

IN THE HIGH COURT OF FIJI  
AT LABASA  
CRIMINAL JURISDICTION

Criminal Case No. HAC 11 of 2013

BETWEEN: THE STATE

A N D:

1. ILAITIA TUBETA
2. JOVESA VUDIDRA
3. ILIESA TURAGANILALI
4. ILAITIA NAIGANI
- 5 LAISENIA VOSAYACO
6. ANARE BARO
7. OSEA GOLEA
8. TEMESI COKOBOA

Counsel: Ms. P. Low and Mr. M. Maitava for the State  
Ms. M. Lemaki for 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Accused  
Mr. R. Tagivakatini for 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> accused

Date of Hearing : 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> May 2014  
Date of Summing Up : 16<sup>th</sup> May 2014  
Date of Judgment : 16<sup>th</sup> May 2014

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## JUDGMENT

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01. The above mentioned eight (08) accused are been charged with one count of 'Rape' contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

02. The charge and the particulars of offence are as follows:

**First Count**

*Statement of Offence*

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

*Particulars of Offence*

**ILAITIA TUBETA, JOVESA VUDIDRA, ILIESA TURAGANILALI, ILAITIA NAIGANI, LAISENIA VOSAYACO, ANARE BARO, OSEA GOLEA, TEMESI COKOBOA** between 2<sup>nd</sup> January 2013 to 3<sup>rd</sup> January 2013 at Korosi, Savusavu in the Northern Division, penetrated the vagina of A. D. with their penises one at a time without A. D.'s consent.

03. After a full trial of 2 weeks, the assessors came out with a divided opinion. The two lady assessors found all the eight (08) accused 'NOT GUILTY' as charged, whilst the gentleman assessor found them all 'GUILTY'.
04. According to Ms. A. D., the alleged victim, she was raped by all the eight accused on the 2<sup>nd</sup> January 2013 night at the 'vacant house' or the 'ghetto'. She said she did not 'consent' to any of the accused to have 'sex' with her. But she admitted that she went out of Marica's house after midnight with the 1<sup>st</sup> accused and in fact, entered to the 'ghetto'. Upon answering a specific question from court she said that the 1<sup>st</sup> accused did not force or threaten her to go inside and she could have even stayed on the road until the 2<sup>nd</sup> accused returned.
05. At the same time, she admitted that apart from 1<sup>st</sup> and 2<sup>nd</sup> accused pushing her down on the floor, no threats or violence used over her by anybody, whilst they having 'sex' with her. It was further agreed by her that he knew that this 'ghetto' is been used by the village boys to spend the nights. Most importantly, the three (03) close by houses, just 20 – 30 feet away, were occupied by her relatives and by the time she entered the 'ghetto', she had seen the occupants are yet to sleep.

06. She admitted that she did not raise alarms or cried for help or attempted to run away, even though all the doors (03) and windows (02) of the 'ghetto' were kept open in that night. She agreed that the neighbourhood would have come to her help, had she raised alarms.
07. After all, she had gone back to her aunty's house with the 1<sup>st</sup> accused and admitted that he told her to go home. Ms. A. D. comes into light once again only on 06<sup>th</sup> of January 2013 when police officers from Savusavu came to question her over her uncle's complaint. She agreed that it was her uncle who had reported the matter to police without consulting her. It was told to Dr. Lingam by Ms. A. D. that she was raped by '06 Fijian boys'. The caution interview statement of the 1<sup>st</sup> accused had been recorded even before the statement of Ms. A. D. was written down. The allegation put to him by the police was that he along with 06 others had raped Ms. A. D.
08. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> accused took up the stand that they had sexual intercourse with Ms. A. D. on this particular night with consent. The 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> accused totally denied the allegation. In this context, the decisive factor of this trial was 'whether Ms. A. D. consented to have sexual intercourse or not'. She plainly said 'NO'.
09. According to Blackstone's Criminal Practice 2011; (page 283), "Consent covers a range behavior from whole hearted enthusiastic agreement, to reluctant acquiescence". It is always been a debatable point whether 'consent' means 'subjectively consented' in the victim's mind or 'objectively consented' in her words and deeds. It was said in the State v. Vilikesa Ramaqa and 3 others, Criminal Case No. HAC 003 of 2011 that,

*"This court has stated many a times that the mechanism operates in the mind of a rape victim at the time of the incident cannot be mathematically enumerated. Victims will react differently to the crisis. That is something natural, as in day to day events, we see different people reacting in drastically different ways even in a small crisis. Therefore, it is not correct for somebody to say that she could have run away or raised alarms or hit the assailants or bit his body. It is acceptable that the way one behaves in a crisis, especially in a situation of a rape, spreads in a very broad spectrum. That is why the law does not treat a victim of sexual offence like an accomplice to the crime anymore and allows her to come forward without any*

*corroborative evidence. That is why the law does not expect a rape victim to show her physical injuries to support her resistance to the act. The fact that the law provides lot of facilities to ease the victims of sexual offences does not mean that the prosecution is relieved proving their case beyond reasonable doubt, against the accused."*

10. The learned prosecutor argued that a young girl is not prohibited of going out of the house in the mid night with a boy. Taking to a boy in an isolated place does not mean that she had extended an invitation to treat. She said that the alleged victim got really weak and helpless with the forceful sexual acts of eight (08) young boys and could not cry for help. This court has no disagreement with those suggestions, at least to a greater extent. Yet for all, there are two points that this court cannot reconcile with the prosecution story. When Ms. A. D. went inside the 'ghetto' whilst knowing the fact that it is been used by the village boys to spend the night, especially after mid night, is it probable to assume that it is only to listen to the 'vibrant stories' of the 1<sup>st</sup> accused? Then, is it the normal human conduct to accompany with the 1<sup>st</sup> accused, after the chaotic or rather catastrophic incidents, to her aunt's place, go to sleep as if nothing has happened and maintain a stoic silence until the police arrived?
11. Is it only because of the fear of disbelieving by the parents and relatives or been embarrassed with shame? If we are to accept this version, where are we going to draw the line to demarcate the 'consensual' and 'non-consensual' sexual intercourse? At what exact point an alleged victim of a sexual offence should break her silence? Though it cannot be any mathematically enumerated time space, it cannot be extended to an indefinite period as well. Thus, at least it should be within a 'reasonable time frame'.
12. In coming back to the matter in hand, one might ask that had Semesa did not divulge what he witnessed to Ms. A. D. 's uncle, could it be possible for Ms. A. D. to remain silent for a longer period than she was? Or else, could it be possible for her to maintain her silence, if the rumours did not start spreading around the village about this night? On the other hand, as the learned prosecutor suggested, though Semesa's subsequent conduct can be justified by not telling this to anybody to prevent further incidents, his reactions could have been totally different inside the 'ghetto' had there been any 'crisis'. Finally, the inconclusive

opinion of the doctor who examined Ms. A. D. highlights the facts that she had been sexually active prior to this incident and the non-availability of any injuries, apart from a minor bruise.

13. Therefore, the probability factor of Ms. A. D.'s narration; not to raise alarm or cry for help or disclose her experience to somebody as soon as practically possible, does not echo in favour of her. It is a totally opposite response to a normal human conduct, when considering the nature of a girl who was actively interacting with the society, especially hovering around the village even at mid-nights and been sexually active.
14. In the light of the above discussed facts, this court is inclined to accept the version of Ms. A. D. The prosecution did not establish beyond reasonable doubt that Ms. A. D. did not consent to have sexual intercourse with the accused as charged. Thus, I see no point going beyond this point to consider the versions of the accused.
15. This court agrees with the majority opinion of the assessors.
16. All eight accused are found "NOT GUILTY" to the charge of 'Rape' contrary to section 207 (1) (2) (a) of the Crimes Decree 2009 and acquitted accordingly.
17. That is the Judgment of court.



A handwritten signature in blue ink, appearing to be "Janaka Bandara".

Janaka Bandara  
Judge

**At Labasa**  
Office of the Director of Prosecution for State  
Office of the Legal Aid Commission for Accused