

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

**CRIMINAL CASE NO: HAC. 306 OF 2014**

**STATE**

**V**

**EPELI WAQANITABUA KELEI**

**Counsel** : Ms. S. Puamau for State  
Ms. T. Kean for the Accused

**Dates of Hearing** : 08<sup>th</sup> & 09<sup>th</sup> June 2016

**Date of Summing Up:** 09<sup>th</sup> June 2016

**Date of Judgment** : 10<sup>th</sup> June 2016

**JUDGMENT**

1. The accused is charged for the following offences;

***FIRST COUNT***

*Statement of offence*

**Rape:** Contrary to Section 207 (1) and (2)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of offence*

**EPELI WAQANITABUA KELEI** on the 13<sup>th</sup> day of November 2014 at Samabula in the Central Division had carnal knowledge of **MAY MAFTUNA**, without her consent.

***SECOND COUNT***

*Statement of offence*

**Rape:** Contrary to Section 207 (1) and (2)(b) of the Crimes Decree No. 44 of 2009.

*Particulars of offence (b)*

**EPELI WAQANITABUA KELEI** on the 13<sup>th</sup> day of November 2014 at Samabula in the Central Division penetrated the vagina of **MAY MAFTUNA**, with his finger, without her consent.

***THIRD COUNT***

*Statement of offence*

**Indecent Assault:** Contrary to Section 212 (1) of the Crimes Decree No. 44 of 2009.

*Particulars of offence (b)*

**EPELI WAQANITABUA KELEI** on the 13<sup>th</sup> day of November 2014 at Samabula in the Central Division unlawfully and indecently assaulted **MAY MAFTUNA**, by kissing her on her lips.

2. The assessors have returned with a unanimous opinion that the accused is guilty of all the above charges.
3. I direct myself in accordance with the summing up delivered to the assessors on 09<sup>th</sup> June 2016 and the evidence adduced during the trial.
4. The complainant was the only witness for the prosecution. The accused gave sworn evidence.
5. With regard to the first count, the accused admits that he had sexual intercourse with the complainant, but he says it was consensual. With regard to the second and third counts, the accused denies that he penetrated the complainant's vagina with his fingers and that he kissed the complainant.
6. I accept the complainant's evidence given before this court. The account she gave regarding what took place on 13<sup>th</sup> November 2014 is reliable. I cannot agree with the defence counsel that the complainant is not a reliable witness in view of the inconsistency which was highlighted in her evidence. In her statement recorded by the police it is written that when she realised that the accused is having sexual intercourse with her it was 4.00am. She gave evidence to the effect that it was 4.00am when she went to the bathroom which suggests that the time that the sexual intercourse took place is not 4.00am that morning but at a time later than that. In my view, this inconsistency is not

material or significant enough to make the complainant an unreliable witness. I also find that she was not drunk to an extent that her judgment was impaired during the time material to this case though there was evidence that she had consumed alcohol prior to the incidents.

7. Though I appreciate the accused's assistance in this case to reduce the trial issues in relation to the first count by admitting the fact that he had sexual intercourse with the complainant, I do not find his evidence credible and reliable considering all the evidence led in this case.
8. Therefore, I agree with the unanimous opinion of the assessors that the accused is guilty of the first count and of the third count. It was open for them to reach that conclusion on the strength of the evidence.
9. I have reservations in respect of the second count. The prosecution relied on circumstantial evidence to prove the second count. Complainant's evidence was that she felt a pain inside her vagina as if two fingers were moving inside. She did not see the accused penetrating her vagina with his fingers. In fact she did not see anyone in her room immediately after she felt the pain. Though she said that it was the accused's fingers that caused the pain she felt in her vagina, the prosecution did not offer any clarification through her, as to how and why she say so when she did not see anyone inserting fingers into her vagina.
10. In my view, the reason for her to conclude that it was the accused who caused the pain she felt may have been because she found the accused having sexual intercourse with her the next time she woke up after feeling that pain. Further, according to her, at that time, only her one year old daughter, her parents, her brother and the accused were at her house. So it is quite reasonable for her to point the finger at the accused as she would not expect anyone else who was there in the house at that time to do such an act. I have no doubt that the assessors' thinking would also have been in this same line.
11. However, the standard of proof applicable to a criminal trial is proof beyond reasonable doubt. In my view, the prosecution failed to adduce sufficient evidence to exclude the possibility of anyone else apart from the accused penetrating the vagina of the complainant in relation to the second count. Moreover, the complainant herself was not

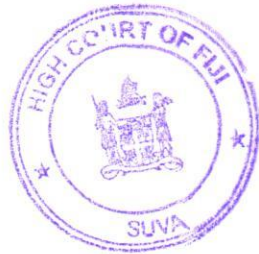


sure whether she was dreaming or not when she woke up after she felt the pain. There is a doubt whether in fact there was penetration.

12. For the reasons above, I find that the prosecution has failed to prove the second count beyond reasonable doubt and therefore I am unable to agree with the opinion of the assessors that the accused is guilty of the second count.

13. In the circumstances, I find the accused guilty of the first and the third counts and convict him accordingly.

14. I find the accused not guilty of the second count and acquit him of the second count.



Vinsent S. Perera

JUDGE

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