

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 205 of 2016**

**STATE**

**V**

**JONE KALE**

**Counsel** : Ms. L. Latu for the State.  
: Ms. K. Vulimainadave [LAC] for the Accused.

**Dates of Hearing** : 11 and 12 March, 2019  
**Closing Speeches** : 13 March, 2019  
**Date of Summing Up** : 14 March, 2019  
**Date of Judgment** : 15 March, 2019

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**JUDGMENT**

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*(The name of the complainant is suppressed she will be referred to as "RM").*

1. The Director of Public Prosecutions charged the accused by filing the following amended information:

**COUNT 1**

*Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009.

*Particulars of Offence*

**JONE KALE** also known as **SIRELI BATIRATU**, sometime between the 1<sup>st</sup> day of January, 2015 and the 18<sup>th</sup> day of January, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, a child under the age of 13 years.

## **COUNT 2**

### *Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009.

### *Particulars of Offence*

**JONE KALE** also known as **SIRELI BATIRATU**, sometime between the 19<sup>th</sup> day of January, 2015 and the 24<sup>th</sup> day of January, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, a child under the age of 13 years.

## **COUNT 3**

### *Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

### *Particulars of Offence*

**JONE KALE** also known as **SIRELI BATIRATU**, sometime between the 1<sup>st</sup> day of May, 2015 and the 31<sup>st</sup> day of May, 2015 at Toge, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

## **COUNT 4**

### *Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

### *Particulars of Offence*

**JONE KALE** also known as **SIRELI BATIRATU**, on the 31<sup>st</sup> day of December, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

## **COUNT 5**

### *Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**JONE KALE** also known as **SIRELI BATIRATU**, sometime between the 1<sup>st</sup> day of August, 2016 and the 31<sup>st</sup> day of August, 2016 at Babriban, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

**COUNT 6**

*Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**JONE KALE** also known as **SIRELI BATIRATU**, on the 3<sup>rd</sup> day of September, 2016 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

**COUNT 7**

*Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**JONE KALE** also known as **SIRELI BATIRATU**, on the 5<sup>th</sup> day of September, 2016 at Babriban, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

**COUNT 8**

*Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**JONE KALE** also known as **SIRELI BATIRATU**, on the 3<sup>rd</sup> day of October, 2016 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

2. The three assessors had returned with a unanimous opinion that the accused was guilty of all the eight counts of rape as charged.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called eight (8) witnesses and the accused exercised his right to remain silent and did not call any witness.
5. The complainant was 12 years and 8 months in January, 2015 she recalled eight occasions the accused had forcefully penetrated her vagina with his penis.
6. Firstly, between 1<sup>st</sup> January, 2015 to 18<sup>th</sup> January, 2015 the complainant after lunch returned home from the river to change her wet clothes. She wanted to change her clothes in the bathroom but the accused insisted that she changed her clothes in the house. At this time the accused was lying on the bed.
7. There was no one else in the house other than the complainant and the accused. After sometime the accused came pulled the hand of the complainant and made her lie on the bed. The complainant was still wearing her towel. The accused then forced his penis into the vagina of the complainant when she shouted, the accused blocked her mouth with a pillow.
8. After this, the accused threatened the complainant with a knife and warned her if she told anyone about what he had done to her he would kill her. The complainant's mother was not at home.
9. When the complainant's mother came home she did not tell her anything about what the accused had done to her because of the threat made to her by the accused.

10. The second incident also happened in January, 2015 after returning home from school the complainant was changing her clothes, the accused was in the house.
11. While changing her clothes the accused came and pulled her hand and held it tightly. The accused warned her not to shout since he had a knife ready. The accused made her lie down and forcefully inserted his penis into her vagina. The complainant was crying and tried to call for help but the accused was blocking her mouth.
12. The accused thereafter threatened the complainant not to tell anyone about what he had done otherwise he will kill her. The complainant's mother was not at home at the time, when her mother came home the complainant did not tell her mother what the accused had done to her because the accused had threatened her with a knife not to tell anyone.
13. The third time was in May, 2015 at around 11.00pm the accused and the complainant went on horseback to a village in Toge, when they were returning the accused forcefully had sexual intercourse with her. The accused had a cane knife with him, he told the complainant to remove her clothes or else he will do something to her.
14. When the complainant refused he forcefully removed her clothes, made her lie down in the bush and forcefully inserted his penis into her vagina. The complainant wanted to shout but did not since it was night time and they were far away from the village. The accused thereafter warned the complainant not to tell her mother or anyone about what he had done to her. The complainant did not tell anyone about the incident.

15. The fourth incident happened on New Year's Eve on 31<sup>st</sup> December, 2015 in the night there was a church service on the other side of the village.
16. When the church service was about to end the complainant was sent home by her mother to bring the torch. When the complainant reached home the accused opened the door and asked the complainant whether the church service had finished.
17. The complainant told the accused it had not, upon hearing this, the accused pulled her into the house and closed the door. The accused made the complainant lie on the bed removed her clothes and forcefully inserted his penis into her vagina. The accused also blocked the complainant's mouth. The accused threatened the complainant with a knife and warned her not to tell anyone about what he had done.
18. After this the accused gave the complainant the torch, when she arrived at the church she did not tell anything to her mother because the accused had threatened her with a knife not to tell anyone.
19. The fifth incident happened in August, 2016 at Babriban when the accused and the complainant were returning home on horseback. It was night time around 11.00pm the accused after pulling some cassava plants forcefully removed the complainant's clothes and forcefully inserted his penis into her vagina. The complainant wanted to shout for help but did not since they were in the middle of the bush and no one would hear her. After this the accused warned the complainant not to tell her mum or anyone otherwise he would kill her.
20. When the complainant reached home she did not tell her mother about what the accused had done to her because of his threats.

21. The sixth incident happened on 3<sup>rd</sup> September, 2016 when she came home from town after about 6.00pm. The accused was at home the complainant went and changed her clothes and then had tea.
23. After a while the complainant went to lie down on the bed shortly after she saw the accused lying beside her. When the complainant told the accused to go and lie down on the floor he blocked her mouth and told her to remove her clothes. After this, he forcefully inserted his penis into her vagina. The complainant tried to shout but the accused pushed her down and blocked her mouth. Her mother was not at home at this time.
24. The accused warned the complainant not to tell anyone about what he had done to her. The complainant's mother returned home in the night but she did not tell her mother what the accused had done to her because the accused had threatened her if she told anyone he would kill her.
25. The seventh incident also happened in Babriban on 5<sup>th</sup> September, 2016 the complainant went with the accused during the night, her mother had allowed her to go with the accused. They had gone to check the fence, on their way back the accused forcefully removed her clothes and forcefully inserted his penis into her vagina.
26. The complainant shouted for help but they were far away from the village, after this the accused warned the complainant not to tell anyone about what he had done to her. He also threatened her that he will kill her if she told anyone.
27. The eighth incident happened on 3<sup>rd</sup> October, 2016 at home when she returned from the Ba Riverside Carnival.

28. The complainant came home at night her mother was not at home. The accused was at home, the complainant went to change her clothes at this time the accused got hold of her and pulled her to the bed. The accused forcefully inserted his penis into her vagina.
29. The complainant shouted for help but no one came to rescue her. The accused later showed her the knife and threatened her not to tell anyone. When her mother came home she told her what the accused had done but she did not believe the complainant.
30. The accused told her mother that the complainant was a liar and for her not to believe the complainant. During a counseling session by her School Teachers on an allegation of vandalism against the complainant she told her teachers about what the accused was doing to her. The matter was reported to the police by her School Teachers. The complainant was medically examined by a doctor on 6<sup>th</sup> October, 2016. The complainant identified the accused in court.
31. The second witness Dr. Farina Bibi Fatima recalled examining the complainant on 6<sup>th</sup> October, 2016 at Ba Mission Hospital.
32. The specific medical findings of the doctor were:
  - (a) The abdomen (stomach) of the complainant was soft, private part had no bruises, laceration or hematoma. The doctor explained hematoma was a collection of blood;
  - (b) Hymen was perforated meant it was broken. This could have been caused by penetrative injury such as sexual activity, penis or finger or by an object.
33. The third witness Rosalia Raqato on 6<sup>th</sup> October, 2016 was a teacher at Nukuloa College where the complainant was a student. The witness



was tasked by the Assistant Principal to investigate an incident of vandalism in the girls' washroom.

34. During internal investigations the complainant was questioned by the witness. When the witness asked the complainant some personal questions the complainant told the witness about her step father. The complainant told her whenever she went to have her shower she normally wore tights and bra but her step father told her not to wear them while having her shower. Furthermore, when she would have her shower the accused would spy on her.
35. Her step father used to make comments such as "big breast" and "black bum" while she had her shower. At times he would show her his private parts, whenever her mother would not be at home they used to have sex together or whenever there was any opportunity they used to have sex.
36. The last time the complainant had sex with her step father was during the Ba Riverside Carnival. The witness had observed that when the complainant was talking tears were rolling from her eyes and she was in fear. The matter was reported to the police.
37. The fourth witness was Sergeant Simione Tuvuiya, who recalled on 6<sup>th</sup> October, 2016 at about 8.30pm he received a call from the charge room that there was a report of an allegation of rape. The witness went to Ba Police Station and formed a team after the police statement of the school teacher was recorded.
38. The witness with Constable Moro went in the police vehicle to Balevuto Village. It took them about 1 hour. The witness approached the Turaga ni Koro who directed the Police Officers to the shed where the accused was.

39. The accused was arrested and conveyed to Ba Police Station where he was handed over to the charge room.
40. The fifth witness was Detective Constable Sikeli Tokovou who informed the court that he was not involved in this case.
41. The sixth witness Morotikei Vocevoce former Police Officer recalled in October, 2016 he had arrested the accused at Balevuto Village with Sgt. Simone.
42. Upon reaching Ba Police Station the accused was taken to the crime office. Apart from arresting the accused the witness had no other involvement in the matter.
43. The seventh witness Miriama Nadumu informed the court that she was the investigating as well as the interviewing officer in this case.
44. Upon receipt of the report lodged at Ba Police Station the witness went to Nukuloa College where she met the complainant, her School Teachers and the School Principal. The complainant was escorted to the hospital for a medical check - up. On 7<sup>th</sup> October, 2016 the witness took the complainant for a crime scene visit. The witness prepared a rough sketch plan of the crime scene in the presence of the complainant.
45. The witness also interviewed the accused in the iTaukei language on 8<sup>th</sup> October, 2016. The witnessing officer was Cpl. Tomasi Nakeke whose role was to see that the interview was conducted fairly. Before the interview the accused was cooperative, she greeted the accused who appeared well.
46. The accused gave the answers in the caution interview voluntarily, he was not forced whatever answers he gave was noted down. The

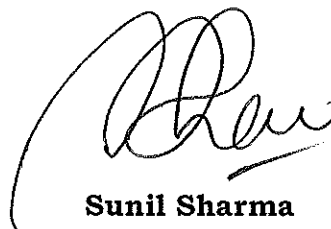
accused did not complain about anything, during the interview there was no threat or assault by the witness or any other Police Officers including the witnessing officer on the accused.

47. The final witness was Cpl. Tomasi Nakeke who was the witnessing officer when the accused was caution interviewed. The witness was present throughout the interview to ensure that the caution interview was conducted fairly. According to the witness the accused was in good health during the interview he never complained about anything and gave his answers voluntarily to the questions asked.
48. The defence takes up the position that the accused did not penetrate the vagina of the complainant with his penis as alleged. Further defence says the complainant made up a story to avoid any suspension or expulsion from school on allegation of vandalism and that she was also under the influence of a couple in the village who hated the accused.
49. I accept the evidence of all the prosecution witnesses as truthful and reliable. The complainant was able to recall what the accused had done to her over a period of time and narrate the same.
50. I also accept that the complainant was afraid of the accused due to his repeated threats that he will kill her. These threats stopped her from making any complaints to anyone about what the accused was doing to her until she answered the questions of her school teacher during the counseling session.
51. Furthermore, the complainant told the court that she had no money to go anywhere else. In my observations of the complainant she was a simple, shy and introverted person who could not be expected to speak out against the accused whilst living with him in his house.

52. It cannot also be ignored that the complainant was 12 years 8 months old when the alleged incidents started.
53. Moreover a 14 year old having the attributes of the complainant cannot be expected to tell her teacher all the details of her forceful sexual encounter with her step father. However, the complainant did disclose material and relevant information about the unlawful sexual conduct of the accused to her teacher. The evidence of the School Teacher Rosalia Raqato was also credible and believable. Rosalia had elicited crucial information from the complainant during the counseling session.
54. Even though the complainant did not tell her teacher about what the accused was doing to her until the teacher questioned her does not in my judgment create any doubt on the reliability of the complainant's evidence.
55. I have no doubt in my mind that the complainant told the truth in court, her demeanour was consistent with her honesty.
56. Furthermore, the complainant was able to withstand cross examination and was not discredited she was forthright in her answers and not evasive.
57. Rosalia Raqato gave a coherent and honest account of what the complainant had told her during the counseling session. Her evidence was credible and reliable as well.
58. The doctor who had examined the complainant had mentioned in her medical findings that the complainant's hymen was perforated meaning it was broken which could have been caused by penetrative injury such as sexual activity, penis or finger or by an object although there were no signs of forceful penetration.

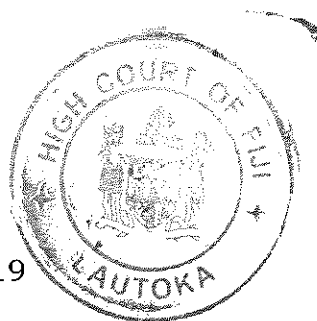
59. A perusal of the caution interview of the accused does suggest that the accused had given the answers voluntarily and they were the truth.
60. This court accepts the evidence of all the Police Officers that the accused was treated fairly, without any assault, inducement, verbal abuse or impropriety.
61. The defence has been of denial that the complainant fabricated a story against the accused to avoid suspension or expulsion from school on an allegation of vandalism and or under the influence of a couple in the village who hated the accused. This court rejects the defence of denial as implausible and untenable considering the totality of the evidence.
62. The defence has not been able to create any reasonable doubt in the prosecution case.
63. I am satisfied beyond reasonable doubt that the accused between the 1<sup>st</sup> day of January, 2015 and 18<sup>th</sup> day of January, 2015 and sometimes between the 19<sup>th</sup> day of January, 2015 and the 24<sup>th</sup> day of January, 2015 (counts one and two) had carnal knowledge (penile sex) of "RM" a child under the age of 13 years.
64. Furthermore, I am satisfied beyond reasonable doubt that sometimes between 1<sup>st</sup> day of May, 2015 to 3<sup>rd</sup> day of October, 2016 (counts 3 to 8) the accused had carnal knowledge (penile sex) of "RM" without her consent. On all occasions the accused had forceful sexual intercourse with the complainant without her consent.
65. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time that is in respect of counts 3 to 8.

66. I agree with the unanimous opinion of the assessors that the accused is guilty of all the 8 counts of rape he is charged with.
67. In view of the above, I find the accused guilty for eight counts of rape as charged and I convict him accordingly.
68. This is the judgment of the court.



**Sunil Sharma**

**Judge**



**At Lautoka**

15<sup>th</sup> March, 2019

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**