IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 206 of 2019

[CRIMINAL JURISDICTION]

STATE

V

VILIKESA RAWAMILA

Counsel	**:**	Ms. W. Elo for State Mr. K. Chang for Accused
Hearing on	**:**	13 – 15 October 2020
Summing up on	**:**	16 October 2020
Judgment on	**:**	16 October 2020

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "SS". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

JUDGMENT

1. The accused is charged with the following offences;

FIRST COUNT
(Representative Count)
Statement of Offence
Sexual Assault: contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

VILIKESA RAWAMILA, between the 1st of January 2016 to the 31st December 2016, at Vuisiga, Vunidawa, in the Eastern Division, unlawfully and indecently assaulted **SS** by touching her breasts and fondling her vagina.

SECOND COUNT
(Representative Count)
Statement of Offence
Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence
VILIKESA RAWAMILA, between the 1st of January 2016 to the 31st December 2016, at Vuisiga, Vunidawa, in the Eastern Division, had carnal knowledge of **SS**, without her consent.

THIRD COUNT
(Representative Count)
Statement of Offence
Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence
VILIKESA RAWAMILA, between the 1st of January 2016 to the 31st December 2016, at Vuisiga, Vunidawa, in the Eastern Division, on an occasion different from Count 2, had carnal knowledge of **SS**, without her consent.

FOURTH COUNT
(Representative Count)
Statement of Offence
Rape: contrary to Section 207 (1) & (2) (a) of the Crimes Act 2009.

Particulars of Offence
VILIKESA RAWAMILA, between the 1st of January 2017 to the 31st December 2017, at Vuisiga, Vunidawa, in the Eastern Division, had carnal knowledge of **SS**, without her consent.

2. The assessors have returned with the following unanimous opinion;

First Count – Guilty

Second Count – Not Guilty

Third Count – Not Guilty

Fourth Count - Guilty

3. I direct myself in accordance with the summing up delivered to the assessors this date and the evidence adduced during the trial.

4. The prosecutrix ("PW1") and her uncle to whom she had first relayed the alleged incidents (PW2), gave evidence for the prosecution. The accused gave evidence and called three witnesses in his defence.

5. Given all the evidence adduced in this case including the evidence of the accused and his witnesses, the demeanour of PW1 when she gave her evidence, I find PW1 to be a credible and a reliable witness. PW1 offered an acceptable explanation for the omissions in her police statement, that she was intimidated by the conduct of the police officer when her statement was recorded and as a result she did not come out with all she could remember when she gave the said statement. Nevertheless, those inconsistencies were not substantial so as to cast doubt on her evidence on the elements of the relevant offences.

6. Given that the offender was her father and her age at the time the offences were committed, I find it reasonable for her not to raise alarm or to complain to anyone while the incidents were taking place and while she was living with the accused. I believe her evidence that she was scared of the threat that her ear would be cut off, and that the accused convinced her not to complain because if she tells someone he will be arrested and there won't be anyone to look after her education. I find that the delay in her revealing to someone about the incidents is also justified given that the perpetrator was her own father.

7. All four charges were representative counts. The time of offence in each count were as follows;

First Count (sexual assault) – 01/01/16 to 31/12/16

Second Count (rape) – 01/01/16 to 31/12/16

Third Count (rape) – 01/01/16 to 31/12/16

Fourth Count (rape) - 01/01/17 to 31/12/17

8. However, when PW1 gave evidence, the prosecutor took steps to adduce evidence only on one incident in relation to the first count and the second count and also guided PW1 to mention that the said incident took place in the first school term in 2016. In relation to the third count, the prosecutor focused only on one incident and PW1 was guided to claim the third school term as the time of offence. With regard to the fourth count, PW1 was guided to claim the first school term of 2017 as the time of offence and the evidence adduced was that there were two incidents of penetration during the said term.

9. The main defence of the accused was that of *alibi* where he claimed that he was not in the village from April 2016 to July 2017 and that he was in Vanua Levu. PW1 also confirmed that the accused did go to Vanua Levu, but she said that he left in February 2016 and returned in March 2017. She said that the first incident took place before the accused left for Vanua Levu and he did it again when he returned. She said that he only left for Vanua Levu once, during the said period; which suggested that the accused came back only in March 2017 according to her. But she also denied the suggestion made by the defence that the accused stayed in Vanua Levu consecutively for a period of one year and two months. By her denial of that suggestion it would mean that, according to PW1, the accused did return to the village in between. But the prosecutor was unable to pick this up and did not make any attempt to have this clarified. In fact it was noted that the prosecutor was not mindful of the defence of *alibi* raised by the accused at all, when she led the evidence of PW1.

10. In light of this evidence given by PW1 which suggested that the accused did not return to the village till March 2017, it was clear that the third count cannot succeed. I have no reason to disbelieve her evidence that the incident she described in relation to the third count did take place, but, given that the accused relied on the defence of *alibi* in relation to this particular count and because of the failure on the part of the prosecutor to properly have this clarified, the benefit of the doubt that surfaced has to be given to the accused. Therefore, I agree with the unanimous opinion of the assessors on the third count that the accused is not guilty.

11. Given the above approach I have taken, I had to first deal with the third count. Now I would turn to the first count.

12. I believe the evidence of PW1 in relation to the first count. Considering all the evidence it was clear that this incident relevant to the first count had taken place before the accused left for Labasa in April 2016. In fact, given all the evidence, I am inclined to hold the view that PW1 was mistaken when she said that the accused left in February 2016. Based on the evidence of the defence witnesses including the accused, I accept the version of the accused that he left the village to attend the funeral in Vanua Levu in April 2016.

13. I would dismiss the allegation that the accused was framed by PW2. On one hand, that allegation was unfounded and on the other hand, PW1's evidence was so convincing and I do not have the slightest doubt that her evidence was fabricated. I would also reject the argument of the defence counsel that the version of PW1 was improbable. According to the evidence, when the first incident take place, it was the accused's father, the mother and his 11 year old son who had been in the house and they were said to be sleeping. PW1 was only 14 years old at that time. Irrespective

of whether the accused's parents and the son heard any noise or not, it was not improbable for what PW1 described to have taken place in the relevant house.

14. The assessors who are the representatives of the society also have come to the same conclusion. The act of removing the 14 year old PW1's clothes, touching her breasts and the vagina and then according to PW1, inserting the hand into her vagina by the accused, the father of PW1, was an assault which is unlawful, indecent and sexual. The evidence clearly suggests that PW1 did not consent for the said conduct of the accused and the accused either knew or he was reckless as to that fact. Accordingly, I agree with the unanimous opinion of the assessors that the accused is guilty of the first count.

15. In relation to the second count, the prosecution relied on PW1's evidence that the accused penetrated her vagina with his penis after he inserted the hand into her vagina. It is the same incident, but the prosecution had opted to frame two charges. The same deliberation in relation to the first count above therefore also applies to the second count. Based on the evidence relevant to the second count, I am satisfied beyond reasonable doubt that the accused penetrated PW1's vagina without her consent with his penis, and, either the accused knew that she was not consenting or the accused was reckless as to the fact that she was not consenting.

16. Therefore I find that the second count is proven beyond reasonable doubt. It appears to me that the assessors may have been confused in relation to the evidence that is relevant to this second count because the conduct relevant to this count forms part of the conduct relevant to the first count. All in all, I am unable to agree with the assessors' unanimous opinion in relation to the second count that the accused is not guilty.

17. DW2 appeared to be a credible witness. However, it was clear that he could not account for all the movements of the accused during the period he said that the accused stayed with him in Labasa. There was a significant inconsistency between his evidence and the evidence of the accused where he said that the accused only went to cut sugar cane when he was about to return in order to gather funds for him to return, the accused said that he stayed in Labasa because there were more opportunities to earn. The accused said that he worked as a cane cutter and then engaged in diving and he also sent money to his village.

18. DW3 though claimed that he knew about the accused and his family could not confirm when the accused's father passed away. Though DW4 said that the accused returned to the village in July 2017, he had told the police that the accused returned between May and June 2017 and he could not offer any explanation for this inconsistency. Given this background, I am inclined to accept PW1's evidence that the accused came to the village in March 2017.

19. Thus, I would reject the accused's *alibi* in relation to the fourth count. It is clear that the assessors also have done so. I dismiss the claims that the accused was framed and that PW1's version was improbable for the same reasons alluded to above in the discussion relating to the first count.

20. Based on the evidence relevant to the fourth count, I am satisfied beyond reasonable doubt that the accused penetrated PW1's vagina without her consent with his penis, and, either the accused knew that she was not consenting or the accused was reckless as to the fact that she was not consenting. I agree with the unanimous opinion of the assessors that the accused is guilty of the fourth count.

21. In the circumstances, I find the accused guilty of the first, second and fourth counts and hereby convict him accordingly.

22. Nevertheless, I find the accused not guilty of the third count and hereby acquit him of the said count.

Vinsent S. Perera
JUDGE

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