

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

**Crim. Case No: HAC 04 of 2013**

**STATE**

**vs.**

**LEPANI LIKUNITOGA**

**Counsel:** Ms. J. Fatiaki for the State  
Mr. K. N. Chang with Ms. N. Mishra for the Accused

**Date of Hearing:** 10<sup>th</sup> and 11<sup>th</sup> December 2018

**Date of Summing Up:** 13<sup>th</sup> December 2018

**Date of Judgment:** 13<sup>th</sup> December 2018

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**JUDGMENT**

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1. The accused has been charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act and one count of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act. The particulars of the offences are that:

**FIRST COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**LEPANI LIKUNITOGA** on the 26<sup>th</sup> day of December 2012, at the Suva in the Central Division, raped **ADI NANISE TARAILAGI** by having carnal knowledge of the said **ADI NANISE TARAILAGI** without her consent.

**SECOND COUNT**

*Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (b) of the Crimes Act 2009.

*Particulars of Offence*

**LEPANI LIKUNITOGA** on the 26<sup>th</sup> day of December 2012, at the Suva in the Central Division, raped **ADI NANISE TARAILAGI** by penetrating the vagina of the said **ADI NANISE TARAILAGI** with his tongue without her consent.

2. The hearing commenced on the 10th of December 2018 and concluded on the 11th of December 2018. The prosecution presented the evidence of two witnesses, including the complainant. The accused gave evidence on oath, but did not call any other witnesses for the defence. Subsequently, the learned counsel for the prosecution and the defence made their respective closing addresses. I then delivered by summing up.
3. The three assessors returned with unanimous opinion that the accused guilty to first count. In respect of the second count, the three assessors unanimously found the accused not guilty.
4. Having carefully taken into consideration the evidence presented during the hearing, the respective closing addresses of the counsel, the summing up and the opinions of the three assessors, I now pronounce my judgment as follows.

5. The prosecution and the defence presented conflicting versions of events, which took place in private between the complainant and the accused. The complainant claims that the accused had sexual intercourse with her without her consent by penetrating into her vagina with his tongue and then the penis. The accused claims that it was a consensual intercourse and he never penetrated her vagina with his tongue. Both the prosecution and the defence did not dispute having a penile sexual intercourse on the 26th of December 2012, however, the accused denied that he penetrated his tongue into the vagina of the complainant.
6. The issue of the existence of consent for an alleged sexual intercourse that took place in private between two persons is always involving with believing of the version of a person against another's. Hence, in order to determine whether the complainant gave the consent, it is important to consider how the complainant and the accused behave before and after the alleged sexual intercourse.
7. The complainant had straight away gone to the police station soon after this incident took place. Mr. Viori, in his evidence, though he claimed that he could not remember much of the events that took place on the 26th of December 2012, said that the lady requested him to accompany her to the police station as the security officer has done something to her. Having taken into consideration the whole of the evidence, if the complainant consented to have sexual intercourse with the accused in return for \$2 of her bus fare, there is no reasons for her to straight away went to the police station and lodged a report regarding this incident.
8. I now take my attention to consider the inconsistency nature of the evidence given by the complainant in the court, with the statement that she made to the police regarding the manner that the accused undressed himself prior to this alleged incident. Having considered the whole of the evidence presented during the hearing, I do not find the said inconsistency has affected the credibility of the evidence given by the complainant.

9. The complainant was asked twice by the learned counsel for the defence that the accused only penetrated into her vagina with his penis. The complainant denied it and said that he penetrated into her vagina with his tongue as well.
10. The accused in his evidence said that he was asked by the male partner of the complainant to go back to the place where they were, and wait for the complainant, after they made the agreement to have sexual intercourse with the complainant in return of her bus fare. He has gone to the place and waited for sometimes but the complainant did not come. The accused had then gone back to them to inquire about it. He had done that twice and only the third time the complainant came and sat beside him. The accused was sitting on the floor when the complainant came and sat beside him. The learned counsel for the defence never put this version of event to the complainant to make her comments when she gave evidence. The learned counsel only cross examined the complainant about the inconsistent nature of her evidence with the statement she made. The issues raised in the evidence of the accused are significantly important to determine whether the complainant gave her consent. The failure of the defence to question the complainant on this issue, has adversely affected the credibility of the evidence given by the accused. The accused in his evidence admitted that he was arrested by the police for this allegation on the same day, that was on the 26th of December 2012, which confirms that the complainant had reported the matter to the police on the same day that alleged incident took place.
11. In view of these reasons, I find the evidence given by the accused is not credible and reliable. Hence, I refuse the evidence given by the accused. Moreover, I find that the evidence given by the accused has failed to create any reasonable doubt about the case of the prosecution.
12. The complainant was straight and coherent in giving evidence pertaining to the main elements of these offences. She specially stated that the accused not only penetrated his penis, but also his tongue into her vagina without her consent during this incident. Accordingly, I find that the prosecution has successfully proven that the accused had

penetrated the vagina of the complainant with his tongue and then with his penis on the 26th of December 2012 without the consent of the complainant.

13. In view of these reasons, I do not find any cogent reasons to disagree with the unanimous opinion of guilty given by the three assessors in respect of the first count. Furthermore, I find cogent reasons to disagree with the unanimous opinion of not guilty given by the three assessors in respect of the second count.
14. In conclusion, I hold that the accused is guilty to each of these two counts as charged and convict him for the same accordingly.



  
R.D.R.T. Rajasinghe  
Judge

**At Suva**

13<sup>th</sup> December 2018

**Solicitors**

Office of the Director of Public Prosecutions for the State.  
Office of the Legal Aid Commission for the Defence.