

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 101 of 2016

[CRIMINAL JURISDICTION]

STATE

V

IANE RUPETI

Counsel : Ms. S. Tivao with Mr. E. Samisoni for State  
Mr. M. Fesaitu with Mr. S. Luvena for Accused

Dates of Hearing : 31<sup>st</sup> January - 03<sup>rd</sup> February 2017

Date of Summing up: 03<sup>rd</sup> February 2017

Date of Judgment : 06<sup>th</sup> February 2017

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as ES.)

JUDGMENT

1. The accused is charged with the following offences;

FIRST COUNT

*Representative Counts*

*Statement of Offence*

**RAPE:** contrary to section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

IANE RUPETI between the 1<sup>st</sup> day of June and 30<sup>th</sup> day of December 2011 at Rotuma in the Eastern Division had carnal knowledge of ES without her consent.

## 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*

**IANE RUPETI** on the 31<sup>st</sup> day of December 2011, at Rotuma in the Eastern Division, had carnal knowledge of ES, without her consent.

## THIRD COUNT

### *Representative Count*

### *Statement of Offence*

**RAPE:** contrary to section 207(1) and 2(a) of the Crimes Decree No. 44 of 2009.

### *Particulars of Offence*

**IANE RUPETI** between the 1<sup>st</sup> January 2015 and 15<sup>th</sup> May 2015 at Rotuma in the Eastern Division had carnal knowledge of ES, 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*

**IANE RUPETI** on 16<sup>th</sup> of May 2015 at Rotuma in the Eastern Division had carnal knowledge of ES, without her consent.

2. Majority of the assessors have decided that the accused is guilty of all four counts. One assessor opined that the accused is not guilty of the first count but guilty of the alternative offence of defilement; not guilty of the second count but guilty of the alternative offence of defilement; and not guilty of the third and fourth counts.
3. I direct myself in accordance with the summing up delivered to the assessors on 03<sup>rd</sup> February 2017 and the evidence adduced during the trial.

4. The prosecution led the evidence of two witnesses including the complainant. The accused opted to remain silent. However, the accused took up the position that the allegations made against him by the complainant are false and the complainant had made up these allegations because of her hatred towards the accused for being strict and for making her to do all the housework.
5. According to the evidence led by the prosecution, the complainant was living in Rotuma with the accused and his wife since 2004. In 2004 the complainant was 6 years old. Accused and his wife were the complainant's guardians since then. Accused's wife is the complainant's mother's sister. The accused's wife came to Fiji in June 2011 for the delivery of the second child. The complainant continued to live in Rotuma with the accused. The accused was in a position of authority over the complainant.
6. The first count is a representative count. The complainant gave evidence of two incidents relevant to the time period mentioned in the first count.
7. I accept the complainant's evidence on the first incident where she said that she found the accused licking her vagina when she suddenly woke up one Wednesday night and then the accused inserted his penis inside her vagina. Complainant said that when she asked him what he is doing when the accused was licking her vagina, the accused had told her to shut up and not to make a noise. From the evidence the complainant gave regarding this first incident, it was clear that the accused had inserted his penis inside her vagina without her consent. The accused knew or believed that she was not consenting and that is why he told her to shut up and not to make a noise.
8. In order to establish the first count, it is sufficient for the prosecution to prove that one offence of rape was committed during the period specified in count one. Therefore, I find that the prosecution has proven the first count beyond reasonable doubt.

9. I accept the complainant's evidence pertaining to the second count. According to her evidence, she went 'fara' on 30<sup>th</sup> December 2011. She explained that 'fara' is a social event which involves singing and dancing. After she returned home the following morning, the accused told her that he wants to have sex with her. When she said she does not want to, the accused had told her that she won't be allowed to go anywhere else if she does not 'give herself'. It is pertinent to note that throughout her evidence the complainant said that she was scared of the accused. The accused was the complainant's guardian at that time who provided her with food and shelter. The complainant's evidence on this incident suggests that she ultimately agreed or submitted herself for the accused to insert his penis inside her vagina.
10. Section 206(1) of the Crimes Decree clearly provides that consent means consent freely and voluntarily given and mere submission without physical resistance does not constitute consent. Further, in terms of section 206(2)(d) consent is not freely and voluntarily given if it is obtained by exercise of authority. Given the evidence, I am satisfied that the complainant did not freely and voluntarily consent within the meaning provided in section 206 of the Crimes Decree for the accused to penetrate her vagina with his penis.
11. The accused knew that the complainant is 13 years old and she is under his care and protection. He knew that he had authority over her. From the fact that he told the complainant that she will not be allowed to go out of the house if she does not agree to have sexual intercourse, it can be inferred that he knew or believed that the complainant was not consenting.
12. In the circumstances, I am satisfied that the prosecution has proved all the elements of the second count beyond reasonable doubt.
13. Third count is again a representative count. The complainant gave evidence of three incidents that had taken place during the time period mentioned in the

third count, which is from 1<sup>st</sup> January 2015 to 15<sup>th</sup> May 2015. The evidence revealed that the accused's wife returned to Rotuma in 2012 and again left in December 2014.

14. The first incident relevant to the third count had taken place in January 2015. The complainant's evidence was that the accused let her go 'fara' on the day in question on the condition that they have to have sexual intercourse. According to the evidence of the complainant, she submitted herself for the accused to penetrate her vagina because the accused told her that she needs to 'pay for it'. The complainant clearly said she did not consent. Given the evidence and the applicable law, I find that the accused did penetrate the complainant's vagina with his penis on this particular occasion and the complainant did not freely and voluntarily consent for the accused to penetrate her vagina.
  
15. Accused was aware of his authority over the complainant. Though the complainant went with her friends for 'fara' that particular day despite him telling her that they need to have sexual intercourse in return; it can be inferred that the accused was aware of the risk that the complainant may not be freely and voluntarily consenting for him to penetrate the complainant's vagina with his penis considering the following circumstances;
  - a) the authority the accused had over the complainant being her guardian,
  - b) the fact that the complainant was 17 years old and that he was about 62 years old, and
  - c) from the fact that he got the complainant to agree by telling her that she needs to 'pay'
  
16. Having regard to those circumstances known to the accused it was unjustifiable to take the risk and penetrate the complainant's vagina with his penis.
  
17. In the circumstances, I find that the prosecution had proven the third count beyond reasonable doubt.

18. The time of offence of the fourth count is 16<sup>th</sup> May 2015. According to the complainant, she complained to the second prosecution witness after this particular incident. The complainant agreed during cross-examination that she went to the second prosecution witness' house on the Monday after the incident where the tea cup was thrown on the wall by the accused. According to the complainant's evidence this incident where the tea cup was thrown, took place after the accused and the complainant returned from Ahau. According to the second prosecution witness the complainant came to his house because of a dispute with the accused on a Monday and the accused and the complainant were there in his house on the previous Saturday. 16<sup>th</sup> May 2015 was a Saturday. When all the evidence led by the prosecution is carefully analysed, it appears on the face of it that the incident where the tea cup was thrown, took place on 16<sup>th</sup> May 2015.
19. Therefore, in my view, the evidence led by the prosecution was not clear with regard to the exact events that took place on 16<sup>th</sup> May 2015. In the circumstances, I find that the prosecution has failed to properly adduce the evidence in relation to the fourth count.
20. Therefore, I find that the prosecution has failed to prove the fourth count.
21. The complainant had complained against the accused after about 4 years since the first incident. I find that the said delay in complaining is justified considering the fact that the complainant was 13 years old at the time of the first incident, that the accused was the only guardian living with her during that time who was providing her with food and shelter, that the accused had threaten the complainant and that the complainant was scared of the accused. The complainant said that she was so afraid so she just waited.

22. The majority opinion of the assessors in respect of the first three counts is not perverse and it was open for them to reach that conclusion based on the evidence led in this case.
23. However, for the reasons given above, I am unable to agree with the majority opinion of the assessors in respect of the fourth count.
24. In the circumstances, I find the accused guilty of first, second and third counts as charged and convict him accordingly. I find the accused not guilty of the fourth count and he is accordingly acquitted of the fourth count.



Vinsent S. Perera  
JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.  
Solicitor for the Accused : Legal Aid Commission, Suva