IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 161 OF 2014

STATE

v

1. Eroni Nabitu
2. Taniela Naiseru

Counsel: Ms. L. Latu for the State
Ms. Vulimainadave for Defence

Date of Summing Up: 07th July, 2017
Date of Judgment: 12th July, 2017

JUDGMENT

1. The Accused persons were charged with following offences and tried before three assessors.

FIRST COUNT
Statement of Offence

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

Particulars of Offence

ERONI NABITU, on the 25th day of October, 2013 at Nailaga, Ba in the Western Division, had carnal knowledge of **VETINIA DIKUILA**, without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

ERONI NABITU, on the 08th day of November, 2013 at Nailaga, Ba in the Western Division, penetrated the vagina of **VETINIA DIKUILA,** with his finger, without her consent.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

ERONI NABITU, on the 08th day of November, 2013 at Nailaga, Ba in the Western Division, had carnal knowledge of **VETINIA DIKUILA,** without her consent.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

ERONI NABITU, on the 08th day of November, 2013 at Nailaga, Ba in the Western Division, penetrated the anus of **VETINIA DIKUILA,** with his finger, without her consent.

FIFTH COUNT

Statement of Offence

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

Particulars of Offence

TANIELA NAICERU, on the 08th day of November, 2013 at Nailaga, Ba in the Western Division, had carnal knowledge of **VETINIA DIKUILA,** without her consent.

2. At the close of the Prosecution case, Court found the 1st Accused not guilty on the fourth count as there was no evidence to maintain that charge any further. 1st Accused was acquitted of the fourth count accordingly.

3. Assessors unanimously found the 1st Accused not guilty on counts 1, 2 and 3. They also found the 2nd Accused not guilty on count 5.

4. I direct myself in accordance with my own Summing Up and review evidence led in the trial. Having concurred with the opinion of Assessors, I pronounce my judgment as follows.

5. Prosecution called three witnesses, the Complainant, her grandmother, Litiana, and doctor Sharma. Prosecution based its case substantially on the evidence of the Complainant. At the close of the prosecution case, both Accused presented evidence under oath.

6. 1st Accused who was 17 years old at that time admitted that he penetrated Complainant's vagina on the 25th of October, 2013 and that he was with her on the 8th November 2013 at the crucial time. 2nd Accused who was 14 years old at the time of the incident is the first cousin of the Complainant. There is no dispute in this case with regard to the identity of Accused persons.

7. Prosecution says that 1stAccused penetrated Complainant on the 25th October 2013 without her consent. 1st Accused, having admitted that he penetrated the Complainant on the 25th October, 2013, denies that he did so without her consent. He also denies penetrating Complainant at all on the 8th November 2013 either with his penis or finger. 2nd Accused denies penetrating her at all.

8. The Credibility of Complainant's evidence was called into question in this case. Complainant did not make any complaint about the 1st alleged incident occurred on 25th October, 2013 to her grandmother. She said that her grandmother is very close to her and shared secrets with her. When Complainant was asked why she did not complain to her grandmother, she said that she was scared. She also said that she did not inform anybody, even her family members, because she suspected that they will spread rumours about her in the village. However, soon after the first incident, and also soon

after the 2nd incident she had met Monika. Complainant said that she informed Monika of what had happened.

9. Prosecution failed to call Monika as a witness to support Complainant's version. There is no requirement for corroboration of Complainant's version. However, in the circumstances of this case, Monika's presence as a witness could have boosted the consistency and credibility of the version of the Prosecution.

10. The 2nd alleged incident occurred approximately 10 days after the 1st alleged incident. During the period between the first and the second incidents, there was no complaint from Complainant to anybody. The second alleged incident came to light not because of her complaint but because she was 'caught'.

11. Complainant's grandmother Litinia in her evidence described how the alleged 2nd incident came to light. On that day (5th November, 2013) Complainant had not returned home till at least 10 p.m. Latinia was awaiting Complainant to return home after the prayer meeting. In the meantime, Litinia's brother's two grandchildren Taniela Rokobaleni and Pony (Romoluse) came and inquired about the Complainant. They informed that the prayer meeting had already finished long time ago. Then Litinia sent those grandchildren to search for Complainant.

12. According to Litinia's evidence, Complainant was brought home by Taniela Rokobaleni and Pony whom she had sent out to search Complainant.

13. Complainant in her evidence endeavoured to conceal this fact. She in her evidence-in-chief said that, after she was raped, Accused just left the scene giving her a warning and, after that, she came towards the road and came straight home. However, under cross examination, Complainant admitted that while they were having sex under the guava tree, another Taniela approached them with a search light and, upon their arrival, Accused fled the scene leaving her behind.

14. This is how the Complainant finally admitted what she was earlier denying:

> *Q: While Dan was on top of you, Taniela, one Taniela another Taniela came, is that correct?*
> *A: No Ma'am.*
>
> *Q: I put it to you, when this Taniela, this Dan was on top of you, another Dan or another Taniela, came?*
> *A: No Ma'am.*

Q: *This Taniela was the son of Mere and Leone's brother is that correct?*
A: *No Ma'am.*

Q: *I put it to you that according to Eroni, one Taniela, the son of Mere and who is also Leone's brother came?*
A: *No Ma'am.*

Q: *According to Eroni, he was holding to a flash light?*
A: *No Ma'am.*

Q: *And when all of you saw him, you all ran away from there?*
A: *No Ma'am.*

Q: *I put it to you that according to Eroni when this Taniela, the son of Mere and Sailasa came, when you people saw him, you all ran away?*
A: *They ran away.*

Q: *Who ran away?*
A: *Eroni, Dan and Leone*

Q: *Somebody….*
A: *Sir, after they did this thing to me and I like I shout and those two boys heard my voice and that time too they were looking for me. When they came these three boys ran away.*

Q: *According to Eroni, you also ran with them?*
A: *No Ma'am.*

Q: *I put it to you, that according to Eroni, you also ran away with them?*
A: *No Ma'am.*

Q: *And the reason why you..*
Crt: *You were shouting and two boys came?*
A: *Yes, Sir. That's both Dan, another Dan. When they came these three boys ran.*

15. When the Complainant entered the house after the second alleged incident, she started crying. Litiana told her -'don't cry; tell me what happened to you?' Complainant in reply informed that Eroni and Leone dragged her and covered her mouth with a cloth. Litiana then asked her- 'did they do something to you?' She said 'Yes'. Complainant had not said anything about sexual acts done to her. (Litinia vehemently denies that Complainant had told

her that Leone pulled down her under pants). Complainant had not told Litiana that Taniela (2nd Accused) was also involved in the incident.

16. According to the summation I gave to assessors, the court can't draw a negative inference as to the truthfulness of the complainant's version merely because it lacked recent complaint evidence. However, in the absence of any plausible explanation from the Complainant, lack of recent complaint evidence in this case greatly affected the consistency of the Complainant's version.

17. Defence Counsel argued that Complainant did not shout or scream and had no external injuries to indicate that she had struggled in protest. It should be acknowledged that no such evidence is required to prove a rape case. Indeed, in the summing up, I directed that there is no classic or typical response to an unwelcome aggression for sex. Despite this direction, assessors found Complainant's conduct questionable. Their finding in my opinion is not stubborn.

18. There is no dispute that, on 25th October 2013, Complainant and 1st Accused were engaged in a romantic talk near the church wooden bell. In that talk, the offer extended to her by the Accused to be his girlfriend was readily accepted. According to Complainant's evidence, after having a short chat, Accused had invited her for a walk but she had refused. The first alleged incident had occurred 7-8 meters away from the church under a tamarind tree. She did not explain how she ended up under a tamarind tree although she said that she was pulled to the guava tree before the 2nd incident. The only inference that the Court could draw from this evidence is that she had voluntarily gone to the tamarind tree.

19. When Complainant was asked whether she shouted in protest, she said that she called out to Dan and said 'see, what Eroni is doing to me?' Dan had in reply told -'just relax'. The words uttered by the Complainant do not manifest that she was protesting.

20. During cross examination, Complainant was denying a series of suggestions put by the Defence Counsel and one such denial was that she did not kiss the Accused. However, when she was asked the same question again, she admitted that she was kissing the Accused after telling stories.

> *Q:* *You and Eroni then started kissing?*
> *A:* *No maam.*

Q: I put it to you that you and Eroni started kissing after telling stories, yes or no?

A: Yes maam.

21. Complainant admitted that when Eroni came on top of her during the first alleged incident, she did not push 1st Accused away or struggle. To explain her passivity she said that she couldn't free herself as he was lying on top of her. She also said that Leone had covered her mouth with a cloth and Dan was holding on to her hand. Complainant also said that she was scared. This type of passive behaviour is not unexpected from a rape victim. However, there is no evidence that Complainant froze or completely incapacitated. Complainant's evidence about intervention and use of force by two other people to facilitate Eroni's attack suggest that she had offered some kind of resistance. Quite surprisingly though, doctor Sharma who had examined her within hours had not observed any physical injury, not even a scratch mark on her body to indicate that she was subjected to such an onslaught.

22. According to Litinia's evidence, 2nd Accused had slept over at her place and after the incident was reported to her, he had run away from her kitchen where he had been hiding. Complainant had been living with Litiana in the same house. Complainant had not implicated the 2nd Accused when she reported the matter to Litiana. It is highly improbable that 2nd Accused would come to the Complainant's house if he had raped the Complainant a few hours ago.

23. There can be no doubt that the Director of Public Prosecution had framed the 4th charge on the basis of the information provided by the Complainant. 4th count alleges that, on the 5th November 2013, 1st Accused penetrated the Complainant's anus with his finger. Complainant in her evidence never said that her anus was penetrated. As a result, at the no case stage, the 1st Accused was acquitted on the 4th count. The consistency of the Complainant was called into question.

24. I observed the demeanour of the Complainant carefully. She was evasive and not straightforward. The part of her evidence reproduced at paragraph 20 shows how unreliable a witness she is.

25. The credibility of the Defence's version was not successfully challenged. Both Accused corroborated each other's evidence. 2nd Accused had told police that when he approached the scene on 5th November 2013, he saw 1st Accused having sex with the Complainant. In his evidence, 2nd Accused said that he could not properly see what was really going on due to the blackout. 1st Accused admitted that he was about to have sexual intercourse with the

Complainant with her consent but could not do so because his penis was not erected. Complainant also confirmed that the incident happened in the dark. There is no material contradiction there. Even if the Court were to reject the Defence's version, Prosecution still had to prove the charges beyond reasonable doubt.

26. Complainant was 14 years old at the time of the alleged incident. 1st Accused admitted that he had carnal knowledge of the Complainant with her consent. Therefore, I considered whether the 1st Accused could be convicted for the lesser offence of Defilement in terms of Section 162(1) (f) of the Criminal Procedure Act.

27. My finding in that regard is as follows: There is no reasonable basis to find the 1st Accused guilty of Defilement in this case due to two reasons. Firstly, there was no opportunity given to the 1st Accused to defend the charge of Defilement.

28. It is true that the law, (Section 162 (1) (f) of the Criminal Procedure Act), says that where a person is charged with Rape, but evidence supports only a conviction of a lesser sexual offence, he can be convicted for the lesser offence, Defilement being one. **However, it should only be done after due process has been followed.**

29. A statutory defence is created by law for a person charged with Defilement. According to Section 215 (2) of the Crimes Act, it shall be a sufficient defence if it shall be made to appear to the court that the person charged had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years.

30. When a statutory defence is created for a particular offence by law, a reasonable opportunity should be afforded to the person charged with that offence to avail himself of the statutory defence. The court at the summing up stage has to consider evidence in the context of the statutory defence and, if evidence before the court provided a basis for the statutory defence, an obligation lay upon the judge to direct the assessors, that the defence existed and what it meant or its application.

31. The 1st Accused in this case was not formally charged with Defilement. There can be no doubt that when an accused is formally charged with Defilement, it is the trial judge's obligation to raise the statutory defence of mistake as to the age of a victim in the summing up, if at least some facts existed in the accused's case that gave rise to the possibility that the defence might be open to the accused. Court in this case did not direct the assessors as to the

availability of the statutory defence because 1st Accused was not formally charged with Defilement and no notice whatsoever was given to that effect.

32. It should be acknowledged that it is not possible to lay a foundation for a defence without a formal charge. The charge is the basis upon which the defence is argued. The fundamental requirement of a charge in a criminal case was vividly explained by Grant CJ in ***DPP v Solomone Tui*** [1975] 21 FLR 4 where His Lordship observed:

> *" It is an essential feature of the criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him so as to be in a position to put forward his defence and to direct his evidence to meet them".*

33. At the outset, the accused must be notified that he had to defend a Defilement charge because the nature of the statutory defence requires court to take both subjective and objective assessments of accused's belief into account. (the court ought to be satisfied that accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years).

34. Before the commencement of a High Court trial, the trial judge is not supposed to evaluate evidence available to the Prosecution for the purpose of framing the charge or information and the framing the information or charge is the obligation of the Director of Public Prosecution. Therefore, it is the obligation of the Prosecution, either through the information or the opening address, to clearly state and disseminate the charge or charges upon which the prosecution case is run, especially when a statutory defence is available to the Defence.

35. In a High Court trial, unlike in a Magistrates Court trial, when a *prima face* case is made out at the end of the prosecution case, the trial judge is not supposed to read out the charge or charges to the accused [see Section 231(2) of the Criminal Procedure Act] and the trial should proceed on the original information. When only the consent is in dispute, the decision turns on the credibility of conflicting versions and, at that stage, the opinion of assessors must be sought. The trial judge therefore does not get an opportunity to frame a lesser charge (Defilement) when the prosecution still relies on the rape count on which some evidence is available on each element of the offence.

36. At the summing up stage, the court can of course direct assessors on the law as set down by Section 162 of the Criminal Procedure Act, and the possibility of them forming a guilty opinion in respect of lesser offence of Defilement. However, giving that direction at that stage without affording the Accused an

opportunity to defend the Defilement charge, in my opinion, is obnoxious to basic principles of criminal law.

37. In ***Ali v State*** [2008] FJCA 30; AAU0014.2008 (11 July 2008) the Court of Appeal considered the legality of a conviction recorded on appeal by High Court for a kindred offence to Rape. In that case, in the High Court, on appeal, without any notice as to the nature of the charge, the appellant was convicted of Defilement which is considered a kindred offence to rape. The question was whether the High Court in its appellate jurisdiction could convict of the kindred offence of Defilement contrary to section 156 of the Penal Code without giving the accused an opportunity to raise the statutory defence provided by that section.

38. The charge in ***Ali*** (supra) in the Magistrates Court was Rape. Before the commencement of the trial, the Magistrate who had the responsibility of framing the charge had enquired from the prosecution whether they were relying on an alternative charge of defilement to which the prosecution replied in negative. At trial the appellant raised the defence of consent which was an available defence on the charge of rape. The appellant succeeded in his defence and he was acquitted of rape.

39. The Court of Appeal concluded that the High Court had the power to convict of the kindred offence of Defilement on appeal against acquittal on a charge of rape, pursuant to section 176 of the Criminal Procedure Code, provided **no injustice is caused to the accused by such order.** The Court held that the conviction recorded for Defilement on appeal against appellant who was led to believe by the prosecution at trial that he only had a rape charge to defend caused injustice to the appellant because he was not notified of the available statutory defence.

40. In view of this judgment, it is my considered opinion that an accused charged with raping a person in the age group of 13-16 should be convicted of Defilement by a High Court sitting with assessors only if he had had notice firstly of Defilement charge at the beginning of trial and secondly of statutory defence of mistake, if that defence is available in evidence.

41. Sharma J in ***State v Tulevu*** [2016] FJHC 561 (7 June 2016) had taken a different view on this issue. In that case, only charge in the Information was Rape. At the end of the prosecution case, there was no evidence to prosecute the rape charge. Defence counsel in his 'no case' application submitted that the prosecution should have charged the accused with an alternative count of defilement if accused were to be put to his defence. Prosecution relied on Section 162 of the Criminal Procedure Act and argued that there was no need

to add an alternative count in the Information filed by the State when section 162 (1) (f) of the Criminal Procedure Decree gives the Court powers to convict a person of lesser charge.

42. The court held with the Prosecution. Sharma J observed: at para 9 and 10:

> *"A careful reading of section 162 above will show that a court can convict upon been satisfied with the evidence adduced in the trial for either a lesser or alternative offence. In this situation it does not matter if the office of the Director of Public Prosecutions decided not to charge the accused with an alternative count. If there is evidence in respect of lesser count and the court is satisfied with the evidence adduced the matter should proceed further.*
>
> *In my view the due process that needs to be satisfied considering the evidence adduced by the complainant is one which points to a lesser count of Defilement. Accordingly it is only proper that the accused be put to his defence. I am satisfied there are some admissible and relevant evidence in respect of the lesser charge of Defilement for the Assessors to deliberate upon and decide what weight they would give to the evidence after assessing the credibility of the witnesses. In situations where section 162 would apply in absence of any alternative count preferred by the Director of Public Prosecutions and there is evidence of the essential elements of the lesser charge before the court, I don't see any reason why section 162 of the Criminal Procedure Decree cannot be read in addition to section 231 (1) of the Criminal Procedure Decree".*

43. Although this decision is not in agreement with my argument, it advocates the notion that, before a conviction on Defilement could be entered on a rape charge, the Accused must be given an opportunity to defend the charge of Defilement at least before he starts his case. Thanks to this decision, Accused can testify about his mistaken belief as to the age of the Complainant. However, considering the nature of the defence that involves both subjective and objective assessment of accused's belief, it is prudent and just to notify the alternative charge of Defilement at the outset so that, during the case for the prosecution, sufficient evidence may be elicited by way of cross-examination or otherwise to establish honest and reasonable mistake or to cast sufficient doubt upon the prosecution case to entitle the accused to an acquittal.

44. It should be acknowledged that the factual background in ***Tulevu*** (supra) case is different from that of the present case. In ***Tulevu,*** there was no evidence at the end of the prosecution case to prosecute the rape charge. Therefore, no case application made by the defence counsel for an acquittal prompted the

prosecution to make an application for the court to consider the lesser charge of Defilement. Court having been satisfied that there was some admissible and relevant evidence in respect of the lesser charge of Defilement put the Accused to his defence. Under these circumstances, some room was available albeit belatedly to the accused to avail himself of the statutory defence. Furthermore, in cross-examination of the complainant the defence counsel had cross examined the complainant in accordance with the statutory defence.

45. In this case, Prosecution did not make such an application as there was some relevant and admissible evidence on each element of the 1st count and continued to rely on the original information. Therefore, Court in any event did not have an opportunity to raise the charge of Defilement. The Accused would have been taken by surprise if the charge of Defilement and its statutory defence were raised in the summing up.

46. There can be no doubt that when an accused is formally charged with Defilement, it is the trial judge's obligation to raise the statutory defence of mistake as to the age of a victim under s 215 (2) of the Crimes Act in the summing up, if at least some facts existed in the accused's case that gave rise to the possibility that the defence might be open to the accused. Court in this case did not direct the assessors as to the availability of the statutory defence because 1st Accused was not formally charged with Defilement and no notice whatsoever was given by the Prosecution at the beginning of the trial that Accused had to defend such a charge.

47. I have come across instances where the Defilement charge had been included in the Information as an alternatively lesser count when a person is charged for raping a person aged between 13-16 years. In my opinion, such a formality is part of due process expected to be followed within the meaning of Section 162 of the Criminal Procedure Act.

48. The 1st Accused was formally charged with Rape and Rape alone. There was no indication form the Prosecution that they rely on Defilement charge in the event the rape charge failed. Therefore, it is not reasonable or proper to convict the 1st Accused for Defilement.

49. Secondly, even if Defilement charge is alive in the present case, Prosecution still failed to discharge the burden of proof beyond reasonable doubt.

50. In the course of cross examination, Counsel for Prosecution asked the 1st Accused whether he was aware that the Complainant was 14 years old. Accused replied in the negative. Counsel for Defence asked the Accused

whether the Complainant had told him that she was 14 years old, again he said 'no'. In light of these answerers given by the 1st Accused, he has discharged the evidential burden to place himself within the statutory defence. Once that was established, then it was for the prosecution to negative such defence.

51. ***Kaw Teh v R*** [1986] LRC (Crim) 553 *Dawson J pointed out:*

> *"[T]he burden of providing the necessary foundation in evidence will in most cases fall upon the accused. But it is not inconceivable that during the case for the prosecution sufficient evidence may be elicited by way of cross-examination or otherwise to establish honest and reasonable mistake or to cast sufficient doubt upon the prosecution case to entitle the accused to an acquittal. The governing principle must be that which applies generally in the criminal law. There is no onus upon the accused to prove honest and reasonable mistake upon the balance of probabilities. The prosecution must prove his guilt and the accused is not bound to establish his innocence, it is sufficient for him to raise a doubt about his guilt and this may be done, if the offence is not one of absolute liability, by raising the question of honest and reasonable mistake. If the prosecution at the end of the case has failed to dispel the doubt then the accused must be acquitted."*

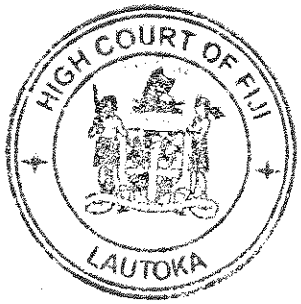
52. The 1st Accused did not give evidence of his honest belief. However, the Prosecution must dispel the doubt created by the 1st Accused as to his mistaken belief in Complainant's age. Prosecution failed to do so. No evidence was placed by the Prosecution to prove that there was no reasonable basis for 1st Accused to believe that Complainant was less than 16 years of age. No question about the alleged conversation or any communication she may have had with Accused as to her age was directed to her in her evidence. The offence of Defilement is not made out.

53. Version of the Prosecution is not credible and believable. I reject the version of the Prosecution. Prosecution failed to prove the charges beyond reasonable doubt.

54. I accept the unanimous opinion of assessors.

55. Accused persons are acquitted and discharged accordingly.

56. That is the judgment of this Court.



Aruna Aluthge
Judge

At Lautoka
12th July, 2017

Solicitors: Office of the Director of Public Prosecution for State
Legal Aid Commission for Accused