notice on the party so proposing, objecting to the statement being tendered in evidence under this section.

(3) The conditions stated in sub-section (2) (c) and (d) shall not apply if the parties agree before or during the hearing that the statement shall be tendered.

(4) The following provisions shall also have effect in relation to any written statement tendered in evidence under this section—

(a) if the statement is made by a person under the age of 21 years, it shall state the age of the person;

(b) if it is made by a person who cannot read it, it shall be read to the person before signature in a language he or she understands and shall be accompanied by a declaration by the person who read the statement to the effect that it was so read; and

(c) if it refers to any other document as an exhibit, the copy served on any other party to the proceedings under sub-section (2)(c) shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party on whom it is served to inspect that document or a copy of it.

(5) Notwithstanding that a written statement made by any person may be admissible as evidence under this section—

(a) the party by whom or on whose behalf a copy of the statement was served may call that person to give evidence; and

(b) the court may of its own motion, and shall on the application of any party to the proceedings, require that person to attend before the court and give evidence or to submit to cross-examination.

(6) So much of any statement as is admitted in evidence under this section shall, unless the court otherwise directs, be read aloud at the hearing and where the court so directs an account shall be given orally of so much of any statement as is not read aloud.

(7) Any document or object referred to as an exhibit and identified in a written statement rendered in evidence under this section shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement.

(8) A document required by this section to be served on any person may be served—

(a) by delivering it to the person or to his or her lawyer; or

(b) by addressing it to the person and leaving it at his or her usual or last known place of abode or place of business or by addressing it to his or her lawyer and leaving it at his or her office; or

(c) by sending it by registered post to the person at his or her last known place of residence or place of business, or addressed to the person's lawyer at his or her office; or

(d) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or sending it by registered post addressed to the secretary or clerk of that body at that office.

(9) The provisions of this section are subject to any provisions of any law dealing with the giving and admissibility of evidence in criminal cases, and shall be read and applied subject to the provisions of such a law."

[Emphasis is mine].

[10] Section 134 (1) of the Criminal Procedure Act provides that a written statement made by any person shall be made admissible in evidence, if such conditions stipulated in sub section (2) are satisfied.

[11] In terms of Section 134 (2) (a) and (b) of the Criminal Procedure Act, I am satisfied that the written statement, the prosecution is relying on, has been signed by the complainant and also that the statement contains a declaration by the complainant to the effect that the contents of the statement are true to the best of her knowledge and belief.

- [12] However, in terms of Section 134 (2) (c) of the Criminal Procedure Act, at least 28 clear days before the hearing at which the statement is to be tendered in evidence, a copy of the statement must be served on the defence by the prosecution (the party proposing to tender the said statement in evidence). The prosecution submits that the statement of the complainant has already been provided to the Accused at the time the disclosures in this case were served on him.
- [13] However, it is my opinion, that the notice envisaged in terms of Section 134 (2) (c) of the Criminal Procedure Act, is a notice that must be given by the prosecution indicating its intention to use such a statement as evidence. This notification would be in addition to serving the relevant statement on the defence, along with the disclosures. This notice indicating the intention of the prosecution to use such a statement as evidence, must be given at least 28 clear days prior to the hearing at which the statement is to be tendered as evidence.
- [14] Where notice is given in terms of Section 134 (2) (c) of the Criminal Procedure Act, it would enable the other party or their lawyers (in this case the Accused), to object to the statement being so tendered in evidence, if they wish to do so, in terms of Section 134 (2) (d) of the Criminal Procedure Act. Any such objection should be made within 14 days from the date notice was served on the defence.
- [15] I find that in this case, no such notice has been given by the prosecution to the defence in terms of Section 134 (2) (c) of the Criminal Procedure Act. In my view, this is a mandatory requirement.
- [16] This case was fixed for hearing from 10 September 2018 to 21 September 2018, as far back as 26 June 2017. Thereafter, the matter was called for PTC on 26 February 2018, 9 August 2018 and 17 August 2018. However, no notice of its intention to tender as evidence the complainant's statement was made by the prosecution on any of the aforementioned dates.
- [17] The Assessors for this case were selected on Monday 10 September 2018, and the leading of the evidence was to commence on Tuesday 11 September 2018. The application by the State was only made at that stage.

- [18] Section 134 (3) of the Criminal Procedure Act, provides that the conditions stated in sub-sections 2 (c) and 2 (d) shall not be applicable (or can be disregarded) only where parties agree before or during the hearing for the statement to be tendered. However, in this case, the defence is objecting to the statement to be made admissible as evidence, as they have not been duly provided with notice, in terms of Section 134 (2) (c) of the Criminal Procedure Act. In my view, the objection taken up by the defence is justified.
- [19] Therefore, taking into consideration all the above facts and circumstances, I am of the opinion that the application made by the State should not be allowed.
- [20] Accordingly, the application by the prosecution, in terms of Section 134 (1) of the Criminal Procedure Act, for the written statement made by the complainant to the police to be made admissible as evidence is refused.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 12th 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.