

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 81 of 2016

STATE

V

EMOSI LCAVI

Counsel : Mr. Taitusi Tuenuku for the State
Ms. Sokoveti Daunivesi with Ms. Swarvana Prakash for the Accused

Dates of Trial : 21-24 May 2018

Summing Up : 25 May 2018

Judgment : 28 May 2018

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

JUDGMENT

[1] The accused Emosi Lecavi is charged with the following offences:

COUNT 1

Statement of Offence

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

Particulars of Offence

EMOSI LCAVI, between the 1st day of August 2015 and 31st day of August 2015, at Waikete Village, Nausori in the Central Division, had carnal knowledge of **KC** without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

EMOSI LCAVI, between the 1st day of October 2015 and 31st day of October 2015, at Waikete Village, Nausori in the Central Division, had carnal knowledge of **KC** without her consent.

- [2] The accused pleaded not guilty to the two 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 two counts of Rape, as charged.
- [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 for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;
 - (i) The accused;
 - (ii) During the specified period (in this case 1 August 2015-31 August 2015);
 - (iii) At Waikete Village, Nausori, in the Central Division;

- (iv) Penetrated the vagina of KC 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] Similarly, the Assessors were directed 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 period (in this case 1 October 2015-31 October 2015);
- (iii) At Waikete Village, Nausori, in the Central Division;
- (iv) Penetrated the vagina of KC 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.

[8] The above individual elements were further elaborated upon in my summing up.

[9] The Assessors were also directed that in relation to the two counts of Rape, in the event they have a reasonable doubt as to whether the prosecution has proven the two elements based on consent, beyond reasonable doubt and therefore the offence of Rape, in counts one and two is not established, as an alternative, they may consider whether the accused is guilty or not guilty of the lesser offence of Defilement of a Young Person between 13 and 16 Years of Age, in respect of the said counts, though the accused is not formally charged in the information for that offence.

[10] The Assessors were directed that in order for the prosecution to prove the charge of Defilement of a Young Person between 13 and 16 Years of Age, the prosecution must establish beyond reasonable doubt that the accused, during the relevant time periods, at Waikete Village, in Nausori, penetrated the vagina of the complainant, who is between the age of 13 and 16, with his penis.

[11] The prosecution, in support of their case, called the complainant KC, her aunt Venina Rakau Wati and Dr. Bandana Priya Dharshani Prasad. The Medical Examination Report of the complainant was tendered to Court as Prosecution Exhibit PE1.

[12] 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 "*Agreed Facts*" without placing necessary evidence to prove them:

1. That the Complainant in this matter is KC.
2. That KC was under the age of 16 in 2015.
3. That Emosi Levaci is the accused in this matter.
4. That Emosi Levaci and KC are related.
5. That Emosi Levaci and KC were both residing in Waikete Village, Tailevu in 2015.

[13] Since the prosecution and the defence have consented to treat the above facts as "*Agreed Facts*", without placing necessary evidence to prove them, these facts are considered as proved beyond reasonable doubt.

[14] The complainant testified that her date of birth is 23 December 2001. Therefore, as at August 2015, she was 13 years of age. During the time, she was staying at Waikete Village. The accused is her grandfather. The accused's house was about 10 foot-steps away from the complainant's house.

[15] She testified to the events which took place one day in August 2015, around 4.00 in the evening. Only her younger sister Vani was at home with her at the time. Her mum, dad, uncle and aunty had gone to the river for fishing. She had been getting ready to go and feed the pigs at the pig pen, when she saw the accused peeping through the window – the window that is at the back of his house. The accused was showing her \$5. She had ignored him. Then she went to feed the pigs.

[16] The complainant had then proceeded to the pig pen. She had poured the pigs' food into the container. She had then seen the accused standing at the opposite side. He

was standing about 5 foot-steps in front of her. He was showing her the money. She thought he was wanting to give the money to her. The witness said that the accused was standing straight and was calling her to come to him. He was showing the money and telling her to come and take it from him.

- [17] Thus she had gone and taken the money from him. At that stage the accused had pulled her right hand. The witness described in Court how the accused pulled her hand. It had been painful. The accused had pulled her hand hard and told her "it will be fast". Thereafter, the accused started to touch her body. He had touched her breasts. She felt disgusted and did not like it.
- [18] The accused had then asked her to lie down. She had refused. The accused had then told to lie down because she had taken the money. He had then forced her to lie down. The accused had spoken harshly to her and told her to lie down saying "because no one has come yet to see us". Because the accused had forced her, she had laid down.
- [19] The accused had then tried to open both her thighs. She tried to stand up. But he was pressing on her thighs. Later she testified that the accused's hands were pressing down on her elbows (not on her thighs). While one hand was still pressing her down, the accused had then taken off his other hand and taken off her clothes. The complainant said she was wearing tights inside and a skirt outside at the time. The accused pulled up her skirt and tried to pull down her tights and panty. The witness was pressing both her thighs together as she did not want the accused to take off her tights.
- [20] However, the accused had taken off/pulled down both her tights and her panty. The witness had been pressing both her thighs (together). The accused tried to open (separate) her thighs. The accused had used the same hand that he used to take off her clothes for this purpose. The accused had been telling her to open her thighs because she had taken the money. He had forced her to open her thighs. Then she had opened it.
- [21] The accused had then moved in front to open the zip of his trousers. He had then put his balls (penis) out. The accused moved closer to her to insert it (his penis) into her private part. She had told him to stop so that she could get up and go home and for

him to take back the money. The accused had told her to hold onto the money "what he will do to me, it will be fast".

- [22] At that stage, the complainant had felt that the accused had inserted his polo into her private part. She had felt that it went inside and it was very painful. When she felt pain, she had told the accused to stop and that she wants to go home. The accused had said "it is about to finish". The accused kept on inserting his balls into her private part. The accused was pressing her down with one hand and was also trying to pull up her t-shirt using his other hand. The witness had tried to slap away his hand so that he does not pull up her t-shirt.
- [23] The accused had then told her to get up and that it has finished. He had told her to wear her clothes. She had worn her clothes. The accused had then told her to follow the same path that she used when she came to the pig pen and that he will go back on the path that he came. The accused had also threatened her not to say what happened to anyone. He had said "if I say it to anyone he will chop me with a knife".
- [24] Thereafter, the complainant testified to the incident which took place one day in October 2015, during the 2nd last week of school. She said she was at home. Both her sisters were also at home at the time. Her older sister, Mereoni had then told her to go and feed the pigs. She says this was in the afternoon, but cannot recall the specific time.
- [25] The complainant had then filled up the pigs' food and gone to the pig pen to feed the pigs. This was the same pig pen she had referred to earlier in her evidence. On reaching the pig pen, she had poured the pigs' food. Then she saw the accused again. He was standing at the same place he was standing before. She had asked him "what do you want?" The accused had been standing there looking at her. He had told her "bear in mind what I told you".
- [26] The witness had then turned around to go back home. The accused had then called her again. The accused had said "Either you come or do you want that thing to be done to you?" The complainant had felt scared.
- [27] The complainant testified that she was standing still. The accused came towards her. He came to her and told her to lie down. She had told him that she wanted to go

home. The accused had forced her to wait. She said, "If I go he will chop me with a knife".

[28] The accused had then forced her to lie down. She had laid down. He then told her to take off her pants. She did not want to take it off. The accused kept on forcing her to take off her pants. So she took off her pants. Then the accused had taken off her panty. He had opened her thighs and inserted his balls into her private party. The witness had started to feel pain. The accused had been telling her "Close your mouth, it is about to finish".

[29] After he had finished, they both stood up. The accused was telling her to kiss each other on the mouth. She had felt disgusted and did not want to kiss him. She had turned away from him and worn her clothes. She had then taken the bucket and went home. When she had turned around, the accused had called out to her and told her "Bear in mind, if you do not want to do this I will kill you".

[30] The witness was also asked the following questions to which she answered as follows:

Q. *What other names you know about this polo?*

A. *Soresore (testicles).*

Q. *What other names do you know?*

A. *No.*

Q. *To your knowledge, what do males use their polo or soresore for?*

A. *To insert it to female.*

Q. *Female's what?*

A. *Their pipi.*

Q. *What do males use to urinate to your knowledge?*

A. *Their polo (balls).*

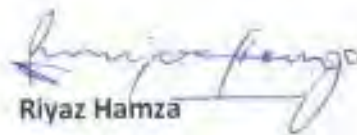
Q. *When you are saying female pipi, what are you referring to?*

A. *Their private part.*

[31] From this evidence I am satisfied that when the complainant referred to the term 'polo' she meant the accused's penis; and when the complainant referred to the term private part or 'pipi' she meant her vagina.

- [32] It is clear that due to the threats made by the accused, the complainant did not inform anyone about the two incidents soon after the incidents took place. She testified that her older sister had heard about the incident from outside, and informed her mother. Her mother had then asked her what happened. The time her mother had asked her, the complainant stated that she had started to cry. Her mother had asked her whether the story (about Emosi and the complainant having sex) is true or whether it's a lie. The witness had told her mother that the story is true. Later her aunty Venina, had also asked her about the incident. The complainant had admitted that the incident was true. Her aunty, Venina had gone and reported the matter to the Police.
- [33] Venina Wati confirmed that on 9 January 2016, she had been at the Nausori Market. She had got to know about what the accused had done to the complainant. When she inquired, the complainant had said that the accused used to show her the money and he followed her to the pig pen. She said that he made her lie down and that he did an unclean act. When asked to be more specific on what the complainant had told her, the witness answered: "That he made her lie down on the soil and he raped her". The complainant had admitted that it was done twice to her.
- [34] Medical Officer, Dr. Bandana Prasad, testified to the medical examination conducted on the complainant on 19 January 2016, at 17:30 Hours, at the Nausori Hospital. The Medical Examination Report was tendered to Court as Prosecution Exhibit **PE 1**.
- [35] The accused is totally denying that the incidents took place. The accused position is that the complainant is lying. The reasons given by the defence for such a proposition is that the complainant's mouth was not covered. However, she never shouted out or screamed for help. If she had screamed for help her siblings who were at home may have heard her. The defence also took up the position that the complainant had many opportunities to run away but she did not. Furthermore, that after the incidents occurred she had not told her family members about the incident.
- [36] The complainant explained as to why she did not scream or shout or run away during the time of the incidents. She also explained as to why she did not inform any of her family members of the incident, until her mother had asked her what happened. Subsequently, on 9 January 2016, her aunt, Venina, had also inquired from her about the incidents.

- [37] The Assessors have found the evidence of prosecution as truthful and reliable, as they have by a unanimous decision found the accused guilty of the two counts of Rape. Therefore, it is clear that they have rejected the version put forward by the accused.
- [38] 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 counts one and two.
- [39] 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 Rape with which the accused is charged in counts one and two.
- [40] In the circumstances, I find the accused Emosi Lecavi guilty of Rape as charged, in respect of counts one and two.
- [41] Accordingly, I convict the accused for the offences of Rape in counts one and two.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Dated this 28th Day of May 2018

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