IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU0152 OF 2019
[Lautoka Criminal Action No: HAC 45/15]

BETWEEN : 1. **APOROSA DAUVUCU**
2. **SEVANAIA LALABALAVU**
3. **TEVITA VIBOTE**
4. **SEVANAIA VARANI**
5. **WAISAKE WAIDILO**
6. **NACANIELI LABALABA**

Appellants

AND : **THE STATE**

Respondent

Coram : **C Prematilaka, RJA**
A Qetaki, JA
R Dobson, JA

Counsel : **Ms L. Manulevu for the 1st Appellant**
Ms N. Khan for the 2nd to 6th Appellants
Ms R. Uce for the Respondent

Date of Hearing : **3rd May, 2024**

Date of Judgment : **30th May, 2024**

JUDGMENT

Prematilaka, RJA

[1] I have had the benefit of reading in draft the judgment of Dobson, JA and agree with his reasons and proposed orders.

Qetaki, JA

[2] I have carefully read and considered the judgment by Dobson, JA in draft. I am in agreement with it, the analysis, reasons and orders.

Dobson, JA

Introduction

[3] The six appellants were all convicted of one count of rape on 18 September 2019 following a trial before Justice Sharma and assessors. The assessors unanimously considered that all appellants were not guilty, however, the trial Judge came to the opposite conclusion. All of them were sentenced on 4 October 2019 to terms of 11 years nine months and 15 days' imprisonment. Non-parole periods of nine years' imprisonment were set in each case.

[4] They were granted leave to appeal their convictions on 6 December 2021. They were not granted leave to appeal their sentences and that aspect of the matter has not been taken any further.

Factual background to the charges

[5] The case for the State was that the appellants were drinking together from around or some time after midnight on the night of 17/18 March 2015. The complainant is a cousin of four of the appellants and was, at the time at least, a friend of the others. The complainant joined their drinking, having been socialising elsewhere, at some point after midnight or 1am on the morning of 18 March 2015. Her evidence was that she was invited to do so by another cousin, Josh.

[6] Sometime before daybreak, the complainant fell asleep. She was heavily intoxicated. The judgment summarises the alleged offending as following:

7. The complainant woke up when she felt someone pulling her shorts, when she opened her eyes she saw the first accused also known as Abo pulling her shorts while the other accused persons were looking at her at this time her panty was also removed. Thereafter, Sevanaia Lalabalavu the second accused came removed his pocket ‘sulu’ and had sexual intercourse with her by inserting his penis inside her vagina.

8. After the second accused finished having sexual intercourse, Tevita, the third accused came, knelt down and then inserted his penis inside her vagina and had sexual intercourse with her.

9. After him the fourth accused also known as Aldo came, and had sexual intercourse with the complainant. Thereafter, Waisake, the fifth accused and the sixth accused, Labalaba came, and had sexual intercourse in turns with the complainant.

10. Finally, the first accused Abo came and had sexual intercourse with the complainant at this time she felt pain so she tried to push the accused away by pushing his chest. The other accused persons were standing and watching what the first accused was doing. The complainant started crying and was afraid although she was feeling really weak when she felt pain she pushed the accused away. Whilst crying she tried to wear her shorts and at the same time she yelled at all the accused persons telling them not to come close to her.

11. According to the complainant all the accused persons had sexual intercourse with her for about four to five minutes each and she does not know where the accused persons had ejaculated. The complainant was lying straight she did not do anything such as push the accused persons away because her body was weak she could not move or shout or call for help or try to stand up and leave since she was really drunk and feeling weak.

12. When the complainant came out of the house, Tevita, (third accused) and Labalaba (sixth accused) came and held her hand and tried to stop her from shouting. The complainant was shouting on the road for about 15 minutes after a while her friend Mere and her uncle Marika came. The complainant’s uncle Marika came and shouted at Labalaba and Tevita to release the complainant’s hand.

13. Thereafter, the complainant went to Mere’s house and lay down in a room. After a while, Labalaba (sixth accused) and Sevanaia Lalabalavu (second accused) came near the window of Mere’s house and wanted to apologize.

> 14. The complainant did not answer at this time Mere's aunt Rusila came and chased the two away she then slept. When the complainant woke up she told Mere about what all the accused persons had done to her.

The evidence and the judgment

[7] The complainant was the only prosecution witness. A medical examination was undertaken of her when she made her complaint, but that was not adduced in evidence. The third, fifth and sixth appellants each gave evidence, and three other witnesses were called for the defence. Two of them had been interviewed by the Police, but were not called for the State.

[8] After summing up to the assessors and receiving their not guilty opinions, the Judge adjourned overnight and delivered his judgment the next day. In it, he summarised the complainant's evidence as well as the evidence from the three accused who gave evidence and the other witnesses called on their behalf. The reasons for judgment were as follows:

> "55. After carefully considering the evidence adduced by the prosecution and the defence I accept the evidence of the complainant as truthful and reliable. The complainant gave a coherent account of what all the accused persons had done to her between the 17th March to the 18th March, 2015.
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> 56. She was also able to withstand lengthy and vigorous cross examination and was not discredited she was forthright and not evasive as well. During cross examination the complainant was referred to some inconsistencies between her evidence in court and her police statement which was given when facts were fresh in her mind.
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> 57. The inconsistencies were not significant to adversely affect the credibility of the complainant's evidence and the inconsistencies did not go to the root of the matter and shake the basic version of the complainant's evidence. I have no doubt in my mind that the complainant told the truth in court and her demeanour was consistent with her honesty.
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> 58. I also accept that the complainant told defence witness Mere Nabiau about what all the accused persons had done to her immediately after the alleged incident. Considering the circumstances of the complainant when she met Mere the complainant did disclose material and relevant information about what all the accused persons had done to her. I am unable to accept that Mere told the truth when

she stated that the complainant had told her the accused persons had tried to have sexual intercourse with her.

59. Mere was a defence witness who through her demeanour in court was not forthright in cross examination by the state counsel. When this information came out during cross examination by the state counsel Mere quickly changed her position to say that she could not recall whether the accused persons tried or actually had sexual intercourse with the complainant.

60. Other than the above, there is no doubt that the two defence witnesses Kelera and Mere saw the complainant crying, shouting and swearing at the accused persons and trying to resist when pulled out of the house and taken towards Mere's house. These two witnesses support the evidence of the complainant that she was in a distressed condition when they saw the complainant. Kelera saw the complainant's shorts were below her waist also gives credence to the evidence of the complainant that she hurriedly tried to wear her panty and her shorts minutes after pushing Abo when he was having sexual intercourse with her.

61. The defence contention that nothing happened and that the complainant did not kick or shout or yell or show any resistance despite her mouth, hands and legs not being restrained is not plausible. I accept the honesty of the complainant when she said she was really drunk and weak at the time the accused persons were having sexual intercourse with her she only pushed the first accused who was last to have sexual intercourse after she felt pain. I reject the defence suggestion that nothing had happened and that the complainant had made a false complaint against all the accused persons.

62. The lack of physical resistance by the complainant considering her state of drunkenness which was not disputed by the defence cannot be construed as consent. Considering the circumstances of the complainant she did not have the capacity to consent moreover, submission without physical resistance by the complainant to the acts of all the accused persons cannot be construed as consent.

63. On the other hand the third, fifth and sixth accused persons did not tell the truth in court their demeanour was not consistent with their honesty. It was obvious that all the accused persons had tailor made their evidence to suit their own interest and that of the other accused persons. I also accept the second accused Sevanaia Lalabalavu and the sixth accused Labalaba had gone to Mere's house to apologise for what they had done to her until they were chased by Mere's aunt Rusila.

64. The defence has not been able to create a reasonable doubt in the prosecution case.

> 65. I am satisfied beyond reasonable doubt that between 17th day of March, 2015 and the 18th day of March, 2015 all the six accused persons had penetrated the vagina of the complainant Selai Koroi with their penis without her consent.
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> 66. I also accept that all the accused persons knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time."

Grounds of appeal

[9] The first appellant was separately represented on the appeal and the others were jointly represented. The grounds of appeal advanced for them substantially overlapped and it is appropriate to consider their arguments together.

First ground

[10] The first ground for all appellants was that the judgment failed to provide cogent reasons for rejecting the assessors' finding. That was required of the Judge by s 237(4) of the Criminal Procedure Act 2007 and what is involved in doing so has been the subject of numerous observations in this Court.

[11] Many of those observations cite the Supreme Court's decision in *Lautabui v The State*.[1] The reasoning in that appeal included the observation that cogent reasons must be founded on the weight of the evidence and must reflect the Judge's views as to the credibility of witnesses.[2] The Supreme Court in that case cited the earlier Court of Appeal decision in *Setevano v The State*,[3] where the Court commented that the reasons of a trial Judge:

> Must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.

[12] That approach has more recently been adopted yet again in the judgment of this Court in the appeal in *Saudromo v The State*.[4]

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1 *Lautabui v The State* [2009] FJSC 7.
2 At [29].
3 *Setevano v The State* [1991] FJCA 3 at p.5
4 *Saudromo v The State* [2024] FJCA 45, at [24].

[13] In general usage, "*cogent*" as referring to reasons or an argument means strong or compelling. When used in respect of judicial reasoning, it has connotations of logical progression to a conclusion, in terms that are capable of being objectively assessed.

Demeanour

[14] Primary reliance on demeanour is a cause for concern. Substantial research in numerous jurisdictions has found that demeanour is not a reliable indication of the truthfulness of a witness. For instance, in New Zealand jurisprudence reflecting the position there and in England, the topic has been considered in the following terms:

(a) From the Court of Appeal in *E v R*:[5]

> [23] It is trite that our criminal justice system depends essentially on oral testimony. The jury plays a critical part as the sole judge of all factual issues arising in a trial. A critical part of that task is the assessment of the credibility and reliability of witnesses. This can be a difficult task and it is therefore vital that any directions given by Judges on these topics should be carefully considered and adapted as necessary in the light of any soundly-based research on this topic.
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> [24] We start our discussion by a consideration of what constitutes demeanour. Writing extra-judicially, Lord Bingham has described demeanour as:
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> > …[the witness's] conduct, manner, bearing, behaviour, delivery, inflexion; in short, anything which characterises (the witness's] mode of giving evidence but does not appear in a transcript of what [the witness] actually said.
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> [25] We add that demeanour also includes the personality or character of a witness. Given the breadth of what may be embraced by the concept of demeanour, we do not think it helpful to speak of "body language" as some traditional jury directions have done.
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> [26] Lord Bingham went on to refer to passages from observations made by three experienced trial judges. We will refer to two of them. First, Lord Devlin has said:
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> > The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is overrated. It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of a particular witness.

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5 *E (CA799/2012) v R* [2013] NZCA 678.

[27] Second, the observations of Mr Justice MacKenna:

> I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground, perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

[28] Lord Bingham went on to refer to the additional difficulties of assessing credibility of a witness giving evidence through an interpreter. He concluded:

> To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm.

[29] Cultural or ethnic issues may also give rise to wrong conclusions in a jury's assessment of demeanour. For example, in some cultures, it is regarded as impolite or discourteous to look directly at another person when conversing. If a jury were to conclude from the averted gaze of a witness from that culture that the witness was not telling the truth, that conclusion would be unjustified.

. . . .

[31] This Court in <u>Munro</u> (**<u>R v Munro</u>** [2007] NZCA 510. [2008] 2 NZLR 87) went to make the following points:

> • Assessments of credibility are hampered by the highly artificial setting of the courtroom.
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> • Behaviour cues often thought to be associated with lying, such as posture, head movements, shifty eyes or gesturing do not necessary indicate dishonesty or lack of credibility.
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> • Studies have shown that witnesses who appear confident and open and have a good memory for peripheral detail are more likely to be believed, whether or not they are truthful.
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> • Unsavoury and unattractive witnesses are less likely to be believed and vice versa.
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> • Another potential pitfall in relying on the demeanour of a witness is that some research has shown that many or even most people believe they are making accurate judgments about whether a witness is telling the truth even though they are not. Professor Paul Ekman has gone so far as to say:
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> "Our research and the research of most others has found that few people do better than change in judging whether someone is lying or truthful."

(b) In *Taniwha v R*[6] the Supreme Court considered whether there should be a mandatory obligation for judges to give juries in criminal trials a direction warning about the likely misleading impact of assessments based on demeanour. Arnold J, writing for the Court, introduced the issue in the following terms:[7]

> [1] In New Zealand, as in other jurisdictions from the common law tradition, criminal trials are conducted orally, in open court. The principle of orality, enshrined in s 83 of the Evidence Act 2006, recognises the fundamental importance of transparency in the administration of justice through the courts. The principle also rests upon the assumption that a fact-finder, whether a judge sitting alone or a jury, is likely to benefit from seeing and hearing witnesses give their evidence. There is, however, research which indicates that a person's demeanour when giving evidence in court generally provides little or no assistance to a fact-finder charged with determining whether or not the witness is telling the truth. A witness who presents as confident, articulate and honest may be mistaken or dishonest; a witness who presents as diffident, hesitant or awkward may be telling the truth and their evidence may be accurate. Not only can appearances be deceptive, but fact-finders may over-estimate their ability to recognise those who are truthful from those who are not, by, for example, relying on unreliable behaviours such as fidgeting or looking away. In this appeal, the Court is asked to consider how a judge instructing a jury in a criminal trial should deal with the question of demeanour.

[15] Similar concerns are recognised in South Africa, although perhaps recognising a more meaningful role for assessments of demeanour where done together with objective assessments of the coherence of a party's total evidence. For instance, the High Court, Free State Division Bloemfontein, judgment ***Mofutsana v. The State*** No. A287/2017 (1 November 2018) adopted earlier observations that demeanour is "*at best, a tricky horse to ride.*" That judgment continued:

> [20] [Demeanour of witnesses is] considered real evidence in the sense that it is something that the trial court observes. The observation or evaluation is therefore in the eye of the beholder and very much subjective with the danger of error due to basic human nature. This instrument must be applied wisely by the trier of evidence. From cases such as **Medscheme Holdings (Pty) Ltd and Another v**

6 *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116.
7 Citations omitted.

Bhamjee 2005 (5) SA 339 (SCA) the following principles evolved as concluded by Schwikkard et al[8]:

(a) Demeanour, in itself, is a fallible guide to credibility and should be considered with all other factors: it is in the overall scrutiny of evidence that demeanour should be considered and then only if there are sufficient indications thereof to be significant.

(b) The limited value of a finding on demeanour becomes even less where an interpreter is used.

(c) The Constitutional Court has pointed out the danger of assuming that: "all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact."

(d) Demeanour can hardly even be decisive in determining the outcome of a case. Demeanour is merely one factor to be taken into account: "In addition to the demeanour of the witness", said Krause J in R v **Momekela & Commandant** 1936 OPD 24, "one should be guided by the probability of his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under enquiry."

(e) A trial court is obviously in a better position than the court of appeal to make a finding on demeanour; and the court of appeal "must attach weight, but not excessive weight" to the trial court's finding. It is as a general rule important that a trial court should record its impression of the demeanour of a material witness.
(citations omitted).

[16] The judgment under appeal relies to a substantial extent on the Judge's perception of the demeanour of witnesses to dictate his view on their reliability. The demeanour analysis is supported to some extent by the Judge's overall view of the coherence of the complainant's evidence, and the explanations he relied on for the inconsistencies that arose throughout *"lengthy and vigorous cross-examination"*.

[17] It is clear, however, that the reasoning would be entirely inadequate without his reliance on the assessment he made based on demeanour of the various witnesses.

[8] Schwikkard et al, Principles of Evidence at 30.4

[18] The Judge's view on demeanour was clearly not the only one, as the assessors unanimously came to the opposite conclusion, having been guided by the Judge's summing up. A difficulty with the Judge's assessments of demeanour is that it is subjective. His descriptions of how the various witnesses appeared to him in the witness box is not related to the coherence or likelihood of their competing narratives being true, to enable the conclusions he drew to be objectively revisited and tested. Nor does the judgment include an analysis of the consistency or otherwise of evidence on various topics.

[19] I accordingly uphold the first ground of appeal. However, that does not necessarily mean that the appeals succeed. Having found an inadequacy in the reasons required of the Judge, this Court has to go on and form its own view on whether the totality of the evidence took the State's case to the point where there was no reasonable doubt about the guilt of each of the appellants.[9]

[20] The numerous criticisms raised by the remaining grounds of appeal for all the appellants can conveniently be canvassed in undertaking that task.

[21] The following analysis of the coherence of the State case, when compared with the evidence from and for the appellants, is set out chronologically except for the complainant's evidence about the alleged rapes, which is addressed after the other topics.

Complainant's movements on the evening of 17 March 2015 until sometime after midnight

[22] The complainant's evidence was that she was with a friend, Mere, from approximately 9pm until 11pm, drinking juice at Solevu Beach. Thereafter, she said that she went to the location of the alleged rapes at the home of Vurabere with Mere, after they had unsuccessfully looked for Mere's boyfriend.

[9] See, e.g. *Naikalivou v. State* [2024] FJCA 63 at [20]

[23] Mere was called as a defence witness and denied having seen the complainant on the night in question, and also denied that she went with her to Vurabere's house.

[24] The third appellant (Tevita) gave evidence which included his recollection of seeing the complainant walking around in the village sometime after approximately 2.30am with "*another boy*" when the complainant advised Tevita that there was drinking going on at Vurabere's house.

[25] The complainant mostly accepted that she had a boyfriend called Mr Nayate in 2015, the year of the alleged rapes, but denied she was still in a relationship with him on the night in question. At one point, she denied she had been in a relationship with him in 2015. Mr Nayate was called as a witness for the defence and gave evidence that the complainant had been with him from about 7pm until 1am and that, by the time they parted having had an argument, she was drunk.

[26] The complainant denied being with Mr Nayate at all on that night and denied that she had been drinking before arriving at Vurabere's house. She also rejected Mere's recollection of not having been with her on the night in question.

Circumstances of complainant's arrival at Vurabere's house

[27] The complainant's evidence was that she arrived at Vurabere's house with Mere, some substantial time after 11pm when the two, on her version, had stopped drinking juice at Solevu Beach. Her evidence was that she met her cousin Josh there and that he said they should have a drink. In cross examination she said she arrived there around midnight. Her evidence was that all six of the appellants were there when she arrived.

[28] Tevita's evidence was that when he arrived with the sixth appellant (Labalaba) at Vurabere's house, the complainant was already there. He put this at some time after 2.30am. His evidence was that Josh was staying at Vurabere's house, and was there participating in the drinking session.

[29] The fifth appellant (Waisake) also gave evidence. His recollection was arriving at Vurabere's house between 3am and 4am and that the complainant was already there at that time.

[30] Both Tevita's and Waisake's recollections are clearly inconsistent with the complainant's on the sequence in which the various people arrived at Vurabere's house.

Was the fourth appellant still present when alleged rapes occurred?

[31] The complainant was consistent in her claim that the fourth appellant (Aldo) was the third to rape her. Aldo did not give evidence, but there are consistent references in the evidence of others that he had left sometime before daylight being the period when it is alleged the rapes occurred. In his evidence, Tevita listed those who were involved in the drinking but did not include Aldo. In cross-examination, Tevita's recollection was that Aldo had gone to transport workers to Castaway, having left the others earlier to sleep.

[32] In Waisake's evidence, he said that when the others went outside, Aldo had gone off to sleep and that Aldo had gone to work. He was inconsistent in cross-examination, saying that when he first joined the drinking at the house (i.e. between 3am and 4pm), Aldo had gone to sleep.

[33] The sixth appellant (Labalaba) was the third to give evidence. He acknowledged Aldo being there when he arrived at Vurabere's house around 3am, but he excluded Aldo from the list of those who moved outside as day was breaking.

[34] Although an observation from a different perspective, the neighbour in Vurabere's house, Kelera, who was also called as a defence witness, did not list Aldo amongst those men that she observed when the complainant was shouting and protesting.

[35] These versions of the personnel present at various times raised the spectre that Aldo was not present when the complainant alleged that she woke to find men raping her.

When did Josh leave?

[36] The complainant's evidence was somewhat inconsistent on the point at which Josh, who appears to have been present when she began drinking with the group, actually left. In cross-examination she initially said that Josh left after one of the men had had intercourse with her and, consistently with that, that he stood up and left when he saw what the men were doing. She then said that he had left before the rapes occurred. When the content of her statement to the Police was put to her, referring to Josh having been sitting on the mat looking at the boys, she then said that Josh had left. In re-examination, she clarified that *"Josh was still sitting there when they started doing these acts on me then he left*".

[37] Tevita's evidence did not address whether Josh remained throughout the period in which the rapes were alleged to have occurred. Similarly, Waisake, in his evidence, identified Josh as one of those present when he arrived at the house, but again that evidence did not address if or when Josh left.

[38] In a prosecution of this type, it was predictable that appellants' counsel should raise the absence of Josh as a witness in a case where there was no corroboration of the complainant's version of events. Certainly, on her evidence it appears that Josh would most likely have been a witness to the start of the rapes, and able to address other aspects of the surrounding narrative.

Where were the appellants when the complainant began protesting?

[39] The complainant's evidence was that she felt pain in her vagina when the sixth of the appellants was raping her and then, for the first time, protested, pushed him off and began shouting at the appellants to get away from her. Her evidence was that they were all still standing around in the room where the rapes had occurred.

[40] The more or less consistent evidence from the appellants who gave evidence was that they had left the complainant inside and moved outside at about daybreak, without there having been any sexual contact between any of them and the complainant. When it was put to the complainant in cross-examination that they had moved outside, leaving her inside, she denied that.

[41] Waisake's evidence was that the complainant was still awake when the men all decided to move outside, but that she did not join them.

[42] Tevita's evidence was that the men moved outside because the complainant was making a scene, throwing beer bottles about. His recollection was that they had moved outside the house to sit beside a mango tree some 12 metres from the house where they continued drinking.

[43] Labalaba's evidence was to the same effect that they moved outside after the complainant started breaking beer bottles and, on his recollection, they also moved to keep quiet because he knew that Kelera and her husband had been asleep. This was maintained in cross-examination.

[44] The effect of the appellants' evidence was that, sometime after they had moved outside, the first appellant (Abo) agreed to go inside to get another bottle of beer and that when he went inside, those outside heard either a continuation or a renewal of the shouting and swearing from the complainant.

[45] The neighbour, Kelera, was called as a defence witness. She knows the complainant, they having lived in the same area for a long time, and her evidence was that she recognised the complainant's voice at around 2am when she and her husband were attempting to sleep on the other side of the house**.** Then she also recognised the voice as that of the complainant between 7am and 8am when she heard her swearing and shouting and the breaking of bottles in the other part of the house. Kelera's perception was that the complainant was at that time alone in the other half of the house, although that was not from her observation of the complainant because, at that point, the door separating the two adjoining halves of the house remained closed. Her perception was no doubt influenced by the fact that, on her evidence, the complainant then forcefully pushed the communicating door between the two halves open and, at that point, the complainant was the only one who came from the other side of the house into the part of the house occupied by Kelera.

[46] The evidence about this point in the sequence of events from Tevita and Labalaba is that they observed the complainant breaking beer bottles. Also Kelera said that she heard and then observed the effects of breaking bottles in the other side of the joined houses, when she thought that the complainant was the only one there. The complainant denied that Tevita and Labalaba were trying to stop her shouting because she was swearing and breaking bottles.

[47] It is common ground that the complainant made a substantial and noisy fuss at some point between 7am and 8am on the morning of the alleged rapes. Her justification is that it was in response to the rapes that had occurred. All the evidence from the three appellants and that from other defence witnesses was consistent with the complainant having woken from a period of sleep after being extremely drunk, and being angry at the situation she found herself in.

Complainant's interactions with Kelera

[48] Kelera acknowledged in cross-examination that her evidence had extended to numerous matters not recorded in the statement she had given to the Police, and in some respects was inconsistent with that. However, she maintained that the evidence she had given to the Court was correct. In re-examination, she explained that her statement had been taken in her dialect of Itaukei, that she had told the Police everything, and had signed the statement without reading it.

[49] Although there was some confusion about details such as the location of doors, and which half of the house should be perceived as being on the left or the right (obviously depending on where a witness's perspective was from), it is tolerably clear that Kelera and her husband were occupying a part of the same structure as Vurabere's house, with their part of it separated by a common wall including a door, with both halves sharing the same roof. Kelera's evidence was that sometime between 10pm and 11pm, the boys who were drinking next door came to invite her husband to join them, but he declined as he had work the next morning.

[50] Having heard a girl's voice that she was satisfied was the complainant around or after 2am, she again heard what she took to be that voice between 7am and

8am the following morning. The woman was shouting and swearing, and she could hear the breaking of bottles.

[51] Kelera then described the complainant breaking into her side of the house by forcefully pushing the connecting door. She asked the complainant what the problem was, as she was swearing and crying. Kelera told the complainant that she was going to pull her shorts up properly, but the complainant did not want her to touch them. Kelera's evidence was that she told the complainant to put on a sulu and she should then leave and go to her own house. After that, three of the appellants came in, namely the second appellant, Mr Lalabalavu, Tevita and Labalaba. Kelera's evidence was that there was no one else in the other side of the house at the time (i.e. where the drinking had occurred and where the complainant slept). She observed the three appellants helping the complainant out of her side of the house and away from it. In cross-examination, she denied that Mere had come to the property to take the complainant away

[52] Kelera's evidence that the complainant's shorts were not properly pulled up may not have the same weight as indicating that she had been interfered with, as it otherwise would, because of the complainant's own evidence that she pulled her own shorts down in anticipation of urinating.

[53] Tevita's evidence was that he and the two other appellants who came in from outside found the complainant on the side of the house occupied by Kelera and her husband. His evidence was to the effect that Kelera and her husband were lying down at the time they arrived. He and the other appellants who had come in then took the complainant out from the side of the house occupied by Kelera.

[54] In Labalaba's evidence he stated that the appellants went in because of the commotion the complainant was making, and that he saw her going through the door to the other side of the house. His recollection was that Kelera and her husband woke up as they arrived or after they arrived, and they all joined in asking her why she was shouting and swearing. His evidence was that they took the complainant out from that second side of the house and took her to Mere's house.

[55] When various aspects of this evidence as it was anticipated by defence counsel was put to the complainant in their cross-examinations of her, there were stark differences. She could not recall whether Kelera and her husband were sleeping in the second half of the house. She denied that she exited the property from their side of it contrary to the clear evidence of the four defence witnesses who were present. As dealt with in the next section, she denied that she was assisted out of the property by any of the appellants. Rather, her evidence was that she was resisting being moved by any of the appellants and that that was a cause of her continuing to shout and swear.

[56] In her evidence in chief, the complainant said she was swearing outside. In cross-examination she accepted that her statement to the Police had been correct in recording that she was shouting in the house when Mere and her uncle came for her.

[57] There is a lack of coherence about the appellants' evidence on what caused them to go back inside, from where they were drinking outside. They had apparently gone outside to get away from the complainant's shouting and swearing. However, sometime later when they heard her screaming and swearing, they were concerned enough to go inside to her. It maybe that the extent of the commotion she was making was more than they expected. None gave evidence that they were concerned for Abo, who had gone back in to get more beer just before they were concerned enough to go in as well.

[58] There are explicable differences for example on whether the complainant was going through the connecting door, or already on Kelera's side when the three appellants came in. Also on whether Kelera was woken, or awake when they came in. The inconsistencies could result from slight differences in the timing of the observations the witnesses recalled.

Who accompanied the complainant to Mere's house?

[59] The complainant's consistent evidence was that she was fetched by Mere and her own uncle, Marika. Her evidence was in effect that they rescued her from the appellants who were holding her hands and attempting to pull her away from Vurabere's house. She said Marika shouted at Labalaba and Tevita to let her go**.** In cross-examination, she denied that anybody else had helped her and was insistent that it was these two who had guided her the distance of some 50 metres to Mere's house.

[60] Mere's evidence was that she did not leave her home, and that the complainant was brought there by the three appellants who she identified consistently with other evidence.

[61] Of those, Tevita's evidence was that he, Lalabalavu and Labalaba had taken her directly from Kelera's side of the property to Mere's house. Tevita did not see anyone else at Mere's house apart from her. There was no reference to any exchange with Marika. I have summarised Labalaba's evidence at [54] above. Waisake's evidence was that the other three had taken the complainant, and that he followed on behind for part of the way.

[62] The complainant gave evidence that when she was lying down at Mere's house, the second and sixth appellants came and stood outside the window, wanting to apologise. She said they were sent away by Mere's aunt Rusila**.** Mere denied that there was any approach of that sort at all, and stated that she was alone in the house. The sixth appellant also denied any apology when cross examined about it. Mere was otherwise uninvolved in the events surrounding the alleged rapes and was sober that morning. The complainant was very drunk and, for whatever reason, was in a highly emotional state. Objectively, that might suggest Mere's recollection could be the more reliable of the two.

[63] On this topic, there is substantial conformity between the evidence of the three appellants addressing it, and the two witnesses called for the defence who described it. Their version is diametrically opposed to that of the complainant, with there being no apparent explanation or means of rationalising the stark

differences. If the complainant's version was correct, then there would need to have been an agreement between the five witnesses giving contradictory evidence to all perjure themselves in similar terms. The same observation applys to the stark differences on other material points, as between the complainant on one hand and five or fewer defence witnesses on the other.

Making the complaint

[64] The first opportunity the complainant had to make allegations of rape would have been to Kelera when Kelera asked her why she was upset. There was no reference to the alleged offending at that point. Nor was there any evidence that the content of what she was shouting and swearing about for some 15 minutes after the alleged rapes included complaints that the appellants had raped, interfered with, or hurt her.

[65] There is a clear conflict on the details of her making the complaint between the evidence of the complainant and that of Mere. In assessing this aspect of the narrative, it is necessary to bear in mind the customary cautions about attempting to assess the credibility of a rape complaint on the basis of the timing and content of an immediate or delayed complaint. Research confirms that there are many reasons for complainants to defer making an allegation of rape, and that they will then often not be forthcoming with details for embarrassment or a range of other reasons. Accordingly, this is not an aspect on which any great weight can be placed.

[66] Nonetheless, the differences are stark. The complainant's evidence was that, because she was still drunk, weak and tired, she did not raise any mention of the alleged rapes until she had had a sleep at Mere's house. That was notwithstanding her sudden transformation from her drunken weak state into her positive pushing of Abo, getting up from a prone position and a protracted period of shouting in strong terms. Her evidence was that she encountered her uncle, Marika, when he and Mere (on her version) helped her back to Mere's house, and also that he was there when she first arrived.

[67] In contrast, Mere consistently denied that Marika was present at all. On her recollection, there was a discussion, including an allegation of rape, without the complainant having a sleep first. The complainant's evidence as to the terms of her complaint were expressed only in general terms – "*then I told Mere what they did to me*".

[68] Mere could not recall what the complainant was wearing but did recall that she was drunk. The complainant had made reference to Rusila, an aunt of Mere, being in the house as well as her uncle Marika, but Mere was firm that she had been home alone on that morning.

[69] In cross-examination, Mere was tested on inconsistencies between the statement she had provided to the Police and the events as she recalled them in her evidence. She was uncertain as to which door (front or back) of her house the complainant had been brought to. In evidence, she stated that the "three boys" had left her at the door, but acknowledged when her statement to the Police was put to her, that she could not be sure whether one or more of them had brought the complainant inside. She was consistent in denying that she had left the house to bring the complainant to her home.

[70] Mere was unsure about the terms in which the complaint had been expressed. She initially agreed with the question that she had been advised that all six of the appellants had had sexual intercourse with her at Vurabere's house, but when asked whether the sex had been described as "*forceful*", her response was "she only told me that they tried to have sex with her, I don't know anything else that happened". The transcript records an intervention about the accuracy of the translation from Itaukei of that answer and when clarification was sought, Mere answered "*I can't recall my Lord, they tried or they actually did it, I can't recall*".

Evidence about the alleged rapes

[71] The complainant was aged 27 and a mother of one child at the time of the alleged offending. She had had the defence witness, Nayate, as a boyfriend for some three years. She was born and had lived in the same village community and was

the only female present through this lengthy drinking session with six men. In some of the cross-examinations it was put to her that the realisation that she had been the sole woman drinking with six men through the night to the point of extreme drunkenness was itself a sufficient cause of grave embarrassment for her to react strongly when she appreciated her predicament in the morning.

[72] Her evidence on the circumstances in which the rapes occurred remained consistent throughout her evidence-in-chief and numerous cross-examinations. Sometime before daybreak, in a very drunken state she had fallen asleep lying flat out in the room where the six men were continuing to drink. After a period, she woke to find Abo removing her shorts and pants and thereafter each of the appellants, in the order of the second to the sixth appellants, and finally the first appellant, knelt down before her and had vaginal intercourse with her.

[73] Her stock response to her lack of protest by crying out or opposing the appellants physically was that she was very weak because she was very drunk. Because her evidence was led by State counsel addressing each of the rapes in the same series of open questions, she had offered this explanation for the lack of objection 31 times by the end of her evidence-in-chief and it was a justification she came back to in the same terms on numerous occasions in the cross-examinations.

[74] The trial appears to have proceeded on the basis that the alleged rapes would have occurred sometime shortly before, or around seven to eight in the morning. She said it was daybreak or daylight when she was woken and that it was broad daylight when she was shouting.

[75] There were two passages of her cross-examination that might be seen as inconsistent with the rest of her evidence. She described that she was lying on her side when she was asleep and Abo was pulling her shorts down. As to this point, appellants' counsel made the point that it would be materially more difficult for another person to remove a woman's shorts and pants if they were lying on their side, than if they were prone on their back. That body position is

implicit in the balance of the complainant's evidence. She described that during one of the rapes she was "*lying straight*."

[76] She also acknowledged that in a drunken state, she had taken her own shorts and sulu off in the urge to urinate. She accepted that she was not able to go to the toilet to urinate. There is no further elaboration on when, in the sequence of events in issue, this had occurred.

[77] The complainant's evidence was that each of the appellants had sex with her for between four and five minutes. The first five rapes would therefore have involved between 20 and 25 minutes of sexual intercourse, plus whatever time was taken between each of the first five appellants removing himself from her, standing up and the next appellant placing himself between her legs and commencing intercourse with her. Despite her extremely drunk and weak state, she was clear about not only the identity of each of the alleged rapists, but also the sequence in which they did this to her.

[78] She accepted that she made no protest at all through any of those five rapes. Her only explanation for that was how drunk and weak she was. Although she said that she was, after the event, shouting out because she was frightened of them at no stage did she say that she remained silent during the rapes because she was afraid.

[79] It was only at some point in the sixth rape when the first appellant allegedly caused pain in her vagina that she cried out and pushed him off. Although the evidence is not explicit, the tenor of this aspect of it was that the first appellant stood up promptly, and she also stood up and put her shorts back on and began protesting loudly to all of the men who were still standing around.

[80] There is no suggestion that she had been subjected to some form of date rape drug or other form of sedation. It was simply that she had been drinking far too much and was very drunk. There is an inherent improbability about her being able to successfully extricate herself from the sixth appellant, seemingly immediately on making any form of protest, when she had felt incapable because

of drunkenness and how weak she felt, from protesting in any way through any of the previous five rapes, or the periods between them. It is quite unlikely for there to have been so rapid a transformation from a semi-comatose state, passively accepting five rapes of four to five minutes each and the beginning of a sixth rape, to her very robust swearing and shouting which occurred immediately thereafter.

[81] There is no suggestion that any threats or force were used to keep her in the position she was in, between each of the rapes. However much she was weakened by the effects of alcohol, there must be a question about the credibility of her doing absolutely nothing in the five gaps between each of the rapes given that she was not prevented from verbally protesting, or making some movement to indicate she did not want it to occur.

[82] The manner in which she presented her evidence clearly impressed the Judge. As a life-long member of a village community, it would be a courageous matter to follow through with allegations of rape by four cousins and two friends. Some might say it would take even greater courage to go through with such allegations if they were made up. The alternative explanation for the loud fuss she made on that morning, namely because of the embarrassment she felt when the realisation dawned of the extent of her socially unacceptable behaviour, is not as strong a reason as that prolonged outburst being a result of six rapes, but nor can it be dismissed as implausible.

[83] While there is no requirement for corroboration of her allegations, her narrative invites an expectation of possible corroboration from three people who, on her version, could have done so. There appears to have been no explanation for one or more of Josh, Marika and Rusila not being called. Nor for the non-production of the report of the medical examination conducted of her at the time she complained to the Police. It is pointless to speculate on whether the State had no option to run its case in sole reliance on the complainant's evidence, or why it may have elected to do so. A finding that her evidence alone does not make out the State's case beyond a reasonable doubt does not mean that she has made

false allegations. Rather, it results from a measured analysis of whether the State's case has removed any reasonable doubt about the elements of the offence.

[84] The complainant's single narrative is to be compared with the combined effect of the evidence of three of the appellants and three defence witnesses. There are some inconsistencies that could be material in the versions given by various witnesses for the defence, but overall I am not satisfied that they demonstrate a pattern of untruths. In his rejection of their evidence, the Judge found that they had "*tailor made their evidence to suit their own interests and that of the other accused persons*". However, the prosect of collusion between witnesses was not put to any of them, and consistency between the evidence of a group of witnesses is equally likely to be an indication of their reliability and truthfulness.

[85] Having carefully analysed all of the evidence, and appreciating the disadvantage that the appellate court is at in not seeing and hearing the witnesses give their evidence from the witness box, my conclusion is clearly that the State was unable to prove these charges beyond a reasonable doubt. A finding that the defence version of events was true is not required. It is enough that it creates a doubt about the truth of the complainant's version. In my view, such a doubt is entirely appropriate.

[86] Counsel for the appellants drew attention to the terms in which the Judge had expressed the prospect of a reasonable doubt:

> The defence has not been able to create a reasonable doubt in the prosecution case.

That suggests an impermissible reversal of the onus, requiring that the defence make out grounds for doubt when of course that was not the case.

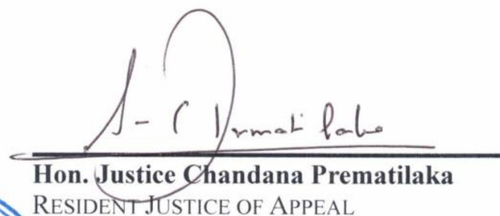
[87] Certainly, it would have been preferable for the Judge to have expressed himself in terms that conformed with the onus of proof. It could have been cast in terms such as that after considering all the evidence, (and notwithstanding the conclusion of the Assessors) he was satisfied that the State's case had been proved, beyond a reasonable doubt.

[88] However, I do not accept that the terms used by the Judge necessarily indicate that he had incorrectly reversed the onus and expected to be persuaded of the existence of a reasonable doubt by the defence case. The Judge's reasoning appears to be consistent with his appreciating the onus remaining on the State to make out all elements of the charges beyond a reasonable doubt. His conclusion based primarily on his perception of the demeanour of the various witnesses, was that he preferred the complainant's version, to the point that he was satisfied it was truthful beyond any reasonable doubt. That is a conclusion with which I respectfully disagree.

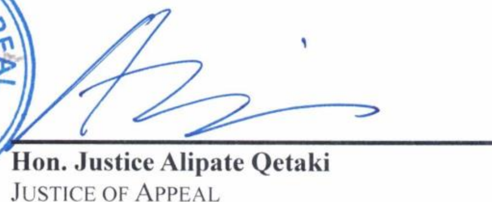
[89] Accordingly, the appeals are allowed. The convictions for all six appellants are quashed.

<u>Orders</u>:

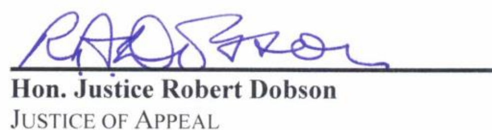
1. The appeals against conviction by all six appellants are allowed.
2. The convictions entered against all six appellants are set aside.
3. All six appellants are acquitted of the charge against them.



Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL



Hon. Justice Robert Dobson
JUSTICE OF APPEAL