

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

**Crim. Case No: HAC 395 of 2016**

**STATE**

**vs.**

- 1. EV**
- 2. MN**

**Counsel:** Mr. T. Tuenuku for the State  
Mr. A. Chand for Accused 1  
Mr. A. Rayawa for Accused 2

**Date of Hearing:** 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, 31<sup>st</sup> January 2019

**Date of Summing Up:** 04<sup>th</sup> February 2019

**Date of Judgment:** 05<sup>th</sup> February 2019

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**JUDGMENT**

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The names of the complainant and the accused are suppressed.

The first accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act and the second accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are that:

**COUNT ONE**

*Statement of offence*

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

*Particulars of the Offence*

*EV, on the 16<sup>th</sup> day of July 2016, at Nabouciwa village, Nakelo in the Eastern Division, had carnal knowledge of AB, without her consent.*

**COUNT TWO**

*Statement of Offence*

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

*Particulars of Offence*

*MN, between the 1<sup>st</sup> day and 31<sup>st</sup> day of August 2016, at Nabouciwa village, Nakelo in the Eastern Division, had carnal knowledge of AB, without her consent.*

The hearing of this matter commenced on the 28th of January 2019 and concluded on the 31st of January 2019. The prosecution called three witnesses, including the complainant. The first accused gave evidence and called three witnesses for his defence. The second accused also gave evidence and called four witnesses for his defence. At the conclusion of the defence case, the learned counsel for the prosecution and the defence made their respective closing addresses. I then delivered my summing up.

Two of the assessors in their opinion found the 1<sup>st</sup> accused not guilty to the 1<sup>st</sup> count and the 2<sup>nd</sup> accused not guilty to the 2<sup>nd</sup> count and one assessor in his opinion found the 1<sup>st</sup> accused guilty to the 1<sup>st</sup> count and 2<sup>nd</sup> accused guilty to the 2<sup>nd</sup> count.

Having taken into consideration the evidence adduced during the hearing, the respective closing addresses of the counsel, the summing up and the opinions of the three assessors, I now proceed to pronounce the judgment as follows.

The prosecution alleges that the first accused came into the kitchen while the complainant was making tea between 6 p.m. to 7 p.m. and asked her to have sexual intercourse with him. The complainant had refused it, stating that she was still a student. The first accused then pulled her hands and covered her mouth and took her to the back of the kitchen, where he penetrated into the vagina of the complainant without her consent. The first accused in his defence claims that he was with his uncle and his family attending to the family devotion at their home at 6 p.m. on the 16th of July 2016. Having attended to the devotion, they then had their dinner. The first accused had then gone to Jovesa's house, which is few feet away from his house, to attend the meeting of the youth.

In respect of the second count, the prosecution alleges that the second accused had called the complainant into his house, when she was passing it. He had then asked her to perform oral sex for him, which she had refused. He had then holds her hands and covered her mouth and took her to the room, where he had penetrated into her vagina with his penis without her consent. The second accused denies the allegation and claims that he was not in the village during the month of August 2016 as he was at his uncle's house at Kalabu. He had attended to the two church camps during the first two Saturdays of the month of August 2016. He was at the church in the village during the last two Saturdays, but never went to the village. The church is situated about 1.5 k.m to 2.k.m. away from the village. The second accused further said that he never had sexual intercourse with a female until he got married.

The defences of the two accused are mainly based upon the contention that they were at somewhere else at the time material to these two counts. Accordingly, I first take my attention to the defence of alibi of the two accused.

In respect of the alibi defence of the first accused, I reiterate my directions given in the summing up at the paragraphs 85 to 87. Having carefully considered the evidence of alibi I find numerous inconsistencies in the evidence given by the first accused and his two witnesses in respect of the alibi defence.

10. The first notice of alibi states that the accused was with Tulia and Jone at their house on the 16th of June 2016 from 6 p.m to 9 p.m. However, the accused in his evidence said that the date was 16th of July 2016. Tulia in her evidence once said that the date is 16th of July 2016, but changed it during the cross examination and re-examination and confirmed the date as 16th June 2016. Jone admitted what he has stated in his statement given to the police is true, where he has stated the date as 16th of June 2016. Neither the accused nor his two witnesses testified in their respective evidence that the first accused was with Tulia and Jone at their house till 9 p.m. The first accused then filed the amended notice of alibi, stating that the first accused was with Tulia and Jone at their house on the 16th of July 2016, between 6 p.m. to 9 p.m.
11. Having taken into consideration the above stated inconsistencies and contradictions in the evidence of alibi, adduced by the first accused, I find the evidence of the accused and the two witnesses are not credible and reliable. I accordingly find the defence of alibi of the first accused is not true and amount to a false defence of alibi.
12. The second accused in his alibi defence, stated that he was at Kalabu with his uncle during the month of August 2016. He had attended to the church at the village only on the last two Saturdays of the month, however, has had not gone to the village during those two visits. The second accused admitted that his mother was still staying in the village during the month of August. Moreover, I take my attention to the evidence given by the first accused, saying that he could not recall where he was in the month of July 2016. Is it probable to a person to remember exactly where was he in August and forgot about the previous month. Is it probable that the accused who had been living away from his family, not to go and visit at least his mother, if he came to a location which is just 1.5 k.m. or 2 k.m. away from his family home. In view of these reasons, I do not find the evidence of the second accused in respect of his alibi defence is reliable and credible. I accordingly find his evidence as untrue and hold it as a false defence of alibi.
13. The second accused further claims that he never had sexual intercourse with a female until he got married. The second accused called his wife to give evidence about the first night of

their marriage. According to her evidence, it is clear that the second accused and his wife had a normal first night of their marriage. According to her evidence, the first accused had performed his role as a husband in their very first intimate relationship. Therefore, I do not find any credible and reliable evidence that can suggest that there is a reasonable possibility that the second accused was not aware of sexual intercourse, before he got married.

14. I now draw my attention to determine whether I can accept the evidence of the complainant as reliable, credible and truthful evidence. Moreover, I will proceed to determine whether what she said in evidence is probable or improbable according to the circumstances which she was explaining.
15. The one of the main contentions of the defence in respect of each count, that the evidence given by the complainant is not reliable and credible. The two accused challenged the complainant asking her, why not she resisted or escape or alert the others in the village when these two incidents took place.
16. In respect of the first count, the complainant said that the first accused held her hands and covered her mouth when he took her to the back of the kitchen. According to the evidence adduced by the prosecution and the defence, it is a rule in the village that everyone has to be at their houses to attend the devotion at 6 p.m. The complainant alleges that this incident took place between 6 p.m. to 7 p.m. The complainant did not explain whether it was still the day light or it has already dark when the first accused came and took her to the back of the kitchen. It is the time that most of the people are in their houses for the devotion. The house of the second accused, whom are related to the complainant is just few steps away from her house. The prosecution did not adduce any evidence to explain the vicinity of the place where this alleged incident took place or the distance of it from the other houses.
17. The complainant explains in her evidence that she did not run away or shout for help as her mouth was covered and her hands were held by the accused. If the accused had been holding her hands and covering her mouth in order to prevent her escaping, how could he

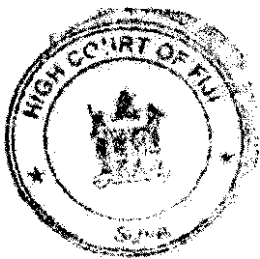
removed his t-shirt and other clothes and spread them on the ground, while holding the complainant by her hand and covering her face. Moreover, the accused had removed the clothes of the complainant as well. There is no evidence to conclude that whether the complainant was asked to lie down, or was she pushed to lie down or she voluntarily did it, or she was threatened to lie down.

18. The complainant then said that she told her grandmother about this incident. The complainant did not further explain what was the reaction of her grandmother when she told her about this incident on the 16th of July 2016. According to her evidence, the grandmother was already lying down on the mattress when she went back to their home after the first alleged incident. The complainant did not specifically stated at what point of time that she told the grandmother about the first incident.
19. The complainant said that the grandmother was angry when she got delay to get home, after she encountered with the second alleged incident. However, she has not told the grandmother about the second incident. Moreover, from the reaction of the grandmother in respect of her delay in returning home, I can infer that the grandmother was concern about the complainant. The second incident took place in a house which is few steps away from her house, while her grandmother was in it. There is no evidence, whether the grandmother was completely immobilized due to the amputated leg or not. According to the evidence of the complainant, only one leg was amputated. The prosecution should have explained these areas, whether the grandmother who was in the house, that is few steps away from the place where this alleged incident took place, was in a position to respond if the complainant shouted and alerted about the second alleged incident.
20. In respect of the second count, it is alleged that the second accused pulled her from the hand and covered her mouth. That was the reasons she could not resist or escape from the scene. If the second accused was holding her hands and covering her mouth, how could he removed his clothes and put his penis out while holding her hand and covering her mouth.

21. The accused had then forced her to perform oral sex for him. The complainant did not explain what was the position she was at that time when he forced his penis into her mouth. Whether she was seated or standing. Afterwards, she was made to lie down. She did not explain how the accused made her to lie down. The accused had then covered her face with a pillow. The complainant did not explain whether the accused inserted his penis into her vagina while the pillow was still covering her face or not.
22. I am mindful of the fact that the complainant is a sixteen years old young adolescence and was giving evidence about a very traumatic incident that took place in 2016. It is the duty of the counsel of the prosecution to properly articulate the questions when the complainant was giving evidence in order to elicit necessary evidence to prove the main elements of the offence. The duty of the counsel is not limited to repeatedly ask the complainant 'what next' or what happened next.
23. The complainant had reported these incidents to the teachers at her school on the 17th of October 2016. That was nearly more than three months after the first incident and two months after the second incident.
24. The complainant said that she did not tell her uncle or his family about these incidents, as she thought that they would not believe her. Moreover, she said that she was scared to be in the village. However, she has told her grandmother about the first incident. Eventually, the complainant had reported to her teachers in the school about these two incidents on the 17th of October 2016. Was there any reason that made her to wait till October to report this matter to the teachers? Was she scared of someone? if then, how could she told her grandmother about the first incident.
25. The complainant in her evidence said that she does not know what has been recorded in D10 and D11 of the Medical Certificate as she only told her story to the Social Welfare Officer and not to the doctor. The Social Welfare Officer had related those facts to the doctor during the medical examination, while the complainant was in a different room. However, the doctor in her evidence said that the complainant related the facts to her

which she recorded under D10 and D11 of the Medical Certificate. The doctor did not say that a Social Welfare Officer was present during the medical examination.

26. In view of the reasons discussed above, there is a reasonable doubt about the reliability and credibility of the evidence given by the complainant. Hence, I find that the prosecution has failed to prove beyond reasonable doubt that the first accused guilty to the first count as charged. Moreover, I find the prosecution has failed to prove that the second accused guilty to the second count as charged.
27. Accordingly, I do not find any cogent reasons to disagree with the majority opinion of not guilty given by the assessors.
28. In conclusion I hold that the first accused not guilty to the first count as charged in the consolidated information and acquit him from the same accordingly. Moreover, I hold that the second accused not guilty to the second count as charged in the consolidated information and acquit him from the same accordingly.
29. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe

**Judge**

**At Suva**

05<sup>th</sup> February 2019

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the 1<sup>st</sup> Accused.

Koroi Law for the 2<sup>nd</sup> Accused.