

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 319 of 2015

STATE

V

ALIPATE TUWAI

Counsel : Ms. Shyamala Alagendra with Ms. Lavenia Bogitini for the State
Mr. Filimoni Vosarogo for the Accused

Dates of Trial : 6-10 August 2018

Summing Up : 13 August 2018

Judgment : 14 August 2018

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

JUDGMENT

[1] According to the Information filed by the Director of Public Prosecutions (DPP), the accused Alipate Tuwai is charged with the following offence:

COUNT ONE

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

ALIPATE TUWAI between the 12th day of September 2015 to the 19th day of September 2015, at Suva, in the Central Division, had carnal knowledge of **ST** without her consent.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 5 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 charge.
- [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] Accordingly, I directed the Assessors that in order for the prosecution to prove the count of Rape, they must establish beyond any reasonable doubt that;
 - (i) The accused;
 - (ii) During the specified time period (in this case between the 12 September 2015 and the 19 September 2015);
 - (iii) At Suva, in the Central Division;
 - (iv) Penetrated the vagina of ST 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] The above individual elements were further elaborated upon in my summing up.
- [8] The prosecution, in support of their case, called the complainant, ST, her primary school teacher, Clare Fong and Doctor Elvira Ongbit.

The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit PE1- Birth Certificate of the complainant.

Prosecution Exhibit PE2- Medical Examination Report of the complainant.

- [9] 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. Alipate Tuwai was a security officer with South Pacific Security (SPS).
 2. ST is the complainant in this matter.
 3. Alipate Tuwai is married to Makelesi Vakairairua and resides at Veiquwawa Settlement, Suva.
- [10] 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.
- [11] The complainant testified that she is now 15 years of age. Her date of birth is 11 September 2002. Therefore, as at 12 September 2015 to 19 September 2015, she would have just turned 13 years of age.
- [12] The complainant testified that she was returning to her home in Gaji Road, Samabula, after spending one week at Wailoku (in Makelesi's house). She was accompanied by the accused, who is Makelesi's husband. This was on a Saturday evening.
- [13] The complainant and the accused had travelled in the Wailoku bus. The accused had been sitting in front of the bus and she was sitting at the back. The accused had rang the bell and signalled for her to get off at MH in Tamavua.
- [14] After getting off the bus they went to Tuisowaqa Road. From there they walked to the Namadi main road. After coming out from Namadi they had gone down the Nabua Road. From Nabua they followed the short cut to Bayview. After reaching Bayview they had walked through the short cut to Raiwasa. They had gone past the Raiwasa Bridge. Then she had looked up and saw the road and she saw vehicles passing. She told the accused that this is the short cut to their home. The accused had said there is another short cut in front.

- [15] The complainant testified that the accused was in front and she was following him. He went right in front and waited for her. When she came near him, then he had given her a \$10 note. When he gave the \$10 then he had pushed her on the grass. The complainant tried to stand up. However, the accused had pointed on her forehead forcefully and she had fallen down.
- [16] Thereafter, the accused took off his t-shirt and used it to close her mouth. He took off his t-shirt and tied it on her mouth. After he tied the t-shirt on her mouth, he held both of her hands with his right hand. The complainant had tried to move around so she can get up. But she could not do so. The accused had then taken off her pants and her panty, with his left hand. At the time the complainant was lying down facing upwards.
- [17] Thereafter, the accused held the complainant's legs and put it up. Then he took off his pants and his underwear. He had pulled up her t-shirt and bra. Both at the same time. He took up one of her legs and pushed it up and he tried to separate both her thighs and he knelt between both of them. He sucked her nipple and bit it. Then he took his penis and put it into her vagina. His penis went inside her vagina. The complainant said it had been painful. She also testified that when the accused's penis went inside her vagina, she felt that it was cracked. The accused's penis had been in her vagina for a short time.
- [18] Thereafter, the accused pulled out his penis, and wore his pants. She had then got up and worn her clothes. The accused had then threatened her and told her not to tell anyone about the incident. He had said if she told it to anyone that he will kill her.
- [19] Thereafter, the complainant testified as to how she had returned to her home at Gaji Road. She said that she did not tell anyone at home about the incident because the accused had threatened her.
- [20] The following Monday she had gone to school. After school, she did not return home. She had gone and stayed at a friend's house. She said "since we were neighbours with Alipate, I could not stand having to keep seeing him".
- [21] On 28 September 2015, the complainant's step-father and her mother's brother had come to school looking for her, as she had been missing from home for a few days. On inquiring further, the complainant had told her class teacher Clare Fong about the incident. The matter had then been reported to the police.

- [22] Dr. Elvira Ongbit also testified on behalf of the prosecution. She had conducted a medical examination on the complainant on 28 September 2015, at 16.00 hours. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE2. As per the medical report the date of the incident has been recorded as 19 September 2015 (which was 9 days prior to the examination).
- [23] The accused is totally denying that the incident ever took place. The accused suggested that at no point of time was a \$10 note given to the complainant. The accused has suggested that the complainant ran away from home as her uncle, Iseli Livikivavalagi, was beating her. The complainant has admitted that her uncle used to always hit her at home. She had even said this to her class teacher Clare Fong. However, the complainant testified that she had never run away from home prior to this occasion (where she had run away from home on the Monday following the incident).
- [24] It was suggested to the complainant that in the Police Statement made by her, on 28 September 2015, she had told the Police that she had gone to Wailoku on one Saturday in the evening, and on the way back on that same Saturday the incident had happened. However, the complainant denied this position. Throughout her testimony in Court she has consistently stated that she went to Wailoku on one Saturday and that the incident occurred on the following Saturday or one week later.
- [25] The defence also suggested to the complainant that the incident was not true as she had no pain or injuries around her mouth, on her wrists, on her back or on her buttocks. It was also suggested by the defence that there is no possibility of a cracking sound emerging during sexual intercourse or when a penis is inserted into a vagina. Even Dr. Elvira Ongbit testified that if the hymen breaks it does not give a sound.
- [26] The complainant said that when the accused's penis went inside her vagina, she felt it was painful and she felt it was cracked. When asked to explain further, she said that there was a cracking sound. What must be borne in mind is that the complainant was merely 13 years of age at the time of the incident, and currently she is 15 years of age. She testified in Court, in her own words, as to what transpired during the course of the incident. This Court is not inclined to disbelieve her evidence merely because of this factor. As to injuries on the body, it is very well possible that no injuries could have been

caused to the complainant around her mouth, on her wrists, on her back or on her buttocks as a result of the incident.

[27] 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 said charge. Therefore, it is clear that they have rejected the version put forward by the accused.

[28] 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 the said Count One.

[29] 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 in Count One.

[30] In the circumstances, I find the accused guilty of Rape.

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




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 14th Day of August 2018

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