

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 402 of 2018

STATE

V

MELI KENAWAI

Counsel : Ms. Swastika Sharma for the State
Ms. Shantel Hazelman with Ms. Maria Cabona for the Accused

Dates of Trial : 6-9 July 2020

Summing Up : 15 July 2020

Judgment : 17 July 2020

The name of both complainants are suppressed. Accordingly, the 1st complainant will be referred to as "IM" and the 2nd complainant will be referred to as "JT".

JUDGMENT

- [1] As per the Amended Consolidated Information filed by the Director of Public Prosecutions (DPP), the accused Meli Kenawai was charged with the following offences:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of Crimes Act 2009.

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, unlawfully and indecently assaulted IM, by touching his penis.

COUNT TWO

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the mouth of **IM** with his penis, without his consent.

COUNT THREE

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the anus of **IM** with his penis, without his consent.

COUNT FOUR

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to Section 208 of Crimes Act 2009.

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, attempted to penetrate the mouth of **JT** with his penis, without his consent.

COUNT FIVE

(Representative Count)

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to Section 208 of the Crimes Act 2009.

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, attempted to penetrate the anus of **JT** with his penis, without his consent.

COUNT SIX

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the anus of **JT** with his finger, without his consent.

COUNT SEVEN

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, unlawfully and indecently assaulted **JT**, by touching his penis.

- [2] The accused pleaded not guilty to the seven charges and the ensuing trial was held over 4 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found the accused guilty of the said seven charges.
- [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 210 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act); Section 207 (1), (2) (a), (2) (b) and (2) (c) of the Crimes Act; and also Section 208 of the Crimes Act.
- [6] At the outset I directed the Assessors on the two Sexual Assault charges (Counts 1 and 7).
- [7] Accordingly, I directed the Assessors that in order for the prosecution to prove the first count of Sexual Assault, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this instance between 1 January 2017 and 31 December 2017);
- (iii) At Nasinu, in the Central Division;
- (iv) Unlawfully and indecently assaulted IM, by touching his penis.

[8] Similarly, I directed the Assessors that in order for the prosecution to prove the seventh count of Sexual Assault, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this instance between 1 January 2017 and 31 December 2017);
- (iii) At Nasinu, in the Central Division;
- (iv) Unlawfully and indecently assaulted JT, by touching his penis.

[9] Thereafter, I directed the Assessors on the three counts of Rape (Counts 2, 3 and 6).

[10] Accordingly, I directed the Assessors 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) During the specified time period (in this instance between 1 January 2017 and 31 December 2017);
- (iii) At Nasinu, in the Central Division;
- (iv) Penetrated the mouth of the 1st complainant, IM, 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 he was consenting.

[11] I directed the Assessors 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) During the specified time period (in this instance between 1 January 2017 and 31 December 2017);
- (iii) At Nasinu, in the Central Division;

- (iv) Penetrated the anus of the 1st complainant, IM, 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 he was consenting.

[12] I further directed the Assessors that in order for the prosecution to prove the sixth count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this instance between 1 January 2017 and 31 December 2017);
- (iii) At Nasinu, in the Central Division;
- (iv) Penetrated the anus of the 2nd complainant, JT, with his finger;
- (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 he was consenting.

[13] Finally I directed the Assessors on the two Attempt to Commit Rape charges (Counts 4 and 5).

[14] Accordingly, I directed the Assessors that in order for the prosecution to prove the fourth count of Attempt to Commit Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this instance between 1 January 2017 and 31 December 2017);
- (iii) At Nasinu, in the Central Division;
- (iv) Attempted to penetrate the mouth of the 2nd complainant, JT, 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 he was consenting.

[15] I directed the Assessors that in order for the prosecution to prove the fifth count of Attempt to Commit Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this instance between 1 January 2017 and 31 December 2017);
- (iii) At Nasinu, in the Central Division;
- (iv) Attempted to penetrate the anus of the 2nd complainant, JT, 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 he was consenting.

[16] All the above individual elements were further elaborated upon in my summing up in respect of the seven counts.

[17] I further directed the Assessors that in relation to the third count of Rape, if they find that the prosecution has failed to establish beyond any reasonable doubt that the accused, between 1 January 2017 and 31 December 2017, at Nasinu, penetrated the 1st complainant's anus with his penis, without the consent of the 1st complainant and the accused knew or believed that the 1st complainant was not consenting, or the accused was reckless as to whether or not he was consenting, has however satisfied beyond any reasonable doubt that the accused, between 1 January 2017 and 31 December 2017, at Nasinu, attempted to penetrate the 1st complainant's anus with his penis, without the consent of the 1st complainant and the accused knew or believed that the 1st complainant was not consenting, or the accused was reckless as to whether or not he was consenting; as an alternative, they are then allowed to look at the lesser offence of Attempt to Commit Rape (In terms of Section 208 of the Crimes Act), though the accused is not formally charged in the Amended Consolidated Information for that offence in Count Three.

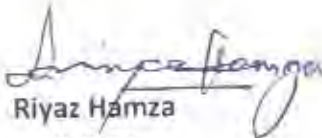
[18] Similarly, I directed the Assessors that in relation to the fourth count of Attempt to Commit Rape, if they find that the prosecution has failed to establish beyond any reasonable doubt that the accused, between 1 January 2017 and 31 December 2017, at Nasinu, attempted to penetrate the 2nd complainant's mouth with his penis, without the consent of the 2nd complainant and the accused knew or believed that the 2nd complainant was not consenting, or the accused was reckless as to whether or not he was consenting, has however satisfied beyond any reasonable doubt that the accused, between 1 January 2017 and 31 December 2017, at Nasinu, unlawfully and indecently assaulted the 2nd complainant by forcing him to masturbate his penis; as an alternative, they are then allowed to look at the lesser offence of Sexual Assault (In terms of Section 210 (1) (a) of the Crimes Act), though the accused is not formally charged in the Amended Consolidated Information for that offence in Count Four.

- [19] The prosecution, in support of their case, called the 1st complainant (IM), the 2nd complainant (JT), and 1st complainant's grand-mother Sera Rogonasau. The prosecution also tendered to Court the Birth Certificate of the 1st complainant as Prosecution Exhibit PE1 and the Birth Certificate of the 2nd complainant as Prosecution Exhibit PE2.
- [20] The accused gave evidence on his own behalf. The defence also tendered (with the consent of both parties) a rough sketch of the accused's residence as Defence Exhibit DE1.
- [21] 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 complainants are IM (PW1) and JT (PW2).
 2. The accused is Meli Kenawai and he is 28 years old.
 3. Meli Kenawai's father is Esava Ditoko and he is a Pastor at the Assembly of God Church.
- [22] Since the prosecution and the defence have consented to treat the above facts as "*Admitted Facts*" without placing necessary evidence to prove them, these facts are considered as proved beyond reasonable doubt.
- [23] The 1st complainant, IM, was between 14 and 15 years of age at the time of the alleged incidents in the year 2017, and was 18 years old when he testified in Court [His date of birth is 13 March 2002]. The 2nd complainant, JT, was between 13 and 14 years of age at the time of the alleged incidents in the year 2017, and was 17 years old when he testified in Court [His date of birth is 12 July 2003].
- [24] I have summarized the evidence of all the witnesses in my summing up.
- [25] The 1st complainant clearly testified to the acts that the accused had perpetrated on him on one particular day during the year 2017 (between 1 January 2017 and 31 December 2017). During his testimony he initially referred to the penis as balls (polo in Itaukei) and testicles (soresore in Itaukei). He later used the term stick (kau in Itaukei). Later when asked for another English term for penis, the witness said 'dick'. He also testified that he uses his 'dick' to urinate. Therefore, there is no doubt in my mind that the 1st complainant was referring to the penis, when he used the terms balls, testicles, stick and dick at different times during his testimony.
- [26] Similarly during his evidence the 1st complainant said that the accused penetrated his buttocks or bum (he used the Itaukei term butaqu). However, considering the totality of his evidence, I am satisfied that the 1st complainant was making reference to his anus.

- [27] The 2nd complainant testified to the acts that the accused had perpetrated on him on four separate occasions during the year 2017 (between 1 January 2017 and 31 December 2017)- the first act was in the accused's room, the next was while the 2nd complainant was sleeping in the sitting room of the accused's house, the third was while he was with the accused, in the accused's twin cab vehicle and the fourth was when he had come to the accused's house to watch the rugby match between Fiji Bati and Australia. During the time of the first three acts the 2nd complainant said that the 1st complainant had also been present. However, during the time the fourth incident occurred he said he had been alone. No mention is made of the presence of the 1st complainant.
- [28] No charges have been framed by the State for the incidents which took place in the accused's twin cab.
- [29] The 2nd complainant initially referred to the penis as stick (or kau in Itaukei). However, later he used the term penis itself. For anus he used the Itaukei term cici, which directly translates to anus.
- [30] The defence submits that there is a major contradiction between the testimony of the 1st complainant and the 2nd complainant in their narration of the events which took place. The 1st complainant only testified to one incident which took place in the accused's room, on one occasion. The 1st complainant said that the 2nd complainant was also present at the time.
- [31] The 2nd complainant while confirming that the said incident as described by the 1st complainant took place in the accused's room, also testified to an incident which took place on another occasion while the 2nd complainant was sleeping in the sitting room of the accused's house, in the presence of the 1st complainant. However, the 1st complainant made no mention of this incident in the sitting room of the accused's house during his testimony. In fact, when questioned as to whether the accused had done anything else to him other than on that night (the incident which took place in the accused's room), the 1st complainant said No.
- [32] I concede that this is no doubt a contradiction. However, it is my opinion, when taking into consideration the totality of the testimony of the two complainants' that there is no reason to disbelieve either witness. It must be borne in mind that even the 1st complainant testified to the acts which were perpetrated by the accused on the 2nd complainant, while in the accused's room. Some of these are the acts which the 2nd complainant said were committed on him by the accused, but in the sitting room, on another day (In addition the 2nd complainant said that the accused poked his anus with his finger).
- [33] As such, I accept the evidence of both the complainants as truthful, credible and reliable.

- [34] The accused testified in Court and totally denied all the allegations made against him by both complainants. He takes up the position that the two complainants have made up the allegations against him.
- [35] The Assessors have found the evidence of the prosecution as truthful and reliable as they have by their unanimous decision found the accused guilty of all the charges. Therefore, it is clear that they have rejected the position taken up by the defence.
- [36] In my view, the Assessor's opinion was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of all seven counts.
- [37] 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 offences of Sexual Assault (Counts 1 and 7), Rape (Counts 2, 3 and 6) and Attempt to Commit Rape (Counts 4 and 5), with which the accused is charged.
- [38] In the circumstances, I find the accused guilty of the offences of Sexual Assault (Counts 1 and 7), Rape (Counts 2, 3 and 6) and Attempt to Commit Rape (Counts 4 and 5), as charged.
- [39] Accordingly, I convict the accused of the offences of Sexual Assault (Counts 1 and 7), Rape (Counts 2, 3 and 6) and Attempt to Commit Rape (Counts 4 and 5), as charged.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 17th Day of July 2020

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