

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 53 OF 2014

STATE

v

- 1. AME TUIVITI**
- 2. VANAVASA DAVE**
- 3. KELEMETE LEPANI YAMOYAMO**
- 4. PENI GUSUIVALU**

Counsel:	Ms R. Uce/ Mr Seruvatu	for State
	Ms L. Volau	for 1st and 4th Accused
	Ms V. Diroi	for 2nd Accused
	Ms K. Vulimainadave	for 3rd Accused

Dates of Trial: 21st to 25th January, 2019

Date of Summing Up: 28th January, 2019

SUMMING UP

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be

recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.

2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the counsel. They were their arguments, which you may properly take into account when evaluating the evidence. It is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law that accused persons are innocent until they are proved guilty. The burden of proving guilt of each accused person rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find an accused guilty, you must be satisfied so that you are sure

of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.

9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this court room. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial. 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.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to.
12. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have

expected to hear, and form your opinion strictly on the evidence you have heard from the witnesses.

13. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a complainant in a rape case such as this should react to the experience. Any person who has been raped, will have undergone trauma whether the accused were known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in court or at the police station. The experience of the courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.
14. As assessors you were chosen from the community. You, individually and collectively represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
15. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.
16. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth.
17. The agreed facts of this case are that:
 - I. It is agreed that the Complainant in this matter is Vilisi Naiba Tabusoi, 16 years old of Matawailevu Village, Ra, and a Vocational student of Ra High School.

- II. It is agreed that the first Accused is Ame Tuiviti, 17 years old of Burenitu, Nalawa, Ra, a Vocational student of Ra High School.
- III. It is agreed that second Accused person is Vanavasa Dave, also known as Panapasa, 18 years old of Nausori Village, Nalawa, Ra, a Vocational student of Ra High School.
- IV. It is agreed that the third Accused person is Kelemete Lepani Yamoyamo, 19 years old of Burenitu Village, Nalawa, Ra, a Vocational student of Ra High School.
- V. It is agreed that the fourth Accused person is Peri Gusuivalu, 17 years old of Nailawa Village, Saivou, Ra, a Form student of Ra High School.
- VI. It is agreed that on the 10th of April 2014, the Complainant and all the accused persons were all present at school, attending school.
- VII. It is agreed that the first Accused Ame Tuiviti was caution interviewed in the itaukei language on the 15th of April 2014 by DC 3920 Sailosi Bawaqa.
- VIII. It is agreed that on the 15th of April 2014, Ame Tuiviti was formally charged in the iTaukei language by CPL Levani, with his father Waisea Rokosamu present.
- IX. It is agreed that the second Accused Vanavasa Dave was caution interviewed in the iTaukei language on the 14th of April 2014 by DC 3917 Paul Gock, with his father Waisea Rokosamu present.
- X. It is agreed that on the 14th of April 2014, Vanavasa Dave was formally charged in the iTaukei language by CPL Levani.
- XI. It is agreed that the third Accused Kelemete Lepani Yamoyamo was cautioned interviewed in the English language on the 14th of April 2014 by D/SGT 2204 Anoop.
- XII. It is agreed that on the 15th of April 2014, Kelemete Lepani Yamoyamo was formally charged in the English language by DIP Isireli Vananalagi.

1. It is agreed that the fourth Accused Peni Gusuivalu was caution interviewed in the iTaukei language on the 14th of April 2014 by CPL 2319 Levani, with his mother Mere Gusuivalu present.
 2. It is agreed that on the 15th of April 2014, Peni Gusuivalu was formally charged in the iTaukei language by DIP Isireli Vananalagi, with his mother Mere Gusuivalu present.
18. Each accused is charged with one count of Rape. The Information reads as follows:

CHARGE STATEMENT

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

AME TUIVITI on the 10th day of April 2014 at Rakiraki in the Western Division, had carnal knowledge of **VILISI NAIBA TABUSOI** without the consent of **VILISI NAIBA TABUSOI**.

Second Count

Statement of Offence

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

Particulars of Offence

VANAVASA DAVE on the 10th day of April 2014 at Rakiraki in the Western Division, had carnal knowledge of **VILISI NAIBA TABUSOI** without the consent of **VILISI NAIBA TABUSOI**.

Third Count

Statement of Offence

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

Particulars of Offence

KELEMETE LEPANI YAMOYAMO on the 10th day of April 2014 at Rakiraki in the Western Division, had carnal knowledge of **VILISI NAIBA TABUSOI** without the consent of **VILISI NAIBA TABUSOI**.

Fourth Count

Statement of Offence

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

Particulars of Offence

PENI GUSUIVALU on the 10th day of April 2014 at Rakiraki in the Western Division, had carnal knowledge of **VILISI NAIBA TABUSOI** without the consent of **VILISI NAIBA TABUSOI**.

19. I will now deal with the elements of the offence of Rape. A person rapes another person if:
- (a) The person has carnal knowledge with or of the other person without other person's consent; or
 - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
 - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
 - (d) The person knew or believed that the complainant was not consenting, or he was reckless as to whether or not she was consenting.

20. Insertion of penis fully into vagina is not necessary. Slightest penetration is sufficient to satisfy this element.
21. Consent as defined in Section 206 of the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. Consent obtained by force, threat or intimidation is not voluntary. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.
22. According to the Crimes Act, the offence of Rape requires proof that the complainant did not consent. The offence may or may not be accompanied by force or the threat of force, but please note that it is no part of the Prosecution's obligation to prove that the accused used force or the threat of force.
23. If you accept that the complainant was not consenting you must ask yourself did the accused know that she was not consenting, and if not, was that a reasonably held belief, or was the accused reckless in going on knowing that she might not be consenting. In the circumstances of this case you consider whether each accused knew or it was reasonable for him to believe that she was consenting.
24. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.
25. In the course of cross-examination, Prosecution and Defence counsel referred to previous statements of witnesses recorded by police. A previous statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath as being true. You can of course use those statements to test

the consistency and credibility of the witness if you are satisfied that such a statement was made.

26. I now wish to direct you on recent complaint evidence. You heard that the victim said that she relayed the incident to her aunt Salaseini on the following day of the alleged incident. Salaseini gave evidence and said that she received a complaint from the complainant on 11th April, 2014 that she was raped by four students in her school. However, Salaseini was not present when the alleged incident happened and therefore, she is not capable of giving evidence as to what actually happened between the complainant and the accused. What she heard from the complainant is not evidence as to what actually happened between the complainant and the accused. Recent complaint evidence is led to show consistency in the conduct of the complainant and is relevant in assessing her credibility. If you are satisfied that Salaseini is a credible witness, than you may use the complaint she received to test the consistency and credibility of the victim.
27. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witnesses' demeanor in the witness box when answering questions. How did they conduct themselves in Court? In general, what was their demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
28. Proof can be established only through evidence. Evidence can be direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. In this case, for example, the complainant was a witness who offered direct evidence as to what she saw, heard or felt. You are also free to draw reasonable inferences if such inferences are based on facts proved by evidence and reasonable in the circumstances of this case.
29. In testing the credibility of a witness, you can consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

30. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in this case, complaint complainant made to police is genuine and what weight you attach to the complaint she eventually made.
31. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told court contradicts with his/her earlier version. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another, for example by a police officer, in recording the statement where the witness is alleged to have given that version.
32. You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.
33. You must consider the case against each accused separately. In doing this you must carefully distinguish between the evidence against one accused and the evidence against the other.
34. You may also see whether there is a motive or obvious reason to fabricate a false allegation against the accused. If there is an obvious reason to make up a case, then you may attach less weight to complainant's evidence.

35. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
36. I will now deal with the summary of evidence in this case. In doing this, I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision in this case.

PW 1 Vilisi N. Tabusoi (Complainant)

37. Vilisi said that in 2014 she was residing in Matawailevu with her aunt Salaseini and grandfather Peniasi. She was a vocational student at Ra High School at that time.
38. On 10th of April 2014, Vilisi was at school. During lunch time one vocational student by the name of Timoci invited her to have lunch together at a cassava plantation besides their classroom. Esita also joined for lunch. While Vilisi and Esita were having lunch, Ame and Kelemete came and joined them. Thereafter Joni and Dave also came and joined them.
39. After that Ame informed Vilisi to go and pick some guavas from a nearby tree. She then went to pick the guavas. Esita was following her. Ame followed Esita. While Vilisi was walking in front, she heard Esita shouting. When she looked back she saw Ame lifting Esita and throwing her on the grass.
40. While Vilisi was returning back to Esita, she met Joni and they went and informed other vocational students what Ame did to Esita.
41. Vilisi then went to look for her school bag to go back to the classroom. Dave was using it as a pillow as he was lying down. On her way back to school, she met

Ame who informed her to go and sit under a tree to tell stories. Then she went to the same place where she initially went to pick guavas. Vilisi started telling stories sitting on a wood with Ame while the rest of the boys went back to school with Esita.

42. Vilisi saw Ame and Dave signaling to each other as Dave went. She was holding a stick and informed Ame that if he did something to her, she will hit him with that stick. When Ame promised that he won't do anything to her, she gave the stick to Ame who then threw it away. On her way back, **Ame pushed her on the ground to be landed on the grass facing upward. Ame then tried to remove her skirt but, he couldn't because she was struggling. She wanted to shout but Ame closed her mouth.** Ame then called Dave. When Dave came, Dave saw her, but Dave did not say anything and went back.
43. While Vilisi was lying down, Ame was sitting on his knees just besides her holding both of her hands with his one hand. **Then Ame removed Vilisi's panty with the other hand and put his male part into her female part. When she shouted he used his one hand to cover her mouth. She did not like what he did. She tried to release herself by pushing him but she couldn't because he was holding on to her. He was strong. He was having carnal knowledge of her for 5 minutes while she was struggling.**
44. After that Ame sat down and called Dave while sitting beside her and holding her hands. When Dave came, Ame stood up. **Vilisi tried to stand up but Dave came and held her hand. She could not scream or shout out for help because, when Ame stood up, Dave came and closed her mouth. Dave lifted her skirt and put his male part into her female part for five minutes while she was struggling to release herself by pushing him away. Vilisi did not like what Dave did to her. Vilisi didn't try to scream or shout out for help because when she wanted to shout, Dave covered her mouth.**
45. After that Dave called Kelemete while she was still lying down. When Kelemete came, Dave left. **When she wanted to get away from there, Kelemete came, pushed her back to the ground and held her and he sat down.** Kelemete informed her that *"I usually call you before but you were very hard to get, now you want this to be done to you"*.

46. **He was having carnal knowledge of her. She was trying to release herself. When he kissed, she bit his tongue. After a while he stood up because he saw his tongue bleeding. She did not like what Kelemete was doing to her. She did not agree for Kelemete to have carnal knowledge of her.** Then he went and washed his tongue in the small creek. She stood up, wore her panty and went looking for her bag from Dave. On her way, she met Ame. Ame informed her that her nose is bleeding. On her way to meet Dave to get the bag, she met Timoci. She complained to Timoci of what happened. Timoci went and brought her bag. After that Navi also came and asked her what they did to her. She said 'nothing'. Then Navi informed her that Ame and Dave were talking to each other about what they did to her.
47. Navi informed her not to be in school and take the short cut and go home. She didn't go straight to school after the incident to complain to the teachers because there was soil all over her shirt and also blood from Kelemete's tongue.
48. Once Timoci arrived with her bag, she informed them that she did not know the short cut to Raghwa's Shop. Navi informed her that Timoci will show her the short cut. She went towards Raghwa's Shop and sat down besides Raghwa's Shop. She saw that some students were also there.
49. Ben came towards her and asked Vilisi what Ame and others did to her. She informed him 'nothing'. Ben then asked her who her boyfriend was in school. She told him 'no one'. **Then he asked if he could be her boyfriend. When she said 'no', he said that he also want to have carnal knowledge of her. She said 'no'. Ben then said that if she did not agree, he will inform the whole school what the vocational students did to her. He insisted that they have carnal knowledge. When she kept on informing him "no", he pushed her and removed her panty. She did not try to stop him from removing her panty, but she told him not to do so. But he proceeded to remove her panty and put his male part into her female part for three minutes whilst sitting on his knees. She pushed him on his chest. She did not like what Ben was doing. She did not agree for Ben to have carnal knowledge of her.** She did not shout or scream because plenty boys were standing at the Raghwa Shop; she thought that if she shouted, they will come not to help but they too will want to have carnal knowledge of her.

50. After having carnal knowledge, Ben stood up and informed her not to inform anyone of what he had done to her. He then went to the bus stop to wait for the school bus. She also went to the bus stop, only to find that the bus had already gone. So she walked down from school to Matawailevu.
51. Vilisi said that she did not go to school to complain to teachers because teachers had already left. When she reached home, her grandfather scolded her because she was late. She did not say anything that evening because she was scared to inform after being scolded by grandfather. The next morning when her aunty asked her to go to school, she informed her aunty what had happened to her at school on Thursday. Aunty asked her to go to school. Aunty informed that she will go to the police station. When aunty went to the police station, her teacher Ms Poe's and Esita's reports were already there.
52. Vilisi said that when she went to school in the following morning, she did not relate the incident to anyone. She did not go directly to school but went to girl's dorm because the boys were talking about the incident.
53. Under cross-examination by Ms. Volau on behalf of the 1st accused, Vilisi admitted that she was earlier in a girlfriend- boyfriend relationship with Ame only for a week. She admitted that she had met Ame once at the teacher's quarters, and Ame had forced her to have sexual intercourse with him. She admitted that she did not report the first incident to police.
54. Vilisi denied that she agreed to the request of Ame to go and pick guavas because she was still in a relationship with Ame. She admitted that even after the first incident, she agreed to go and sit underneath a tree and tell stories with Ame. She said that she only agreed to talk to him as a friend and come-back. Vilisi said that she had put an end to the relationship with Ame when he forced her at the teacher's quarters.
55. Vilisi admitted that she did not receive any injuries although she was pushed hard on the grass. She said she received only grass cuts while struggling to free herself. She denied that she did not shout and kick because she had agreed to have sex with Ame. She admitted that she did not complain to teachers at Ra

High School. She denied that she reported the matter only because she wanted to save herself when she learnt that the students were talking about what had happened to her. She denied that she informed her aunt about the incident only after her teacher had questioned about it.

56. Under cross examination by Ms. Diroi, Vilisi said that even though her teacher Ms Poe had given specific instructions to have lunch inside the classroom, she decided to have lunch outside because one Timoci had invited her for lunch. She admitted that she met with Ame although she had seen Esita was being thrown to the ground by Ame upon which Esita started crying. She denied that she did not shout when Dave approached her because she had consented to have sexual intercourse with Dave.
57. Explaining the alleged contradiction with her statement to police, Vilisi said that Ms. Poe didn't question her, but she only called her and asked about the incidents. Vilisi said that she informed her aunt about the incidents on the following morning (11th) before she left for school. She admitted that she was just hanging around the cassava plantation for some time before going home after the first three incidents.
58. Under cross-examination by Ms Vulimainadave, Vilisi denied that she was waiting Kelemete to come and kneel in front of her after Dave had finished. She denied that Kelemete asked her in the Ra dialect that if he could have sex with her and asking Kelemete to "be quick with it".
59. She denied that whilst Kelemete was trying to pull down his trousers and getting himself ready, she accidentally jerked her knee up, and her knee had hit Kelemete's lips. She admitted that whilst sexual intercourse was in progress, Kelemete started bleeding and the blood dropped on her shirt. She denied that the police had come to school to investigate about missing rugby boots of Saula.

60. Under Cross-examination by Ms Volau on behalf of the 4th accused, Vilisi said that she informed Timoci and Navi what Ame, Dave and Kelemete did to her. She said that Ben already knew what had happened to her because he was with Ame and Dave. Vilisi said that she was sitting in the cassava plantation behind Ragwa Shop when Ben came to her and asked her to have sexual intercourse with him. She admitted that she did not run away from the cassava plantation when Ben asked her to have sex with him. Vilisi denied that she did not shout for help or kick because she had consented to have sexual intercourse with Ben.
61. Vilisi said that she was lying down flat on to the ground and Ben was on his knees when the sexual intercourse took place. She admitted that the police came to school on 11th April 2014 and her statement was recorded on 12th April, 2014. She said that she never reported the matter to Ms. Poe when she went to school on the 11th but Ms. Poe called her and asked about the incident and she told her everying. Then she said she did not tell Ms Poe but she told everything to police whe~~φ~~she was asked to do so by Ms. Poe.
62. Under re-examination, Vilisi, said that she did not go to school after having sex with Kelemete because she was ashamed that she had mud and blood marks on her shirt. She said that the class had already started half way through and she thought that, if she did go to school, other students would find it out. She said Ms. Poe had called her and told her to inform the police what happened.

PW 2 Salaseini Navo

63. Salaseini said that in the year 2014, she was residing in Matawailevu with her niece Vilisi Naiba who had come to her place for schooling. On 11th of April, 2014, she woke Vilisi up for her to go to school. When Vilisi woke up, she started crying and she informed her everything that had happened at school on the 10th

of April, 2014. Vilisi informed that four of the students that she was schooling with had raped her just beside her classroom.

64. While she was at home, Esita's father came and informed that he had come back from Waimecia Police Station and informed of what had happened. She was awaiting Vilisi's return from school for her to be taken to the hospital. When they were about to go to the hospital on 12th of April, the police vehicle from Waimecia came. They got in the vehicle and went to Rakiraki.
65. Under cross-examination by Ms Volau, Salaseini emphasized that she received the complaint from Vilisi on the 10th morning although in her statement to police it is sated that *'On Friday 11th of April 2014, she came home after school and informed me that she was raped by 4 male students of Ra High School on Thursday 10th of April, 2014 during lunch hour at the back of her classroom.'*
66. Under cross-examination by Ms Vulimainadave, Salaseini denied that she was lying in court to save her niece.
67. That was the case for the Prosecution.
68. When the Prosecution had closed its case, you heard me explain to the Accused persons their rights in defence that they could remain silent and say that the Prosecution had not proved the case beyond reasonable doubt; they could give evidence and be subjected to cross examination and call witnesses on their behalf.
69. You are aware that the 3rd and 4th accused elected to give evidence under oath although they had nothing to prove in this case. By electing to give evidence,

they assume no onus of proof. That remains on the Prosecution throughout. They are under no obligation to prove their innocence. Their evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

70. 1st and 2nd accused elected to exercise their right to remain silent. That is their right. You should not assume that they remained silent because they are guilty. They have nothing to prove in this case.

Case for Defence

DW 1 Kelemete Lepani Yamoyamo (3rd Accused)

71. Kelemete said that on 10th of April, 2014, during his lunch time at school, he went to have lunch with Ame, Joni, Panapasa and Navi under a teak tree. Vilisi and Esita were also there. After having lunch, he went to the classroom, wore his overall and went back to continue with his work at the toilet he was building.
72. From the place where he was building the toilet, he saw Ame and Vilisi talking to each other and after a while having sexual intercourse at the cassava plantation where they had lunch. He said he saw Ame was waiting for Vilisi to remove her clothes. Vilisi was lying down. She lifted her leg up and Ame came on top of her. When Ame finished, Dave went there.
73. Kelemete said that Ame came to him and informed that Vilisi and Dave were having sexual intercourse. He asked Ame if he also can have sexual intercourse. Ame asked him to just go down there. When he reached there, Dave stood up. He asked Dave if he (Dave) could ask Vilisi if he could also have sex with her.

Dave asked '*Vilisi please you also have sex with Kele*'. Then Vilisi said, "yes". Dave informed him that Vilisi has agreed for him to stay with her.

74. Kelemete said that he himself asked Vilisi once again. Vilisi agreed and said, "*be fast before the siren goes*". Vilisi was lying down. Her leg was lifted up and both of her hands were on her forehead. He removed his overall and trousers and they stayed together. When he informed her to move up, she lifted her leg up and, when she did that, her knee hit his mouth. He laid on top of her and had sex. While they were having sex he felt blood coming from his mouth. He saw blood dripping from his mouth. Blood did not drip on her shirt it dripped on to her mouth. He could feel his lips stink. He stood up, wore his clothes and went down to the small creek to wash his mouth.
75. On the 11th of April 2014, he was in school. Vilisi and Esita were questioned by two police officers about missing rugby boots of Saula who had reported it to police.
76. Under cross examination by Ms. Uce, Kelemete denied the proposition that he was not constructing a toilet and that he did not see Ame and Vilisi having sexual intercourse. He later admitted that, in his statement to police, it is stated that he was in the classroom when Dave had told him to go with him to the plantation as Ame had already fixed and had sexual intercourse with Vilisi. He denied that he was wearing his uniform at the time of sexual intercourse although the police had so recorded. He denied that Vilisi had bit his tongue although, in his statement to police, it is stated that "*she bit my tongue*", and that when police officer asked- *Did you receive injury on your tongue?*, he had answered in the affirmative.
77. Under re-examination by Ms. Vulimainadave, Kelemete said that he informed the police that he wanted to change his disclosures when he learnt that his

statement is not correctly recorded by an Indian police officer but he admitted that he did not inform his counsel about it.

DW 2 Peni Gusuivalu / Ben (4th Accused)

78. Peni said that in the year 2014, he was sixteen (16) years old student attending Ra High School. On 10th April, 2014, after school, he went to Raghwar shop with his brother Kalaveti and 2 others. During lunch time, when he went to drop his brother's lunch, he heard from vocational students about the intercourse that took place and saw Vilisi following the short cut towards the fence behind Raghwar shop. He walked towards Vilisi to have a talk. He asked her if she is free, she said 'no'. He then asked Vilisi what happened at lunch time. She did not say anything and then he said '*that that thing was done to you'...*, '*if I could also have sex with you?*'.
79. Vilisi agreed and she wanted him to move a bit further into the cassava plantation, she removed her panty. He informed her not to lie down because the ground was a bit wet. They were then engaged in "dog style" sexual intercourse.
80. **Under cross Cross-examination**, Peni admitted that he was blackmailing Vilisi that if she did not agree to have sex with him he would tell other students what the boys did to her. He did not agree with his previous statement to police where he had allegedly stated that he laid on top of her.
81. Peni said under re-examination, that he just informed Vilisi so that she can give her consent for him to have sexual intercourse.

DW 3 Timoci Namuakalou

82. Timoci said that in 2014 he was attending Ra High School where he was doing vocational studies with about 11 students. He recalls Nacanieli, Viliame, Vacala, Joni, Navi, Gabirieli. He, as the Form Captain of his class, was looking after his class mates. He only remembers one Alesi and another Indian girl from the girl's class.
83. He said that he recalled of an incident in 2014 that police had come to school to investigate a complaint where one of the students had robbed money from another student. That is the only incident he recalls. The day before that incident they had lunch in the classroom and after lunch they were informed to meet up in the hall. There was a shop besides the classroom and there was only one road leading to that shop from the classroom. He said he did not meet with any of the female vocational students on that day.
84. Under cross-examination by Ms Uce, Timoci said that he did not know any girl by the name of Vilisi in 2014. He said that the accused were his classmates.

Analysis

85. The accused persons each charged with one count of rape. To find the accused guilty of rape in this case, the Prosecution must prove beyond reasonable doubt that each accused penetrated complainant's vagina with his penis, without her consent. You have to consider evidence against each accused separately.
86. None of the accused denies sexual intercourse with the complainant. Therefore there is no dispute as to the first two elements of the offence of rape. Only dispute is in relation to the consent. The complainant says that all four accused forcefully had sexual intercourse with her without her consent. Accused on the other hand say that the complainant consented for them to have sexual intercourse with her. The case turns on one word against the other. The

resolution of the dispute depends on whether you accept the complainant as a truthful witness.

87. Prosecution called two witnesses and based its case substantially on the evidence of the complainant. If you are satisfied that the evidence she gave in court is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration is required.
88. You heard what the complainant said as to how she was forced by the 1st accused in relation to the 1st count. She said: *Ame pushed her on the ground and tried to remove her skirt but he couldn't because she was struggling. She wanted to shout but Ame closed her mouth. Then Ame removed Vilisi's panty with the other hand and put his male part into her female part. When she shouted he used his one hand to cover her mouth. She did not like what he did. She tried to release herself by pushing him but she couldn't because he was holding on to her. He was strong. He was having carnal knowledge of her for 5 minutes while she was struggling.*
89. Describing the 2nd alleged incident in relation to the 2nd count, complainant said: *she tried to stand up but Dave came and held her hand. She could not scream or shout out for help because Dave came and closed her mouth. Dave lifted her skirt and put his male part into her female part for five minutes while she was struggling to release herself by pushing him away. She did not like what Dave did to her. When she wanted to shout, Dave covered her mouth.*
90. Describing the 3rd alleged incident in relation to the 3rd count, complainant said: *When she wanted to get away from there, Kelemete came and pushed her back to the ground and held her and he sat down. She was trying to release herself. When he was having carnal knowledge of her, he kissed her. She bit his tongue. She did not like what he was doing to her. She did not agree for Kelemete to have carnal knowledge of her.*
91. In relation to the 4th count, the complainant said: *Ben asked if he could be her boyfriend. When she said 'no', he said that he also want to have carnal knowledge of her. She said 'no'. Ben then said that if she did not agree, he will inform the whole school what*

the vocational students did to her. He insisted that they have carnal knowledge. When she kept on informing him "no", he pushed her, removed her panty. She did not try to stop him from removing her panty, but she told him not to do so. He proceeded to remove her panty and put his male part into her female part for three minutes whilst sitting on his knees. She pushed him on his chest. She did not like what he was doing. She did not agree for Ben to have carnal knowledge of her. 4th accused admitted that he blackmailed the complainant to get her consent.

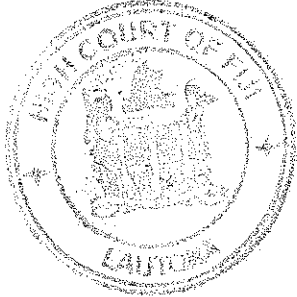
92. Having presented this evidence, Prosecution says that the complainant told the truth in court when she said that she was forced into sexual intercourse. To support its version, Prosecution relies on recent complaint evidence and her subsequent conduct to prove complainant's consistency. The complainant said that she relayed the incident promptly to Timoci at the school and on the following day, to her aunt, Salaseini, and made a report with the police thereafter on the 12th April 2014.
93. Timoci who was called by the Defence, denied having received such a complaint. Salaseini, the aunt of the complainant said that she received the complaint from the complainant on the following day (11th April, 2014) that she was raped by 4 boys at school. If you believe that Salaseini told the truth in court, you can use her evidence to test the consistency of the conduct of the complainant.
94. Defence says that complainant's conduct is consistent with consensual sexual intercourse with each accused and it relies on following pieces of evidence to discredit the version of the prosecution: Defence says:
 - That complainant had ample opportunity to make a prompt complaint to her teachers after the first three incidents but she did not complain.
 - That complainant never shouted, called for help or kicked.
 - That she had not received any injuries in her body.

- That it is not probable for her to follow 1st accused's instructions to go and pick guavas and to agree to tell stories under a tree with Ame having known 1st accused's previous conduct.
 - That she eventually complained against accused to save herself when she learnt that the students had spread the story in the school.
95. You will remember, complainant in her evidence gave her explanations on each of above points of contention. In light of directions I have given, you consider whether the explanations she has given are reasonable in the circumstances of this case and from her perspective. You decide if she agreed to have sexual intercourse with four boys, one after the other.
96. In her closing argument, Defence Counsel submitted to you that complainant's failure to protest and react positively demonstrates that complainant was not telling the truth. This is an argument which you should consider with care when you do, you should not assume that there is any classic or typical response to an unwelcome demand for sexual acts. The experience of the courts is that people who are being subjected to nonconsensual sexual activity may respond in variety of different ways.
97. Both 3rd and 4th accused denied the allegations and gave evidence in their defence although the accused were not required to prove their innocence or prove anything at all. The 2nd accused called Timoci. You must consider evidence adduced for defence and evaluate the same using the same tests that you have used to test the credibility of Prosecution's witnesses.
98. Prosecution says that 3rd and 4th accused were self-serving and that Defence witnesses did not tell the truth in court. The State Counsel highlighted some previous inconsistent statements of the accused to support her version. You can compare the evidence they gave in court with what they had told police about the incidents and ask yourselves whether they are consistent. State Counsel also said that Timoci is an untrustworthy witness because he did not know Vilisi although he was the captain of the class and did not know that there is a short cut to Raghwa shop as was admitted by Peni. Timoci was giving evidence about

an incident that had happened after a robbery at school and not about a theft of rugby boots. You decide what weight you should attach to defence's evidence.

99. If you believe the version of the Defence, you must find them not guilty. Even if you don't believe the version of the Defence, Prosecution must still prove the charges beyond reasonable doubt. Remember, the burden to prove the charges rests on the Prosecution. Accused are under no obligation to prove their innocence or prove anything at all.
100. If you are satisfied that the version of Prosecution is credible and believable, then you have to be satisfied that each element of the offence of rape as charged had been proved beyond reasonable doubt.
101. If you are sure that each accused has had sexual intercourse with the complainant without her consent, then you can find the accused guilty on rape as charged.
102. Ladies and gentleman assessor, it is for you to determine the case of each accused separately against each count on a consideration of all the evidence and applying the directions that I have given to you.
103. That concludes my summing up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and form your individual opinions on whether the charges have been proved against each accused. On your return you will be asked to separately state in Court your opinion in respect of each accused whether he is guilty or not guilty of the charge with which he is charged.
104. Your possible opinions would be:
 - 1st Count - 1st accused guilty or not guilty?
 - 2nd Count - 2nd accused guilty or not guilty?
 - 3rd Count - 3rd accused guilty or not guilty?
 - 4th Count - 4th accused guilty or not guilty?

105. Any re-directions?



A handwritten signature in black ink, appearing to read "Aruna Avuthge".

Aruna Avuthge
Judge

AT LAUTOKA
28th January, 2019

Solicitors: **Office of the Director of Public Prosecution for State**
 Office of the Legal Aid Commission for Accused