

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 399 of 2016

STATE

V

ANANAIASA QAQATURAGA

Counsel : Ms. Lavenia Bogitini for the State
Ms. Talei Kean with Ms. Anisha Singh for the Accused

Dates of Trial : 3-5 December 2018

Summing Up : 6 December 2018

Judgment : 10 December 2018

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

JUDGMENT

[1] The accused, Ananaiasa Qaqaturaga, was charged with the following offence:

COUNT ONE

Statement of Offence

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

Particulars of Offence

ANANAIASA QAQATURAGA, on the 15th of October 2016, at Gau Island, in the Eastern Division, penetrated the vagina of **MS** with his penis, without her consent.

- [2] The accused pleaded not guilty to the charge 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, the three Assessors unanimously found the accused not guilty of the count of Rape.
- [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) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] The Assessors were directed that in order to prove the charge of Rape, the prosecution must establish beyond reasonable doubt that;
 - (i) The accused;
 - (ii) On the specified day (In this case the 15 October 2016);
 - (iii) At Gau Island, in the Eastern Division;
 - (iv) Penetrated the vagina of MS 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] Each of the above individual elements were further elaborated upon in my summing up.
- [8] In support of their case, the prosecution called the complainant, MS, her first cousin, Elenoa Bainivalu, and her mother, Naina Qaranivalu. The prosecution also tendered a rough sketch depicting the accused's house and shop and veranda/porch as Prosecution Exhibit **PE1 (A)** and a rough sketch depicting the inside of the accused's house as Prosecution Exhibit **PE1 (B)**.

[9] The accused opted to remain silent.

[10] 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 "*Admitted Facts*" without placing necessary evidence to prove them:

1. The accused is Ananaisa Qaqaturaga, 39 years of Sawaike Village, Gau as at 15.10.16.
2. The complainant in this matter is MS of Sawaike Village, Gau as at 15.10.16.
3. The accused is the complainant's uncle from her maternal side.
4. The complainant refers to the accused as 'Tu Ana'.
5. On 15.10.16, the complainant went to the accused house to wash the accused's clothes.
6. The accused gave \$15 to the complainant for washing their clothes.
7. The accused daughter is Alumita, 12 years of age as at 15.10.16.
8. The accused also calls MS by her second name 'S'.

[11] 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.

[12] Based on the said agreed facts the identity of the accused, the date of incident (15 October 2016), and the place of incident (Gau Island), are proved beyond reasonable doubt.

[13] However, the prosecution must prove that the accused penetrated the vagina of MS with his penis; and that the accused penetrated the vagina of MS 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.

[14] The complainant, MS, testified that:

- (i) *She is currently residing in Gaji Road, Samabula. She was staying there with her aunty. She had come to stay there this year.*

- (ii) *The complainant said her date of birth was 22 December 1998. So she is currently 19 years old. She will be turning 20 on the 22 December this year,*
- (iii) *She testified that on 15 October 2016, she was staying in Sawaieke Village, in Gau. She was living with her parents, her two brothers and sister. She is the third eldest in the family. Her mother's name is Naina Qaranivalu. Her sister's name is Raijieli, who is younger than her. The witness said that Raijieli is 15 years old now.*
- (iv) *On 15 October 2016, the complainant was 17 years of age. She was attending Gau Secondary School and was in Form 6.*
- (v) *The complainant testified that on 15 October 2016, she was at home in the morning. Her mother had sent her to Ratu Ananaiasa's shop to buy butter. She knows the accused Ananaiasa as Tu Ana. The witness said that Tu Ana is her uncle from her mother's side. The complainant had gone to the accused's shop with her sister Raijieli. After buying the butter they had left. The accused had then asked her to wash his clothes.*
- (vi) *The complainant went home and informed her mother and father (about what the accused had told her). They agreed to the complainant going to wash the accused's clothes.*
- (vii) *The complainant testified that she then went to the accused's house to wash his clothes and that the accused had given her \$15 for washing his clothes [Both these facts have also been admitted by both parties]. The complainant testified that was the first time she was going to wash the accused's clothes. She said, it takes about 2 minutes to walk to the accused's house. The accused's shop is located in front of his house. The two rough sketches produced by the prosecution as Prosecution Exhibit PE1 (A) and PE1 (B), clearly depicts the location of the accused's house and his shop.*
- (viii) *When she went to the accused's house, only the accused and his daughter, Alumita, were there. She was 12 years old at the time. There were others drinking grog in front of the accused's shop.*
- (ix) *After arriving at the accused's house, the complainant had first swept the house and soaked his clothes in the sink. She testified that she swept the house because it has not been swept. At this time, Alumita was sitting in the living room.*
- (x) *The accused's wife was said to be in Suva at the time.*
- (xi) *After soaking the clothes, the complainant had gone into the living room. This is because the accused had bought biscuits and peanut butter for*

them to have tea. The witness had taken the biscuit and the peanut butter and kept it on the cupboard.

- (xii) Thereafter, the complainant had gone to wash clothes in the bathroom. The bathroom has one exit. This exit leads to the door that goes outside.
- (xiii) While the complainant was washing clothes inside the bathroom, the accused was going around the living room. He had then come to the complainant with a bottle of oil and asked her to massage his head. The witness explained that when the accused was going around the living room, he had pulled down the curtains. She had seen the accused pulling down the curtains when she went to hang the clothes.
- (xiv) When the complainant went to hang the clothes, she had also heard the accused tell Alumita to go and look for their phone. Later she said that he had told her to go and look for it at another house.
- (xv) When the accused had asked the complainant to massage his head, she was in the bathroom at the time. At that time only the accused and the complainant were in the house. The witness further testified, when the accused had asked her to massage his head, she had done so. She had massaged his head in front of the bathroom (outside the bathroom).
- (xvi) The accused had then entered the bathroom. The witness said that she felt shocked because at the time the accused had asked her whether she wants to smoke. She said she could not believe that the accused will come and ask her to massage his head and ask her to smoke.
- (xvii) Thereafter, the witness testified that the accused tried to 'harass her.' She explained that he had entered the bathroom, held her and pushed her on the wall. The complainant also demonstrated in Court as to how the accused had pushed her against the wall.
- (xviii) The complainant testified that when the accused had pushed her, she had screamed. The accused had covered her mouth. The accused had asked her why she screamed for. The witness had then cried. She said she cried because she could not believe what the accused did to her. She said the accused had been covering her mouth for 2 minutes.
- (xix) At the time the accused had entered the bathroom, he had taken off his t-shirt. He had been wearing a three quarter (trouser). At the time, the complainant had been wearing a blue t-shirt and a pink sulu. The accused had then pulled away her sulu, pulled down her panty, and forcefully inserted his penis into her vagina.

- (xx) *At the time the accused was inserting his penis into her vagina, they were both in a standing position and facing each other.*
- (xxi) *The complainant said that the accused's penis went inside her vagina. She knew that his penis went inside her vagina because it was painful. The accused's penis had been inside her vagina for 5 minutes. During this 5 minutes she had been crying and was trying to do something to the accused to release her so she can go outside. She had tried to push him but he was holding on to her tightly.*
- (xxii) *After those 5 minutes she had felt that the accused had released her. She had then run out of the bathroom, opened the house door and run out of the house.*
- (xxiii) *The complainant testified that she had wanted to run home, but then she went to her cousin Elenoa Vadei's place, because she saw her cousin and since her cousin's house was the closest to the accused's house. She had told Elenoa of what the accused did to her.*
- (xxiv) *At the same time her mother had come looking for her. When the complainant was telling Elenoa as to what the accused had done to her, her mother had entered Elenoa's house. Then Elenoa had told her mother the story.*

- [15] The defence is totally denying that the accused raped the complainant in the bathroom that morning whilst she was doing the washing.
- [16] However, in my considered opinion the complainant's evidence can be accepted as truthful, credible and reliable evidence. There was absolutely no reason for her to make up this story against the accused, who is her maternal uncle.
- [17] In her closing address the Defence Counsel has stated that if the complainant had actually screamed, the people who were near the accused's shop veranda would have heard her screams. Firstly this position was never put or suggested to the complainant. In addition the complainant testified that the shop veranda was about 10 metres away from the bathroom. As clearly depicted in the rough sketch PE1 (A), the shop or store of the accused is situated between the house and the shop veranda. Thus, it is highly unlikely, for any sounds or screams emanating from inside of the accused's house, in this instance from inside of the accused's bathroom, to be heard near the veranda of the shop.

- [18] In her closing address the Defence Counsel also stated that it is physically impossible to commit rape in a standing or face to face position. This position was also never put or suggested to the complainant. In my opinion, it is not physically impossible for a male to insert his erect penis into a female vagina in a standing position or as in this instant in a face to face position. Having seen the complainant testify in Court over a period of nearly two days, I note that the complainant is shorter in height than the accused. Thus, the accused being taller than the complainant, it was clearly possible for him to insert his erect penis into the complainant's vagina in the said standing or face to face position.
- [19] It was also suggested to the complainant by the defence that she did not tell the two lady teachers, who were drinking kava at the shop veranda, about the incident because the accused did not rape her. The complainant explained that the reason why she did not tell the two teachers was because when she ran out, she ran straight to Elenoa's house. She was not paying attention to the people at the veranda. I fully accept the explanation offered by the complainant in this regard. It is highly improbable to expect a teenage girl, who has just been subjected to a serious sexual assault, to be informing almost total strangers (although the complainant said she knew one of the teachers) about the incident, and that too, to persons who were consuming kava at the time, at the accused's own premises.
- [20] In her closing address the Defence Counsel also stated that there was a long delay in reporting the matter to the Police. The prosecution has explained the reason for the delay in reporting the matter which Court accepts as justifiable. It must also be borne in mind that complainant had informed the recent complaint witness, Elenoa Bainivalu, about the incident as soon as she left the accused's house.
- [21] For all the aforesaid reasons I find that the unanimous opinion of the Assessors in finding the accused not guilty is perverse and not justified.
- [22] 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 offence of Rape with which the accused is charged.
- [23] In the circumstances, I find the accused guilty of the charge of Rape.

[24] Accordingly, I convict the accused for the offence of Rape as charged.



Riyaz Hamza
Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT SUVA

Dated this 10th Day of December 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.

Solicitors for the Accused : Office of the Legal Aid Commission, Suva.