

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 159 of 2018

STATE

V

ONISIVORO BAREWA

Counsel : Ms. Shirley Tivao for the State
Ms. Namrata Mishra for the Accused

Dates of Trial : 19 and 21-22 May 2020

Summing Up : 25 May 2020

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

SUMMING UP

Madam Assessor and Gentlemen Assessors,

[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the documents tendered as prosecution exhibits and the admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submissions made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, a matter which will be of primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14]** The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15]** According to the evidence you heard in this case, the complainant, LD, was 15 years and 11 months old at the time of the alleged incident, and was 18 years old when she testified in Court (Her date of birth being 30 April 2002). Experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

- [16]** You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to perceive (or know) in any other way the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [17]** In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [18]** A statement made to the Police by a witness can only be used during cross-examination to highlight inconsistencies or omissions. That is, to show that the relevant witness on a previous occasion had said something different to what he or she said in Court (which would be an inconsistency) or to show that what the witness said in Court was not stated previously in the statement made to the Police (which would be an omission). You have to bear in mind that a statement made by a witness out of Court is not evidence. However, if a witness admits that a certain portion in the statement made to the Police is true, then that portion of the statement becomes part of the evidence.
- [19]** This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [20]** However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is

inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider the witness to be reliable.

- [21] Madam and Gentlemen Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [22] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [23] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the charges. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [24] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [25] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [26] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. This is also referred to as circumstantial evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.

- [27] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench of this Court room. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [28] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [29] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [30] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [31] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [32] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [33] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [34] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant in this case or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.

[35] I must also explain to you as to the reason for the use of screen, when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when a screen is placed, the complainant is relieved of any mental pressure to describe the often unpleasant incidents which she alleged took place. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

[36] The same applies for permitting a closed court proceedings when the complainant gave evidence in this case; and also for permitting a support person (The complainant's mother) to sit beside her when she testified in Court. I wish to reiterate once again that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

[37] Let us now look at the charges contained in the Amended Information.

[38] There are three charges preferred by the Director of Public Prosecutions (DPP), against the accused:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

ONISIVORO BAREWA, on the 12th day of April 2018, at Lami, in the Central Division, had carnal knowledge of **LD**, without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

ONISIVORO BAREWA, on an occasion other than that referred to in Count One, on the 12th day of April 2018, at Lami, in the Central Division, had carnal knowledge of **LD**, without her consent.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

ONISIVORO BAREWA, on an occasion other than that referred to in Count One and Count 2, on the 12th day of April 2018, at Lami, in the Central Division, had carnal knowledge of **LD**, without her consent.

[39] As you would observe the accused has been charged with three counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act).

[40] Let me now explain to you the elements of the charges.

[41] Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

[42] Section 207 (2) (a) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

[43] Therefore, when Section 207 (1) is read with Section 207 (2) (a) it would read as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent.

[44] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

[45] Therefore, in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;

- (ii) on the specified day (in this case the 12 April 2018);
- (iii) at Lami, in the Central Division;
- (iv) penetrated the complainant's vagina, 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.

[46] In order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 12 April 2018), but on an occasion other than that mentioned in Count One;
- (iii) at Lami, in the Central Division;
- (iv) penetrated the complainant's vagina, 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.

[47] Similarly, in order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 12 April 2018), but on an occasion other than that mentioned in Counts One and Two;
- (iii) at Lami, in the Central Division;
- (iv) penetrated the complainant's vagina, 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.

[48] Let me now elaborate on these elements together in respect of counts one, two and three.

[49] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[50] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[51] The fourth element involves the penetration of the complainant's vagina; with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

[52] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.

[53] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[54] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

- [55] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 15 years and 11 months of age at the time of the incident, and therefore, she had the mental capacity to consent.
- [56] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape is obviously considered as a Sexual Offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.
- [57] If you are satisfied beyond any reasonable doubt that the accused, on 12 April 2018, penetrated the complainant's vagina 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, then you must find him guilty of the first count of Rape.
- [58] If you are satisfied beyond any reasonable doubt that the accused, on 12 April 2018, on an occasion other than that mentioned in Count One, penetrated the complainant's vagina 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, then you must find him guilty of the second count of Rape.
- [59] If you are satisfied beyond any reasonable doubt that the accused, on 12 April 2018, on an occasion other than that mentioned in Counts One and Two, penetrated the complainant's vagina 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, then you must find him guilty of the third count of Rape.
- [60] If you find that the prosecution has failed to establish any of these elements in relation to any of the three counts, then you must find the accused not guilty of those charges.
- [61] However, in the event you have a reasonable doubt as to whether the prosecution has proven the two elements based on consent, which I explained earlier, beyond reasonable doubt and therefore the offence of Rape, in either of the three counts is not established, as an alternative, you 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 count, though the accused is not formally charged in the Amended Information for that offence.

[62] In terms of Section 215(1) of the Crimes Act:

“A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years”.

[63] As I have mentioned before, in layman’s terms, having carnal knowledge with or of any person, means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

[64] Therefore, for the prosecution to prove the offence of Defilement of a Young Person between 13 and 16 Years of Age, the prosecution must establish beyond reasonable doubt that the accused, on 12 April 2018, at Lami, penetrated the vagina of the complainant, who is between the age of 13 and 16 years, with his penis.

[65] It is a defence to this offence if it appears to you that the accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years at the time.

[66] No issue of consent comes into play under Section 215(1) of the Crimes Act, as it is said it is no defence to any charge under this Section to prove that the person consented to the act.

[67] I wish to remind you once again that you need to go in this direction ONLY if you find that the prosecution has failed to establish the two elements based on consent beyond reasonable doubt in respect of the three counts of Rape. If you are satisfied that the prosecution has established all the elements constituting the offences of Rape beyond reasonable doubt, then you must find the accused guilty of Rape as charged in respect of the three counts of Rape.

[68] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[69] 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 *“Amended Admitted Facts”* without placing necessary evidence to prove them:

1. Onisivoro Barewa is a 26 year old Security Guard at Aqua Safe, Walu Bay.
2. Onisivoro Barewa agrees that on 12 April 2018, he and the complainant, LD, had met at the car park besides the building of his work place, thereafter Mr Barewa took the complainant to his work place.
3. The complainant and Mr Barewa were together at his work place until the next morning.

4. The identification of Mr Barewa is not in dispute he is known to the complainant.

[70] Since the prosecution and the defence have consented to treat the above facts as “Amended Admitted Facts” without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[71] The prosecution, in support of their case, called the complainant (LD) and Medical Officer, Dr. Nikotimo Bakani. 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.

[72] Evidence of the complainant LD

- (i) *The complainant testified that she currently lives at Rampur in Navua. She said she is attending Lomary Secondary School, doing technical courses on Cooking and Sewing.*
- (ii) *In 2018, she was staying at Nakoba, Qauia. This is around the Lami area.*
- (iii) *She testified that her date of birth is 30 April 2002. A copy of her Birth Certificate was tendered to Court as Prosecution Exhibit PE1.*
- (iv) *The complainant testified that she knows Onisivoro Barewa, the accused in the case. She had (first) met him at the Gas Station at Wailada. They had contacted each other through Facebook. Prior to meeting him, she had been in contact with the accused for 2 or 3 days on Facebook. The witness said that the nature of the relationship she was having with the accused was a boyfriend and girl-friend relationship.*
- (v) *It is an Admitted Fact that on 12 April 2018, the complainant had met the accused at the car park besides (next to) the building of his workplace. She said that it was the accused who had told her to come there.*
- (vi) *When she came there and met the accused, they had been seated in the front talking. When asked what they were talking about, she said “We were talking about the standard of our life.” The witness confirmed that the place where she had met the accused was at the car park where the Gas Station in Wailada in Lami is located. When asked what time it was, she said it was night time.*
- (vii) *Later, the accused had told her that the two of them go to the back of the building where the cars had parked. There was no one else present at the back of the building.*
- (viii) *The following questions were then asked from the witness and she answered as follows:*

- Q. *What happened when Mr. Barewa (Onisivoro Barewa) took you to the back of the building car park?*
- A. *He told me to get off my clothes and for him to do that unethical act (the witness used the term 'Tovo lolovira' in iTaukei to mean unethical act).*
- Q. *When he told you this, how did you react?*
- A. *I was scared.*
- Q. *When he asked you this, what was your reply to this?*
- A. *No.*
- Q. *Just to clarify, when he asked you to do this, you said no?*
- A. *Yes.*
- Q. *What happened after he asked this, and you replied?*
- A. *He kept asking me.*
- Q. *When he kept asking you, what was your reply to him?*
- A. *No.*
- Q. *Do you recall how many times he asked you?*
- A. *No.*
- Q. *You mentioned "for him to do that unethical act" – what was this he was asking?*
- A. *He said for me to take off my clothes and for him to do that unethical act.*
- Q. *What happened after that?*
- A. *I was lying down. I got a shock to have felt cold on my thighs. When I got up I saw that my trousers were taken off.*
- Q. *Can you clarify where you lying down (at the back car park of the building)?*
- A. *I was lying down beside at the back of the car park where a carton had been spread.*
- Q. *And who had spread the carton?*
- A. *Him (the accused).*
- Q. *Prior to you getting a shock, when Onisivoro Barewa was asking you to do the unethical act, why didn't you leave?*

- A. *There were fence around that area.*
- Q. *Do you know who took off your trousers?*
- A. *Onisi.*
- Q. *What happened after he had taken off your trousers?*
- A. *He did that unethical act to me.*
- Q. *After he took off your trousers what did he then do?*
- A. *When my trousers were taken off, I saw that he has taken off both his trousers and then he got down and do that unethical act.*
- Q. *When you referred to he, you are referring to Onisivoro Barewa?*
- A. *Yes.*
- Q. *When you say 'unethical act' what was this unethical act he did to you?*
- A. *He put his male private part into my female private part (the witness used the term 'yaya vatagane' for male private part and 'yaya vayalewa' for female private part in the iTaukei language).*
- Q. *This male private part, do you know where it is on the male body?*
- A. *In front.*
- Q. *The female private part, where is it located on the body?*
- A. *Down.*
- Q. *Is there any other word you know to describe the male private part?*
- A. *Penis.*
- Q. *Do you know any other word to describe the female private part?*
- A. *Vagina.*
- Q. *When Onisivoro Barewa had put his penis into your vagina, what were you doing?*
- A. *I told him to move, but he did not want to.*
- Q. *Do you know how long Onisivoro Barewa had put his penis into your vagina?*
- A. *One hour.*
- Q. *While Onisivoro Barewa was doing this to you why didn't you escape?*
- A. *There was a fence around that place, and if I go to the back the dog will bite me.*

- Q. *What was the reaction to Onisivoro Barewa doing this unethical act to you?*
- A. *I was angry.*
- Q. *What exactly did you tell Onisivoro Barewa when you asked him to move?*
- A. *I told him to move and when I tried to get up, he had locked me with both his hands.*
- Q. *Could you describe or explain how he did this to you?*
- A. *He was pressing both his hands hard on my legs.*
- Q. *And when he was doing that to you could you get away from him?*
- A. *No.*
- Q. *What happened after he did this unethical act to you?*
- A. *After he had done this unethical act to me, he had left and gone in front. When he returned, he did it again to me. He did it 3 times.*
- Q. *After he had done the act the 1st time, and he left, what were you feeling?*
- A. *I was weak.*
- Q. *Can you explain further when you said you were weak?*
- A. *When he had done that unethical act to me 3 times.*
- Q. *After he had done this unethical act the 1st time, why didn't you leave or escape?*
- A. *I was unconscious.*
- Q. *Are you saying after he had done the unethical act the 1st time, you were unconscious?*
- A. *Yes.*
- Q. *Then you mentioned that he left and came back and did it again. When did you regain consciousness?*
- A. *When he had given my trousers.*
- Q. *What did he do when he came back after doing the 1st unethical act?*
- A. *I was not wearing my trousers. When he came he had taken off his trousers. Then he did that unethical act.*
- Q. *This 2nd time, can you please explain, what you mean by unethical act?*

A. *He put his male private part (penis) into my female private part (vagina).*

Q. *The 2nd time he did this to you, what was your reaction to that?*

A. *Scared.*

Q. *Did you say anything to him when he was doing this to you?*

A. *No.*

Q. *What were you doing when he was doing this to you the 2nd time around?*

A. *I was lying down.*

Q. *Did you want him to do these things to you?*

A. *No.*

Q. *The 2nd time around, why didn't you tell him no?*

A. *He was forcing me.*

Q. *You used the word 'forcing' – what do you mean?*

A. *When he put his male private part into my female private part.*

Q. *Are you saying Onisivoro Barewa had used force when he had put his male private part into your female private part?*

A. *Yes.*

Q. *How did he forcefully do this to you? Can you explain?*

A. *He pushed my shoulder and he told me to relax my body.*

Q. *What happened when he pushed your shoulder?*

A. *For me to lie down again and for him to do that unethical act again.*

Q. *After the 1st unethical act, you said Onisivoro Barewa left and came back and did the 2nd unethical act? How long did Onisivoro Barewa take when he left and came back to do the 2nd unethical act?*

A. *After 5 minutes.*

Q. *After Onisivoro Barewa had done the 2nd unethical act, how did you feel at the time?*

A. *I was weak.*

Q. *Did you do anything else other than lying down when he was doing this to you (During the 2nd incident)?*

- A. No.
- Q. *Other than lying down why didn't you do anything?*
- A. *I was weak.*
- Q. *While the 2nd unethical act was done, you didn't say anything – why didn't you?*
- A. *I was scared.*
- Q. *Why were you scared?*
- A. *Because he can do another thing to me.*
- Q. *What do you mean by 'another thing'?*
- A. *He will do another thing to me because he will force on what he had done previously.*
- Q. *Are you referring to the 1st unethical act?*
- A. Yes.
- Q. *The 2nd unethical act, how long did he do this to you?*
- A. *5 minutes.*
- Q. *Just to clarify – the 1st unethical act, you said one hour and the 2nd unethical act, you are saying 5 minutes?*
- A. Yes.
- Q. *Tell me what happened after the 2nd unethical act had finished?*
- A. *I remained lying down there.*
- Q. *And where was Onisivoro Barewa after the 2nd unethical act?*
- A. *He went in front.*
- Q. *And when he went in front, why didn't you escape?*
- A. *I was really weak.*
- Q. *And after Onisivoro Barewa went in front did he return again?*
- A. Yes.
- Q. *After how long did he return?*
- A. *After 10 minutes.*
- Q. *Can you tell us what happened after he returned?*
- A. *He came and do that unethical act again.*

- Q. *This unethical act – what was it?*
A. *He put his male private part (penis) into my female private part (vagina).*
- Q. *And, what were you doing when Onisivoro Barewa was doing this unethical act?*
A. *I was just lying down.*
- Q. *Did you do anything else other than lying down?*
A. *No.*
- Q. *Did you say anything to Onisivoro Barewa while he was doing the unethical act the 3rd time?*
A. *I told him to move, but he locked both my legs.*
- Q. *Could you explain to us, how he did that ‘locked both your legs’?*
A. *Both his hands were pressing on my thighs.*
- Q. *Were you able to get away from him when both his hands were pressing on your thighs?*
A. *No.*
- Q. *How long did this 3rd unethical act take?*
A. *5 minutes.*
- Q. *While Onisivoro Barewa was doing this unethical act to you, did he say anything?*
A. *He told me to quietly lie down and relax my body.*
- Q. *How did you feel at this time?*
A. *I was angry.*
- Q. *Angry at who?*
A. *Onisi.*
- Q. *Why is that?*
A. *Because he had done that unethical act to me.*
- Q. *What happened after this 3rd unethical act had finished?*
A. *He then told me for me to wait for him so we can go together.*
- Q. *After he had done this unethical act to you, do you know what time it was?*

A. No.

Q. Was it day time or night time.

A. Night time.

Q. And after the 3rd unethical act, which Onisivoro Barewa had done to you, why didn't you leave or escape?

A. I was really weak.

Q. Could you explain what do you mean when you say, I was feeling weak?

A. Because I cannot get hold of anything and I can't even get my trousers and put it on.

Q. So what happened after Onisivoro Barewa said to wait for him and we will go together?

A. To wait when it's day time and then we go together – or when the sun rises then we go together.

Q. So what did you do during that period you were waiting?

A. We were yarning.

Q. What do you mean?

A. We were talking about the standard of our life.

Q. Why were you talking to Onisivoro Barewa even after he had done these 3 unethical acts to you?

A. Because I told him for me to leave, but he said for me to wait for him.

Q. And why did you listen to him when he told you to wait for him?

A. Because he will do another unethical act that is more worse.

Q. Would you know at about what time you left in the morning?

A. Nearly half 6.00.

(ix) The complainant had testified that she had then returned home. She had not told anyone at home as to what had happened. After returning home, she had been in contact with the accused. She had been calling him using her mum's phone. When asked as why she called him she said because she wanted to ask him for some money so that she can go to the village. She testified that she wanted to go to the village because she wanted to forget all that had happened to her.

(x) The witness then testified as to how this incident had come to light. She said that she had a fight with her mother and left the house, she had then gone to

meet the accused at his work place. Whilst sitting and talking with the accused, a taxi had come and parked, her father had been in the taxi. Her father had taken both the accused and her to the Lami Police Station.

- (xi) From the Lami Police Station, she had been taken to a Doctor for medical examination.*
- (xii) When asked by Court to clarify as to what she meant by being unconscious, the witness said: "I could not get hold of anything".*
- (xiii) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.*
- (xiv) The complainant agreed that the accused had said that his supervisor keeps patrolling so that was the reason for taking her to the car park at the back of his work place. And after moving to the car park at the back of the work place, since there was no place to sit, that the accused had laid a carton on the ground for both of them to sit.*
- (xv) The complainant also agreed that while she and the accused were sitting on the carton and talking, after about 25 to 30 minutes the accused would do his rounds around his work place. At the time the accused does his rounds, his supervisor would also come in his vehicle to check on the accused. After the supervisor would leave, the accused would come onto the carton and sit and talk to her. She also agreed that it took the accused 10 minutes to patrol the building, and during the said 10 minutes she would be seated on the carton by herself.*
- (xvi) The witness testified that during the time they were together, she and the accused kissed each other like boyfriend and girlfriend do and that they touched each other intimately.*
- (xvii) When asked the question as to whether she agrees that the accused never made her have sex with him that evening, she said that he made her have sex with him that evening.*
- (xviii) The Defence highlighted certain inconsistencies in the testimony given in Court by the witness vis a vis her statement made to the Police:*

- i. In her testimony in Court, the witness said that for the 1st unethical act, she was lying down, then she got a shock when she felt cold on her thighs and then she felt her trousers were taken off.*

However, in her statement made to the Police, it is recorded as follows:

"I was just standing there when he forcefully removed my shorts with my panty and he told me lie down."

The complainant agreed that she had said so in her Police Statement.

- ii. *In her testimony in Court, the witness said that during the 1st act, the accused had put his penis into her vagina for one hour.*

However, in her statement made to the Police, it is recorded as follows:

“After a few minute he stop and I don’t know if he ejaculated or not because the place was dark.”

The complainant agreed that she had said so in her Police Statement.

- iii. *In her testimony in Court, the witness said that after the unethical acts, the accused had told her to wait for him so that they could both go together.*

However, in her statement made to the Police, it is recorded as follows:

“After we had sex, we were just talking to each other until the next day 13/4/18. At about 7am on the same day that was on Friday I walked back home.”

The complainant agreed that she had said so in her Police Statement.

- (xix) *The complainant agreed that before giving her statement to the Police that she had never informed anyone that the accused had allegedly raped her. She also agreed that the 1st time she had said that the accused had raped her was when she gave her statement to the Police. She further agreed that she said that she was raped in her Police Statement because she was scared about her parents finding out about her relationship with the accused.*
- (xx) *In re-examination, the State Counsel clarified from the witness the answers given by her in cross examination.*

[73] Evidence of Dr. Nikotimo Bakani

- (i) *The doctor testified that he is currently at home waiting for renewal of his contract with Medical Services Pacific (MSP). He has worked with MSP for two years managing the clinic at Labasa (the MSP Labasa Office).*
- (ii) *He has been practising as a Medical Officer for 17 years, after having graduated from the Fiji School of Medicine, with a MBBS Degree, in 2003.*

- (iii) *The witness testified that he has worked with Dr. Elvira Ongbit in 2018 and 2019 and he is familiar with her work. Dr. Ongbit was based at the Suva Office of MSP.*
- (iv) *The witness testified that a medical examination on the complainant was conducted by Dr. Elvira Ongbit, on 16 April 2018, at 11.30 a.m. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE2.*
- (v) *The Doctor testified as to the specific medical findings as found in column D12. Under vaginal examination, it is stated that the hymen was fimbriated with fresh partial lacerations at 3.00 o'clock and 9.00 o'clock positions.*
- (vi) *He explained that the hymen is the tissue that is present at the entrance to the vagina. It has a natural opening. Fimbriated means 'finger like projections'. This is the normal variation of the hymenal shape. The Doctor explained further that partial means not complete; and laceration means a tear. So what is meant by partial laceration, is that there was an incomplete tear in the hymen.*
- (vii) *The witness further testified that in medical terms 'fresh' meant that the injury had occurred during 4-6 days prior to examination.*
- (viii) *Under the specific medical findings, it is further noted that the vaginal opening admits 2 fingers easily. The Doctor explained that there had been a penetration or breach of the hymen and that it admits 2 fingers easily.*
- (ix) *The Medical Officer further testified that under summary and conclusions, it is noted: 'Positive for penetration'. He elaborated that as per his expert opinion, this means that there was penetration that caused the fresh partial lacerations in the hymen at 3.00 o'clock and 9.00 o'clock positions.*

[74] That was the case for the prosecution. At the end of the prosecution case, this Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could give sworn evidence from the witness box and/or call witnesses on his behalf. He could also address Court by himself or his counsel. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to offer evidence under oath.

Case for the Defence

[75] The accused gave evidence in support of his case.

[76] Evidence of Onisivoro Barewa

- (i) The accused testified that he currently resides at Jittu Estate, Gaji Road in Raiwaqa. He is married. He is working as a delivery boy at Turners and Growers. He has been there for 4 years.*
- (ii) The witness testified that he recalls the events that took place in April 2018. At the time he was working as a security guard at Aqua Safe in Lami.*
- (iii) He then testified to the events which took place on 12 April 2018. He said he got to know the complainant through Facebook. The complainant was his Facebook friend. They had been friends for about 2 weeks.*
- (iv) On 12 April 2018, the complainant had come to his work place at Aqua Safe to meet him. This had been after 7.00 in the night. After the complainant arrived they had sat in front of the work place and had been talking. Thereafter, he had suggested to her to go to the car park at the back. He did so because his supervisor would come and check on him at his work site.*
- (v) After going to the car park at the back, he had spread a carton on the concrete floor for the two of them to sit on. Thereafter, the complainant and he had sat on the carton and they had been yarning. He said that they had been yarning about the standards of their life.*
- (vi) The complainant had remained there the whole night until the next morning. He testified that while they were together nothing happened between the two of them.*
- (vii) The accused said that after every 25 or 30 minutes he used to patrol around his work site. That took about 10 minutes to do. At the time, the complainant was sitting by herself in the car park.*
- (viii) The complainant had left at 7.00 in the morning the next day.*
- (ix) The witness totally denies the allegations of rape made against him by the complainant.*

Analysis

[77] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, LD, and Medical Officer, Dr. Nikotimo Bakani. The defence relied on the evidence of the accused himself.

[78] In this case, the complainant had been medically examined by Dr. Elvira Ongbit. However, the said Medical Officer is said to be currently overseas. In such situations the law permits for the contents of any report which the prosecution intends to give as evidence and about which notice has been given to the defence, to be referred to and commented upon by any other expert called as a witness in any criminal trial.

- [79] This is the basis on which the prosecution relies upon the evidence of the Medical Officer, Dr. Nikotimo Bakani. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [80] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [81] As I have informed you earlier, the burden of proving each ingredient of the three charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [82] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [83] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt. Based on the said agreed facts the identification of Onisivoro Barewa as the accused is not disputed. Further the date of incident and the place of incident has been agreed upon. Thus those two elements are also not in dispute.
- [84] However, the prosecution must prove beyond reasonable doubt that the accused penetrated the complainant's vagina, with his penis. In addition, the prosecution must prove beyond reasonable doubt that the accused penetrated the complainant's vagina 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.
- [85] I have already explained to you how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation given by the witness for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [86] However, if there is no acceptable explanation given by the witness for the inconsistency or omission which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies and omission in the evidence given by a witness influence your

judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his evidence is inaccurate. In the alternative, you may accept the reason he provided for the inconsistency or omission and consider him or her to be reliable as a witness.

- [87] The accused has testified in Court and totally denies the three charges against him. He totally denies that he penetrated the complainant's vagina with his penis on the three occasions as set out in the Amended Information. He submits that nothing happened between the complainant and himself while they were together on the evening of 12 April 2018. He said that he and the complainant were only talking or yarning until 7.00 the next morning.
- [88] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the element of the offences, beyond any reasonable doubt.
- [89] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider his evidence also for its consistency and also the probability of their version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case.
- [90] If you neither believe the evidence adduced by the defence nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charges.
- [91] However, I must caution you that even if you reject the evidence of the defence as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.
- [92] You must consider each count separately and you must not assume that because one count is proved, that the other accused must also be guilty of the other counts as well.
- [93] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you believe the evidence of the defence, then you must find the accused not guilty of the charges of Rape;*

- ii. *If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charges of Rape;*
- iii. *If you reject the version of the defence, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charges of Rape;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of Rape have been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
- vi. *As an alternative to the charges of Rape in the three counts, you may consider whether the accused is guilty or not guilty of Defilement of Young Person between 13 and 16 Years of Age in respect of the said counts.*

[94] Any re directions the parties may request?

[95] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately on the three charges of Rape against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[96] Your possible opinions should be as follows:

First Count

Rape- Guilty or Not Guilty

If not guilty,

In the alternative

Defilement of Young Person between 13 and 16 Years of Age- Guilty or Not Guilty

Second Count

Rape- Guilty or Not Guilty

If not guilty,

In the alternative

Defilement of Young Person between 13 and 16 Years of Age- Guilty or Not Guilty

Third Count

Rape- Guilty or Not Guilty

If not guilty,

In the alternative

Defilement of Young Person between 13 and 16 Years of Age- Guilty or Not Guilty

[97] I thank you for your patient hearing.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 25th Day of May 2020

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