

IN THE HIGH COURT OF FIJI  
AT SUVA  
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 20 of 2020

STATE

V

NIMATI QIONIMUA

Counsel : Mr. Saif Shah for the State  
Ms. Litiana Ratidara for the Accused

Dates of Trial : 25-27 January 2021

Summing Up : 28 January 2021

Judgment : 29 January 2021

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

## JUDGMENT

[1] The accused, Nimati Qionimua, was charged with the following offence:

### COUNT ONE

*(Representative Count)*

*Statement of Offence*

RAPE: Contrary to Section 149 and 150 of the Penal Code.

### *Particulars of Offence*

**NIMATI QIONIMUA**, between the 1<sup>st</sup> day of January 1987 and 28<sup>th</sup> day of January 1994, at Waibau, Naitasiri, in the Eastern Division, penetrated the vagina of **TT**, with his penis, without her consent.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 3 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by their 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 149 of the Penal Code.
- [6] The Assessors were directed that in order to prove the count of Rape, the prosecution must establish beyond reasonable doubt that;
  - (i) The accused;
  - (ii) During the specified period (in this case between the 1 January 1987 and 28 January 1994);
  - (iii) At Waibau, Naitasiri, in the Eastern Division;
  - (iv) Penetrated the vagina of the complainant **TT**, 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] Each of the above individual elements were further elaborated upon in my summing up in respect the charge.
- [8] I also explained to the Assessors as to what is meant by a representative count. I explained to them that the representative count of Rape against the accused is based on an act or series of acts done during a specified time period (In this instance between 1 January 1987 and 28 January 1994). The prosecution is expected to prove just one incident of Rape, which falls within this period in respect of the charge. They need not prove a continuous or a series of incidents of Rape in support of a representative count.

[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. THAT the complainant in the matter is TT.
2. THAT TT was born on 7<sup>th</sup> December 1976.
3. THAT NIMATI QIONIMUA was charged with one representative count of Rape contrary to Section 149 and 150 of the Penal Code.
4. THAT NIMATI QIONIMUA is the step father of TT.

[10] I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as “*Agreed Facts*” without placing necessary evidence to prove them, they must therefore, treat the above facts as proved beyond reasonable doubt.

[11] In support of their case, the prosecution called the complainant TT. The accused gave evidence on his own behalf.

[12] I have summarized the evidence of the complainant and the accused in my summing up.

[13] The complainant is now 44 years of age. She clearly testified to the incidents which took place since she was in Class 7. She said she was in Class 7 in 1990. Thus she would have just turned 13 at the time.

[14] She testified as to how the accused, her step-father, used to have sexual intercourse with her, 2-3 times a week. She said she was innocent at the time.

[15] The complainant *inter-alia* testified as follows regarding the alleged incident:

Q. *Can you tell the Court what had happened just as you have explained in your statement?*

A. *At that time I was innocent.*

Q. *What happened when you were innocent?*

A. *At that time when I am at home my stepfather used to do something to me.*

Q. *What did your stepfather do to you?*

A. *For us to be together.*

- Q. *What do you mean for us to be together?*  
A. *To have carnal knowledge or to have sex. [The witness used the iTaukei term 'Veiyacovi' to mean man and woman having sexual intercourse].*

.....  
Q. *When you say to have carnal knowledge or sex what did Nimati do to you?*

A. *I was at home one day. And he came and asked me and told me that he liked me. I did not say anything because I was scared and innocent.*

Q. *What happened after he said that to you?*

A. *After that we were together.*

Q. *What do you mean by 'we were together'?*

A. *To have sex.*

Q. *Where did this happen?*

A. *At home.*

Q. *What time of the day did this happen? Was it morning or night time?*

A. *Sometimes in the morning and sometimes in the evening.*

Q. *When he would have sex with you, sometimes in the morning and sometimes in the evening, who all would be in the house?*

A. *That is when the house is empty.*

Q. *How would this take place? Would he undress you or what would happen each time?*

A. *Yes he used to undress me and then have sex.*

Q. *How would he have sex with you?*

A. *I would lie down, and he would lie on top of me.*

Q. *And after he would lie on top of you what would he do next?*

A. *Then we would have sex.*

Q. *How would he have sex with you? What would he do?*

A. *Like to have sex like we used to do.*

Q. *How would you have sex? What would he do?*

A. *I would not do anything when I am lying down. He will do everything/ he will do the work.*



- Q. *What would he do while you were lying down?*  
A. *When I am lying down, then he will lie on me and he will use his thing to insert.*
- Q. *What do you mean he would use his thing?*  
A. *His male private part.*
- Q. *Where will he insert his male private part?*  
A. *Into my female private part.*
- Q. *When you say his male private part, what are you referring to?*  
A. *His balls (polo) or what's that.*
- Q. *Can you tell this Court what other name do you know for the male private part?*  
A. *I don't know what else to describe it.*
- Q. *Would you be able to tell us what you call this male private part in English?*  
A. *Private part.*
- Q. *What do you mean when you say female private part?*  
A. *I know it as a female private part.*
- Q. *Can you tell this Court if you know any other name for this female private part?*  
A. *No.*
- Q. *When he would do these things to you how would you feel at that time?*  
A. *I used to be scared.*
- Q. *Why would you be scared?*  
A. *Because he is old and I am very young.*
- Q. *In a week how many times would this happen?*  
A. *Maybe twice or 3 times – depends on when the house is empty.*
- Q. *How long did this continue for?*  
A. *For a long time and we had 2 kids together.*
- Q. *How do you know that those were his kids?*  
A. *Because there were no other men I went out with.*

Q. *You said he used his polo – can you tell this Court what does he usually use this for?*

A. *He just used his male private part to have sex with me.*

Q. *What do men usually use their polo for apart from sex?*

A. *I just know that it is used for sex.*

Q. *What does this polo look like? Can you describe?*

A. *It's long.*

Q. *Where is this polo located in a man's body?*

A. *It is in front – witness points to her groin area.*

Q. *What do you use your female private part for?*

A. *To urinate.*

Q. *Where is this located?*

A. *It is in front – witness points to her groin area.*

Q. *What do males use to urinate?*

A. *The male private part.*

.....

Q. *In your evidence you stated this used to happen 2 to 3 times a week. How did you feel when Nimati would do this to you?*

A. *I used to be scared.*

Q. *Why would you be scared?*

A. *Because he is old and I am still young and innocent.*

Q. *Each time he would do this to you, did you agree to this?*

A. *No.*

Q. *When this used to happen to you, did you tell anybody about this at that time?*

A. *No.*

Q. *Why not?*

A. *I was scared to say it.*

Q. *You mentioned that you had 2 children from these incidents and you also mentioned that you know these were Nimati's children as he was the only*

*one you went out with? When you say he was the only person you went out with, what do you mean?*

A. *Because he is the only one we were together and there is no other guy.*

Q. *When you say you were together can you elaborate further?*

A. *That we had sex.*

[16] The complainant testified that the names of her two children that she had with the accused were Laijia Cama and Nanise Takape. She confirmed that Laijia Cama was born on 28 January 1994; and that Nanise Takape was born on 27 October 1995.

[17] Court is conscious of the fact that the period of offending, as stated in the Amended Information, is from 1 January 1987 and 28 January 1994. 28 January 1994, is the day on which the complainant's eldest child, Laijia Cama, was said to have been born. Therefore, whatever acts of sexual intercourse that may have taken place after this date and which would have led to the complainant becoming pregnant and later giving birth to her second child Nanise Takape, who was said to be born on 27 October 1995, will not be considered by Court as part of the offending at this stage.

[18] The following suggestions were, inter-alia, put to the complainant in cross-examination and she answered as follows:

Q. *I am putting it to you that the sexual intercourse that you had with Nimati was consensual or that you had agreed to have sex with him?*

A. *Only sometimes.*

Q. *I am also putting it to you that every time you had sexual intercourse with Nimati that you did not push him away or indicate to him in any manner that you are saying no?*

A. *Only sometimes.*

Q. *What do you mean only sometimes?*

A. *Only sometimes when he wants to be with me I agree and sometimes I don't.*

Q. *It is those times that you agreed that you two had sexual intercourse?*

A. *Yes.*

Q. *Those times you wouldn't want to have sexual intercourse with him there was no sexual intercourse?*

A. Yes.

- [19] The main issue of contention in this case is the issue of consent. The accused has testified in Court and totally denies the charge of Rape against him. He submits that all acts of sexual intercourse with the complainant took place with her consent.
- [20] The position taken up by the prosecution is that the complainant did not consent to have sexual intercourse with him. The prosecution position is that the accused had groomed the complainant to have sexual intercourse with him from the time she was in Class 7 and that the accused used his authority and control over the complainant or that he took advantage of the complainant's young age and innocence to have sexual intercourse with her.
- [21] In this case, in her evidence-in-chief the complainant stated that she did not agree or consent to the acts of sexual intercourse with the accused. In cross-examination the complainant said that 'only sometimes' she agreed or consented.
- [22] It is my opinion that considering the complainant's tender age and circumstances at the time, even if she had consented to have sexual intercourse with the accused at any time, the said consent would not have been freely and voluntarily given by her.
- [23] Therefore, in my opinion, the defence version cannot be accepted. It is my considered opinion that the complainant's evidence, especially what she testified to in her evidence-in-chief, can be accepted as truthful, credible and reliable.
- [24] The Assessors have found the evidence of the prosecution as truthful and reliable as they have by their unanimous decision found the accused guilty of the charge of Rape. Therefore, it is clear that they have rejected the position taken up by the accused.
- [25] 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 charge of Rape.
- [26] 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 charge of Rape with which the accused is charged.



[27] In the circumstances, I find the accused guilty of the Count of Rape as charged.

[28] Accordingly, I convict the accused of the Count of Rape as charged.



  
Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT SUVA

Dated this 29<sup>th</sup> Day of January 2021

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.

Solicitors for the Accused : Office of the Legal Aid Commission, Suva.