IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 328 of 2019

[CRIMINAL JURISDICTION]

STATE

V

1. **ALIPATE DURI**
2. **TT (Juvenile)**
3. **LEMEKI KOROI**

Counsel	:	Ms. S. Shameem for the State Ms., L. David for the 1st Accused Ms. N. Mishra for the (2nd) Juvenile Ms. A. Singh for the 3rd Accused
Hearing on	:	14 September 2020 & 06 October 2020
Ruling on	:	12 October 2020

RULING

(In terms of section 214(2) of the Criminal Procedure Act 2009)

1. The (first) Information in this case was filed in this case on 17/10/19 and it is dated 16/10/19. It reads thus;

FIRST COUNT

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ALIPATE DURI on the 8th day of September, 2019 at Cunningham in the

Central Division, had carnal knowledge of **KT**, without the consent of the said **KT**.

SECOND COUNT

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ALIPATE DURI on an occasion other than that referred to in Count 1, on the 8th day of September, 2019 at Cunningham in the Central Division, penetrated the vagina of **KT,** with his penis, without the consent of the said **KT**.

THIRD COUNT

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

LEMEKI KOROI on the 8th day of September, 2019 at Cunningham in the Central Division, penetrated the vagina of **KT,** with his penis, without the consent of the said **KT**.

FOURTH COUNT

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

TT on the 8th day of September, 2019 at Cunningham in the Central Division, penetrated the vagina of **KT,** with his penis, without the consent of the said **KT**.

2. Then an amended Information dated 12/05/20 was filed on 21/05/20. It contained a single charge which reads thus;

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ALIPATE DURI, TT, LEMEKI KOROI AND OTHERS on the 8th day of September, 2019 at Cunningham in the Central Division, had carnal knowledge of **KT**, without the consent of the said **KT**.

3. For the reason that it was alleged in the Information filed previously that there were four separate acts of penetration, and since the prosecutor who appeared on

21/05/20 also acknowledged same, the said prosecutor was asked to reconsider the Information as it was clearly defective. The case was accordingly fixed on 10/06/20.

4. On 10/06/20 a further 21 days was sought by the prosecution to consider the charges and the case was fixed on 06/07/20. On 06/07/20, a further 14 days was sought by the prosecution and again the case was fixed on 23/07/20 for the amended Information. Then on 23/07/20, the prosecutor sought a further 21 days to file the amended Information and the case was accordingly fixed on 13/08/20.

5. Finally, on 13/08/20, the amended Information dated 12/08/20 was filed. The charges reads thus;

FIRST COUNT

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ALIPATE DURI on the 8th day of September, 2019 at Cunningham in the Central Division, had carnal knowledge of **KT**, without the consent of the said **KT**.

SECOND COUNT

Statement of Offence

Rape: contrary to Section 45 (1) and 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ALIPATE DURI and **TT,** on the 8th day of September, 2019 at Cunningham in the Central Division, had carnal knowledge of **KT,** without the consent of the said **KT**.

THIRD COUNT

Statement of Offence

Rape: contrary to Section 45 (1) and 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ALIPATE DURI and **LEMEKI KOROI,** on the 8th day of September, 2019 at Cunningham in the Central Division, had carnal knowledge of **KT**, without the consent of the said **KT**.

6. All three indictments were signed by the Director of Public Prosecutions Mr. Christopher T. Pryde ("the DPP").

7. It is pertinent to note that on the second count and on the third count above, two accused persons are charged (under a single count) for having sexual intercourse with the prosecutrix without her consent.

8. The physical element of rape is constituted by conduct, which is penetration. Where the alleged penetration is a penile penetration of the vagina, it is understood that, in normal circumstances, only one person could engage in the conduct of penetration by his penis. Accordingly it was pointed out to the prosecutor on the same day that the particulars of the offence in counts two and three are irrational and ambiguous. The learned defence counsel also took objection in relation to the second and third counts on the same line.

9. When this was pointed out, the prosecutor submitted that according to the prosecution case, it was only one accused who had penetrated the prosecutrix's vagina in relation to each count and the other was aiding and abetting. The prosecutor was then informed to reflect that in the particulars of each count (two and three) to clear the obvious ambiguity. Accordingly, the prosecutor sought time to reconsider the charges and the case was fixed on 31/08/20.

10. On 31/08/20, the prosecutor informed the court that the DPP wants to proceed with the information filed on 13/08/20 and that the disclosures filed in the case would reveal as to which accused had carnal knowledge of the prosecutrix in relation to count two and count three. Due to this position taken by the prosecution, this court invited submissions from both the prosecution and the defence on whether count two and count three in the Information filed on 13/08/20 (hereinafter referred to as 'count two' and 'count three') are defective. The case was fixed on 14/09/20 for written submissions.

11. Accordingly, both parties filed written submissions on 14/09/20. However, Ms. S. Shameem who is the counsel in carriage was indisposed on the said date whereas Ms. N. Mishra was ready to make oral submissions on behalf of all three accused. The State Counsel who appeared on 14/09/20 sought a further date on behalf of Ms. Shameem for her to appear in the case and to make further submissions. This application was allowed and the case was accordingly fixed for further hearing on 06/10/20.

12. Additionally, as it was noticed that the written submissions filed on behalf of the State by the Office of the DPP was lacking in quality and depth, this fact was brought to the attention of the State Counsel who appeared on that day and was informed that it would be prudent for the officer in carriage to file further written submissions after conducting further research on the issue to study how other jurisdictions had dealt with similar situations when it comes to the offence of rape. It was pointed out that a party is at liberty to take a certain view on a particular matter, but it is important for such party to ensure that steps are taken to passionately substantiate the relevant position so that the court will be able to make a correct and an informed decision on the relevant issue.

13. Ironically, Ms. Shameem who appeared on the next date, on 06/10/20, informed the court that she was directed by the DPP, not to file any further submission and simply to rely on the submissions already filed. In other words, according to Ms. Shameem, she was directed by the DPP to ignore the suggestion made by this court to conduct further research on the issue at hand for her to better understand the issue so that she would be in a better position to assist the court. Upon hearing this, Ms. Shameem was in fact advised to choose her words carefully. Because, if this statement made by Ms. Shameem is true, it reflects an attitude which is inappropriate, uncooperative and condescending in nature on the part of the DPP towards court proceedings. Nevertheless, the fact remains that Ms. Shameem made that statement in court as a State Counsel, being the DPP's representative. This is a matter the DPP should take cognizance of.

14. In essence, the DPP's position in this case is that though it is alleged in the particulars of offence of count two and count three that two accused persons had carnal knowledge of the prosecutrix (in relation to each count), it was only one accused who had carnal knowledge whereas the other accused is an aider or abettor, and, the defence counsel/ accused and the court should read the disclosures to find out which of the two accused named in each count in fact had carnal knowledge or penetrated the prosecutrix's vagina with the penis. Based on this contention, the DPP asserts that counts two and three are not defective.

15. Before examining the validity of the aforementioned contention and thereby that of counts two and three, it would be useful to first be reminded of certain provisions relevant to the drafting of Information.

16. Section 58 of the Criminal Procedure Act 2009 ("Criminal Procedure Act") states thus;

> *Offence to be specified in charge or information with necessary particulars*
>
> *58. Every charge or information shall contain –*
> *(a) a statement of the specific offence or offences with which the accused person is charged; and*
> (b) *such particulars as are necessary for giving reasonable information as to the nature of the offence charged.*

17. It should be noted that the word 'charge' in the above section and other sections under 'Division 2' of the Criminal Procedure Act refers to the document which is filed before the Magistrate Court which is usually referred to as the "charge sheet" and not to a charge or a count that is included in the Information filed before the High Court.

18. Section 60 of the Criminal Procedure Act reads thus;

> *Joinder of two or more accused in one charge or information*

60. The following persons may be joined in one charge or information and may be tried together –

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of –
(i) aiding or abetting the commission of the offence; or
(ii) attempting to commit the offence;

(c) persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or a similar character; and

(d) persons accused of different offences committed in the course of the same transaction.

19. The DPP is relying on the provisions of section 60 above in support of the issue at hand. To avoid any misapprehension, it would be appropriate to be reminded that the word 'charge' in the section alluded to above does not refer to a charge or a count in the Information, but to the formal document akin to the Information that is filed before the Magistrates Court. The import of section 60(b) above is that an aider or an abettor can be joined in the same indictment with the principal offender. The said section cannot be read as an approval to join an aider or abettor with the principal offender in the same count.

20. Of course in an appropriate case, it may not be inapt to join an aider, abettor, counsellor or procurer (secondary offender) and the principal offender in the same count, provided that such secondary offender is clearly informed of the offence he/ she is charged with and the particulars of offence of the relevant count does not misstate the facts.

21. Section 66 of the Criminal Procedure Act reads thus;

General rule as to description

> *66. Subject to any other provisions of this Division, it shall be sufficient to describe any place, time, thing, matter, act or omission to which it is necessary to refer in any charge or information in —*
>
> *(a) ordinary language; and*
>
> *(b) in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to.*

22. The above provisions requires the act or omission of an accused which is necessary to be referred to in the Information, to be described in ordinary language and with reasonable clearness.

23. In the instant case, counts two and three relate to particular acts (the manner of penetration) and certainly it is because the DPP found it necessary to be included in the said counts. In fact, for the reason that the interpretation provided by the Crimes Act to the offence of rape is so broad where the said office could be committed in several ways based on the physical act [at least in nine different ways as identified in ***State v Vosatokaera*** [2020] FJHC 334; HAC233.2019 (22 May 2020)], it is in fact necessary when it comes to a rape charge for the particulars of offence to refer to the relevant act of the accused based on which the prosecution alleges that the offence of rape was committed.

24. That being the case, section 66(b) of the Criminal Procedure Act alluded to above would apply to every rape charge and accordingly, the alleged act or the conduct which constitutes rape according to the prosecution should be indicated with reasonable clearness in the relevant particulars of offence. Therefore, the position taken by Ms. Shameem and the DPP that count two and count three of the Information dated 13/08/20 should be read with the disclosures to figure out which of the two accused in fact penetrated the vagina of the prosecutrix in relation to each count, is not supported by any law or valid precedent known to this court and in fact the said contention clearly contravenes the explicit provisions in section 66 of the Criminal Procedure Act.

25. Ms. Shameem, in her submissions relied on the case of ***State v Talala*** [2016] FJHC 1025; HAC30.2015 (11 November 2016) and on certain paragraphs from Blackstone's Criminal Practice (2012) to advance the argument that counts two and three are not defective.

26. In relation to the case of ***Talala*** (supra), it is pertinent to note that it is a case where the allegation was that the (deceased) male victim was raped by inserting a stick in his anus and multiple accused were charged with the offence of rape. The circumstances in the said case is remarkably different from the case at hand. Firstly, the alleged offence in ***Talala*** (supra) lacks one important characteristic generally noted in the offence of rape which is classified as a sexual offence. That is in relation to the defence of consent which is generally available to an accused who is charged with the offence of rape of an adult victim, to raise. Given the nature of the object alleged to have been used in ***Talala*** (supra) to penetrate the anus of the victim in that case, no person with a sound mind would consent for such penetration. Therefore, the defence of consent was not available to be raised in the said case given the nature of the alleged offending, though the elements of the offence of rape were taken to be satisfied. Secondly, inserting a stick as a form of violence as in the case of ***Talala*** (supra) could be carried out by any accused where there are more than one accused who are charged with the offence; whereas, inserting of a penis which is understandably a body part of an accused as it is alleged in the instant case, could only be done by that accused.

27. Ms. Shameem had quoted from the said decision in ***Talala*** (supra) to wit;

> "*Pursuant to Section 45 of the Crimes Decree, it is not necessary for the Prosecution to prove in respect of each accused whether he is a principle or secondary offender. All that is required is proof that the respective offences were committed and that the conduct of each accused must have aided or abetted (assisted or encouraged) with the intention of assisting or encouraging the commission of those offences with knowledge of what the principal offender is doing*."

28. However, with due respect to the decision in the aforementioned case, I am unable to construe the provisions of section 45 as alluded to in the above paragraph. Firstly, in terms of section 45(2) of the Crimes Act, for a person to be guilty under section 45(1), the persons conduct must have **in fact** aided, abetted, counselled or procured the commission of the offence by another person. On the other hand, the import of section 45(7) of the Crimes Act is that when the trier of fact is not able to determine whether the accused was an aider, abettor, counsellor, procurer (secondary offender) or whether the accused was a principal offender, but when satisfied beyond reasonable doubt that the accused is either a secondary offender or the principal offender, the trier of fact may find that accused guilty of the relevant offence. Section 45(7) reads thus;

> *45(7) If the trier of fact is satisfied beyond reasonable doubt that a person either –*
> *(a) is guilty of a particular offence otherwise than because of the operation of sub-section (1); or*
> *(b) is guilty of that offence because of the operation of sub-section (1) –*
> *But is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.*

29. Therefore, the above provisions makes it mandatory for the prosecution to prove that the relevant accused is either a principal offender or a secondary offender. The practical application of this section could be deduced by reflecting on the provisions of sections 45(2) and 45(3) of the Crimes Act which reads as follows;

> *45(2) for the person to be guilty –*
> *(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and*
> *(b) the offence must have been committed by the other person.*
>
> *(3) Subject to sub-section (6), for the person to be guilty, the person must have intended that –*
> *(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or*
> *(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.*

30. Accordingly, taken in its entirety, what section 45 actually provides for is that, in order to prove a particular charge against an accused, the prosecution could either;
    a) establish all the elements of the relevant offence against the accused, or
    b) establish that the accused in fact aided, abetted, counselled or procured the commission of the offence by another person, and that other person must have committed the offence, and the accused either
        i. intended that his conduct would aid, abet, counsel or procure the commission of an offence which is of the type that was committed by the other, or
        ii. intended that his conduct would aid, abet, counsel or procure the commission of an offence and he/ she was reckless about the commission of the offence that was in fact committed.

31. Where the prosecution had proven beyond reasonable doubt that the accused is either the principal offender or a secondary offender, the court can find the accused guilty of the relevant offence and need not make a determination as to whether the accused is in fact the principal or the secondary offender when the court is unable to do so given the facts of the case. Section 45 of the Crimes Act does not mandate a trier of fact to find an accused guilty to an offence where the prosecution has only proved that an offence was committed and that the accused was present at the time and at the place of offence, on the assumption that the accused may have been either the principal offender or a secondary offender; unless of course the guilt of the accused is the only reasonable and the irresistible inference to be drawn, given the circumstances.

32. Therefore, the decision in ***Talala*** (supra) could be clearly distinguished and the said decision would not support the position taken by the prosecution in the instant case.

33. The relevant passages from Blackstone Ms. Shameem relies on are as follows;

". . . when indicting a secondary party to an offence, namely an aider, abettor, counsellor or procurer, there is no need to indicate either in the statement of the offence or particulars, that such was his role.'

". . . in drafting the counts, there is no need to distinguish between the principal offenders and secondary parties."

34. I do not find any inconsistency between the above excerpts from Blackstone and the provisions found in the Crimes Act and the Criminal Procedure Act relating to the drafting of charges (counts). What Ms. Shameem and the DPP have failed to comprehend is the difference between not specifying the role of an accused who is a secondary offender in a charge, and misstating the role played by an accused in a charge.

35. It should be noted that a person who aids, abets, counsels or procures the commission of the offence of rape by another (where the alleged penetration is vaginal penetration by the penis) does not commit the offence of rape by penetrating the prosecutrix's vagina with his penis or having carnal knowledge of the prosecutrix without her consent, but by aiding, abetting, counselling or procuring the principal offender to do so in view of the provisions of section 45 of the Crimes Act.

36. It is not difficult to understand that it is factually incorrect to allege that the person who aided, abetted, counselled or procured the principal offender to commit rape had carnal knowledge of the relevant prosecutrix where in fact it was not that secondary offender but the principal offender who had had the carnal knowledge. Moreover, section 45 of the Crimes Act or the above quotations from Blackstone do not provide any legal basis to misstate the facts in the particulars of offence of a rape charge in that manner.

37. Another argument advanced by Ms. Shameem in her oral submissions was that, for the reason that section 45 is referred to in the statements of offence of counts two

and three, the defence is put on notice that one of the accused named in each count is an aider or abettor.

38. In this regard, Ms. Shameem has failed to realise that the statement of offence and the particulars of offence in counts two and three in the Information dated 13/08/20 are inconsistent and they relate to two different positions as regards to the role of the two accused persons named in the relevant charge. It is pertinent to note that in the case of ***State v Ravutanasau*** [2019] FJHC 1109; HAC377.2017 (12 November 2019) Rajasinghe J was also faced with a similar situation.

39. To elucidate on this inconsistency noted on the face of the two counts I would reproduce the said count two which reads thus;

> **SECOND COUNT**
>
> *Statement of Offence*
>
> **Rape:** contrary to Section 45 (1) and 207 (1) and (2) (a) of the Crimes Act 2009.
>
> *Particulars of Offence*
>
> **ALIPATE DURI** and **TT,** on the 8th day of September, 2019 at Cunningham in the Central Division, had carnal knowledge of **KT,** without the consent of the said **KT**.

40. It should be noted that, according to the statement of the offence the two accused named in the particulars of offence had committed an offence contrary to section 45(1) and section 207(1) **and section (2)(a)** of the Crimes Act. It is understood that there is no section with the number '(2)(a)' in the Crimes Act and it should be 207(2)(a). Therefore the appearance of the number '(2)(a)' in the statement of offence could be the result of an oversight or it could be attributed to poor drafting. I would however ignore this error and focus only on the reference to section 45(1) of the Crimes Act in the statement of offence which is relevant for purposes of the present discussion. Section 45(1) of the Crimes Act reads thus;

> *45. (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.*

41. By including the said section 45(1) in that manner, the prosecution has in fact alleged that both accused named in that count have committed the offence of rape as aiders, abettor, counsellors or procurers. But as noted from the particulars of offence, it is alleged that both accused had committed the offence of rape as principle offenders. It is not difficult to understand that these are two contradictory positions. Moreover, according to Ms. Shameem, the disclosures would reveal that one accused is an aider or abettor and only one is a principal offender. Accordingly, from the submissions made by the prosecution itself, it is clear that the facts of the case at hand is not consistent either with the statement of offence or with the particulars of offence of count two. The situation is the same in relation to count three.

42. The foregoing discussion clearly establishes that counts two and three of the Information filed on 13/08/20 are defective. Before issuing an order in terms of section 214(2) I wish to address one more point.

43. It is important to mention whether a particular accused is charged as a principal or a secondary offender in the charge or the Information mainly for two reasons. One reason is the difference between the elements that needs to be established in relation to a particular offence against a secondary offender and a principal offender. It is trite law that though two or more accused could be joined in one count, the case against each accused in relation to the relevant offence should be considered separately. Additionally, section 45(2) and section 45(3) provide certain additional elements that needs to be established in relation to a secondary offender as opposed to a principal offender. [See paragraph 29 above]

44. Therefore, it would be helpful to the court, to the defence counsel/ accused and in fact even to the prosecutor if the charge or the Information clearly indicates whether a particular accused is a secondary offender (if it is clear to the prosecution); so that it would be less likely for the court to overlook to deal with the necessary elements, for the defence counsel/ accused to mount an appropriate defence and for the prosecutor not to overlook the necessary elements when adducing the evidence.

45. However, it should be noted that, in my view, not specifying in the relevant charge that a particular accused is charged as a secondary offender is not an impediment to find that accused guilty of the offence on the basis that the said accused was in fact a secondary offender, in terms of section 45(7) of the Crimes Act as discussed above.

46. The second reason why it is important for the charge or the Information to reflect whether a particular accused was a secondary offender, or the principal offender is because, it is relevant when it comes to sentencing. It is necessary to identify whether an accused was a secondary offender or a principal offender to gauge the culpability of that accused in relation to the offence in question, in order to decide the appropriate sentence.

47. A similar view was expressed in the case of ***DPP of Northern Ireland v Maxw*ell** (1978) 1 W.L.R. 1350 at 1359 where it was observed thus;

> *"I nevertheless respectfully share the view expressed by the noble and learned Lord on the Woolsack that where, as here, the role of an accused is that of a principal in the second degree, it makes for clarity if the particulars of the charges explicitly assert it. Such a course is likely to prove helpful to the judges of fact. It is also preferable for the purpose of the record of convictions that such distinction should be drawn in the particulars of the charges preferred. Furthermore, as Lord Reading C.J. said in Gould & Co v Houghton [1921] 1 K.B. 509, 518, "when considering the sentence to be imposed these are convenient expressions to distinguish between the degrees of actual participation by the various offenders . . ."*"

48. Whereas I have found counts two and three of the Information dated 13/08/20 to be defective, and, considering all the circumstances and especially the difficulty the prosecution appear to have been facing in drafting charges in this case as evinced by the fact that three different indictments have been filed with different charges thus far, I would make the following orders in terms of section 214(2) of the Criminal Procedure Act;

    a) The prosecution should replace count two of the Information dated 13/08/20 with a charge contrary to section 207(1) read with section

207(2)(a) of the Crimes Act where only the principal offender (according to the prosecution case) is charged;

b) The prosecution should include a separate charge against the accused who aided or abetted the principal offender (according to the prosecution case) in the charge which replaces the present count two in view of the above order; a charge contrary to section 207(1) read with section 207(2)(a) of the Crimes Act and with section 45(1) of the Crimes Act, if the prosecution wishes to maintain a charge against the said aider or abettor;

c) The prosecution should replace the count three of the Information dated 13/08/20 with a charge contrary to section 207(1) read with section 207(2)(a) of the Crimes Act where only the principal offender (according to the prosecution case) is charged;

d) The prosecution should include a separate charge against the accused who aided or abetted the principal offender (according to the prosecution case) in the charge which replaces the present count three in view of the above order; a charge contrary to section 207(1) read with section 207(2)(a) of the Crimes Act and with section 45(1) of the Crimes Act, if they still wish to maintain a charge against the said aider or abettor; and

e) The prosecution is hereby directed to file an amended Information in line with the above orders before 09.30am on 16/10/20.

Vinsent S. Perera
JUDGE

Solicitors;
Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused