IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 328 of 2019

[CRIMINAL JURISDICTION]

STATE

V

1. **ALIPATE DURI**
2. **TUATE TUVUNI**
3. **LEMEKI KOROI**

Counsel	**:**	Ms. S. Shameem for the State
		Ms. L. David and Mr. P. Varinava for 1st Accused
		Ms. N. Mishra for the 2nd Accused
		Ms. A. Singh for the 3rd Accused
Hearing on	**:**	27 - 28 October 2020
Summing up on	**:**	29 October 2020
Judgment on	**:**	30 October 2020

JUDGMENT

1. The accused were charged with the following offences;

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 **KARALAINI TUBUNA**, without the consent of the said **KARALAINI TUBUNA.**

SECOND COUNT

Statement of Offence

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

Particulars of Offence

TUATE TUVUNI, on the 8th day of September, 2019 at Cunningham in the Central Division, had carnal knowledge of **KARALAINI TUBUNA,** without the consent of the said **KARALAINI TUBUNA.**

THIRD COUNT

Statement of Offence

Aiding And Abetting: contrary to Section 45 and 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, aided and abetted **TUATE TUVUNI,** to have carnal knowledge of **KARALAINI TUBUNA,** without the consent of the said **KARALAINI TUBUNA.**

FOURTH 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, had carnal knowledge of **KARALAINI TUBUNA,** without the consent of the said **KARALAINI TUBUNA.**

FIFTH COUNT

Statement of Offence

Aiding And Abetting: contrary to Section 45 and 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, aided and abetted **LEMEKI KOROI,** to have carnal knowledge of **KARALAINI TUBUNA,** without the consent of the said **KARALAINI TUBUNA.**

2. At the close of the prosecution case, the prosecutor conceded that the second count and the fourth count are not made out. That was because the prosecutrix ("PW1") clearly said in her examination in chief that the others who penetrated her vagina on the material date did not know that she was not consenting for them to penetrate her vagina. This evidence clearly negated the fault element in respect of counts two and four requiring this court to find that there is no case for the second accused and for the third accused to answer. It should also be noted that PW1 did not give evidence specifically against the second accused and the third accused explaining the circumstances under which each of them penetrated her vagina and that she did not consent for each of them to penetrate her vagina, though the two had admitted penetration.

3. Accordingly, in terms of section 231(1) of the Criminal Procedure Act 2009, a finding of not guilty was recorded in relation to the second count and the fourth count which were against the second accused and the third accused respectively.

4. It is pertinent to note that in terms of section 45(2)(a) of the Crimes Act, for a person to be found guilty of aiding, abetting, counseling or procuring, the offence must have been committed by the other person. The question then was when the second and the third accused were found not guilty of their respective rape charges, whether it was possible for the two charges against the first accused for aiding and abetting them to be maintained.

5. I was mindful of the provisions of section 45(5) to the effect that a person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty. The decision in the case of ***Regina v. Cogan and Leak*** [1 Q.B. 217 (1976)] where the husband (Leak) procured his friend Cogan to have sexual intercourse with his wife without her consent and where Cogan was acquitted because he believed that she was consenting, but Leak was convicted of aiding and abetting rape was also relevant. In the said case the court observed thus;

> *The only case which Mr. Herrod submitted had a direct bearing upon the problem of Leak's guilt was* ***Walters v. Lunt and another. (1951) 2 all England Reports 645.*** *In that case the respondents had been charged under the Larceny Act, 1916, section 33(1) with receiving from a child aged seven years, certain articles knowing them to have been stolen. In 1951 a child under eight years was deemed in law to be incapable of committing a crime: it followed that at the time of receipt by the respondents the articles had not been stolen and that the charge had not been proved. That case is very different from this because here on fact is clear the wife had been raped. Cogan had had sexual intercourse with her consent. The fact that Cogan wads innocent of rape because he believed that she was consenting does not affect the position that she was raped.*

6. Therefore, though the second accused and the third accused were found not guilty of the relevant offences, I decided that there was a case to answer for the first accused in relation to counts three and five where he is charged for aiding and abetting each of those two accused. Accordingly, the case proceeded in respect of counts one, three and five against the first accused.

7. The assessors have returned with the unanimous opinion that the first accused is not guilty of all three counts alluded to above.

8. I direct myself in accordance with the summing up delivered to the assessors on 29/10/20 and the evidence adduced during the trial.

9. PW1 was the sole witness for the prosecution. The accused gave evidence in his defence and called two witnesses, the second accused and the third accused who were found not guilty of counts two and four.

10. In view of all the evidence led in this case, it was manifestly clear that the account given by PW1 was not what actually took place on the night in question. In my judgment, PW1 did not come out with the whole truth and nothing but the truth. Neither did the first accused and his two witnesses, the two accused who were acquitted.

11. PW1's evidence with regard to her encounter with the first accused was improbable and unreliable which suggested that the first accused's version that he had consensual sexual intercourse with PW1 may be true. However, having considered all the evidence, it appeared to me that her evidence that she did not agree to have sexual intercourse with the other persons may be true and that the first accused may have planned with the others to approach her first and thereafter to let others have sexual intercourse with her.

12. Though PW1 may have agreed to have sexual intercourse with the first accused, she may have agreed to go to the ghetto not knowing that there would be others also waiting to have sexual intercourse with her. I note her evidence where she said that they hid her clothes. Therefore, it appears to me that the first accused and the others may have made use of PW1's naivety and vulnerability and had exploited her. Nevertheless, for the reason that PW1 did not come out with exactly what happened between her and the three accused persons on the night in question, it also appeared

that the first accused's version that PW1 had consensual sexual intercourse with him and with the other two accused, but she cried rape because she was embarrassed when she got caught to the lady who found her dressed in a bed sheet, may also be true. Needless to say, an accused cannot be convicted of an offence based on a mere possibility.

13. The unanimous opinion of the assessors clearly points out that they have found PW1's evidence to be improbable and unreliable and that they have concluded that the prosecution has failed to prove the relevant charges beyond reasonable doubt. I have no reason to disagree with the said unanimous opinion.

14. All in all, I agree with the unanimous opinion of the assessors.

15. I find the first accused not guilty of counts one, three and five.

16. Accordingly, I hereby acquit the first accused of the relevant charges. I would also hereby formally acquit the second and third accused of their respective charges.

HIGH COURT OF FIJI
SUVA

Vinsent S. Perera
JUDGE

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