

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 069 OF 2013S

STATE

VS

1. SAMISONI NAIKATACI
2. VANAISA LEDUA
3. ROMULO DELAI
4. LUKE NAIVOLA

Counsels : Ms. A. Vavadakua for State
Mr. J. Savou for all Accuseds

Hearings : 31 July and 1 August, 2014

Ruling : 1 August, 2014

RULING ON A NO CASE TO ANSWER SUBMISSION

1. On 31 July 2014, the first day of the trial proper, the following information, was put to all the accuseds, in the presence of their counsel:

FIRST COUNT

Statement of Offence

DEFILEMENT OF YOUNG PERSON BETWEEN 13 AND 16 YEARS: *Contrary to section 215 (1) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

SAMISONI NAIKATACI on the 10th day of November 2012, at Wainimala Secondary School, in the Central Division, had unlawful carnal knowledge of **M. S.**, being above the age of 13 years and under the age of 16 years.

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

VANAISA LEDUA on the 10th day of November 2012, at Wainimala Secondary School, in the Central Division, had carnal knowledge of **M. S.**, without her consent.

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

ROMULO DELAI on the 10th day of November 2012, at Wainimala Secondary School, in the Central Division, had carnal knowledge of **M. S.**, without her consent.

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

LUKE NAIVOLA on the 10th day of November 2012, at Wainimala Secondary School, in the Central Division, had carnal knowledge of M.S, without her consent.

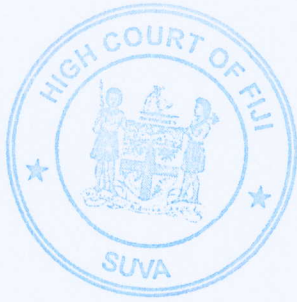
2. The matter proceeded to trial. The first prosecution's witness was the complainant herself (PW1). When giving evidence, she said, she had sexual intercourse with all the accuseds at the material time. As far as Count No. 2, 3 and 4 were concerned, she said, she did not consent to having sex with the accuseds. She confirmed the above during cross-examination, but she said, she smiled at each accused before they each penetrated her with their penis. When re-examined, she said, she smiled at each accused because she consented to each of them having sex with her. She confirmed that she gave the above statement out of her own free will.
3. Because of the above, and in the interest of not wasting the court's time, the prosecution decided not to call any other State's witness. She then formally closed her case.
4. The defence choose to make a submission of "no case to answer" against each accused. Defence Counsel submitted that, given the complainant's evidence that she consented to sexual intercourse with each accused, at the material time, Accused No. 2, 3 and 4, ought to be acquitted, on the ground that they have committed no offence. As for Accused No. 1, if accused No. 2, 3 and 4 are found to have committed no offence, then the court had no jurisdiction to try Count No. 1, as the Count is a summary offence triable only in the Magistrate Court.
5. Prosecution, in their reply, conceded to the points advanced by the defence.
6. The law, at this stage of the proceeding, is section 231 (1) and (2) of the Criminal Procedure Decree 2009, which reads as follows:

- (1) *When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.*
- (2) *When the evidence of the witnesses for the prosecution has been concluded, the court shall, if it considers that there is evidence that the accused person (or any one or more*

of several accused persons) committed the offence, inform each such accused person of their right:

- (a) to address the court, either personally or by his or her lawyer (if any); and*
- (b) to give evidence on his or her own behalf; or*
- (c) to call witnesses in his or her defence.*

7. The offence of "rape" consists of the following elements:
 - (i) the accused had sexual intercourse with the complainant, that is, his penis penetrated the complainant's vagina;
 - (ii) without her consent, and
 - (iii) the accused knew she was not consenting to sex, at the time.
8. In this case, the complainant, in her evidence, admitted that she consented to having sex with all the accuseds, at the material time. She said, she made the above statement out of her own free will.
9. Given what the complainant said above, Accused No. 2, 3 and 4 had not committed any rape offence. Consensual sex between a 15 years 2 months old girl and three teenage boys is not a criminal offence. I therefore find that there is no case to answer against Accused No. 2, 3 and 4, because they have not committed any rape offence. I find Accused No. 2, 3 and 4 not guilty of rape, and I acquit them accordingly.
10. Accused No. 1 is charged with the offence of "defiling a young girl between 13 and 16 years", contrary to section 215 (1) of the Crimes Decree 2009. This offence is a summary offence, and pursuant to section 4 (1) (c) of the Criminal Procedure Decree 2009, is an offence triable only in the Magistrate Court. Because I am no longer trying an indictable offence, which would enable me to try Count No. 1, I have no jurisdiction to hear Count No. 1 now. I therefore remit Accused No. 1's case to the Nausori Magistrate Court (ie. Resident Magistrate W. George) to deal with according to law.
11. Accused No. 1 is to attend Nausori Magistrate Court on 15 August 2014, at 9.30 am for mention. Your bail is extended accordingly.



Salesi Temo
JUDGE

Solicitor for the State
Solicitor for all Accuseds

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Office of the Director of Public Prosecutions, Suva.
Legal Aid Commission, Suva.