

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

Date of Summing Up : 28th January, 2019

Date of Judgment : 31st January, 2019

JUDGMENT

1. The Accused persons were charged with rape on following information and tried before three assessors.

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**.

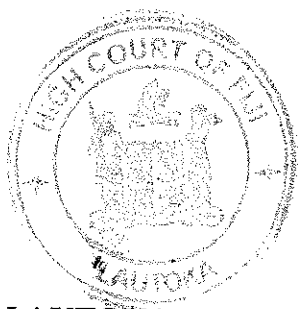
2. Assessors unanimously found all accused guilty of Rape as charged.
3. I direct myself in accordance with my own Summing Up and review evidence led in the trial. Having concurred with the unanimous opinion of assessors, I pronounce my judgment as follows.
4. The accused persons each charged with one 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.
5. None of the accused denies sexual intercourse with the complainant. 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.
6. Prosecution called two witnesses and based its case substantially on the evidence of the complainant. Having heard evidence led in trial, I am satisfied that complainant's evidence is truthful and believable.
7. The complainant explained how she was forced by the accused persons, one after the other, to have sexual intercourse with them. 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.*
8. Describing the 2nd alleged incident in relation to the 2nd count, the 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.

9. Describing the 3rd alleged incident in relation to the 3rd count, the 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.*
10. 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.*
11. 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.
12. Timoci who was called by the Defence denied having received such a complaint. Assessors rejected Timoci's evidence for very good reasons. Timoci proved himself to be an untrustworthy witness. His evidence that he did not know a vocational student by the name of Vilisi is unbelievable because he was the class captain in 2014. He did not mention names of any of the accused when he was asked to name some of the vocational students with whom he was studying at the Ra High School. When the court inquired only he said that he knew the accused persons. 4th accused admitted that there was a short-cut to Raghwa's shop from his class. However, Timoci said that he never knew of such a short-cut. Defence Counsel for 3rd accused cross-examined the complainant on the basis that the police had come to the classroom to investigate about missing rugby boots. Timoci said that the police had come to investigate a robbery. Timoci's evidence is inconsistent and it did not cast any doubt on complainant's evidence.

13. Salaseini, the aunt of the complainant said that she received the complaint from the complainant on the following day of the incident (11th April, 2014) that she was raped by 4 boys at school. There is no material contradiction as was suggested by the Defence between her evidence and her previous statement to police. Salaseini's recent complaint evidence bolstered the version of the prosecution.
14. 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 calling 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 when she knew about 1st accused's previous conduct.
 - That she eventually complained against the accused to save herself when she learnt that the students had spread the story in the school.
15. The complainant in her evidence gave her explanations on each of the above points of contention. Her explanations are reasonable, probable and believable in the circumstances of this case and from her perspective.
16. Both 3rd and 4th accused gave evidence in their defence denying the allegations. Evidence given by the 3rd and the 4th accused was self-serving and not credible. The State Counsel highlighted some previous inconsistent statements of the accused which are material enough to discredit their evidence. 3rd accused contradicted his previous statement to police where he had admitted that his tongue was bitten by the complainant when he was having sexual intercourse. Fourth accused admitted that he blackmailed the complainant to get her consent.

17. I observed the demeanour of the complainant carefully. She was straightforward and not evasive. She frankly admitted that she had a short relationship with the 1st accused where she was forced to have sexual intercourse.
18. It is highly implausible that a 16 year old-girl had agreed to have sexual intercourse with four boys, one after the other, at the school premises and its vicinity. Evidence of the Defence did not discredit the version of the Prosecution.
19. I am sure that each accused has had sexual intercourse with the complainant forcefully, without her consent. I accept the version of the Prosecution and reject that of the Defence.
20. I agree with the unanimous opinion of assessors which is available in evidence led in trial.
21. Prosecution proved all four charges beyond reasonable doubt. Each Accused person is convicted accordingly.
22. That is the judgment of this Court.




Aruna Aluthge
Judge

AT LAUTOKA
31st January, 2019

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