

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 315 of 2015

[CRIMINAL JURISDICTION]

STATE

V

1. RATU MELI VATUREBA
2. NASONI RABURAU

Counsel : Ms. J. Fatiaki for State  
Ms. B. Malimali for 1<sup>st</sup> accused  
Ms. N. Mishra for 2<sup>nd</sup> accused

Hearing on : 24 - 27 July 2017

Summing up on : 27 July 2017

Judgment on : 28 July 2017

JUDGMENT

1. The two accused are charged with the following offences;

**FIRST COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**RATU MELI VATUREBA** on the 18<sup>th</sup> day of September 2015 at the Korovou Prison Compound, in the Central Division, had carnal knowledge of Taraivini Sydney, 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*

**NASONI RABURAU** on the 18<sup>th</sup> day of September 2015 at the Korovou Prison Compound, in the Central Division, had carnal knowledge of Taraivini Sydney, without her consent.

2. The assessors have returned with the unanimous opinion that each accused is not guilty.
3. I direct myself in accordance with the summing up delivered to the assessors on 27<sup>th</sup> July 2017 and the evidence adduced during the trial.
4. The prosecution led the evidence of the complainant and two other witnesses. The first accused gave evidence and called one witness. The second accused gave evidence.
5. The complainant's evidence was that, when she regained consciousness after being blacked out due to alcohol, the first accused was on top of her penetrating her vagina with his penis and thereafter continued to penetrate her vagina even though she kept on pushing him. After the first accused left, the second accused came inside and then she felt the second accused on top of her inserting his penis inside her vagina. She struggled and told the second accused "please, enough", but he closed her mouth and continued to penetrate her vagina. Thereafter she blacked out again until she woke up in her room in the spinsters' quarters. During cross-examination she admitted that she blacked out before the second accused inserted his penis inside her vagina.
6. From the evidence presented by the prosecution, it was clear that the complainant meant that she cannot remember what happened by saying that she was 'blacked out' and on some occasions 'unconscious'.
7. The third prosecution witness saw the complainant inside the room where the two alleged incidents had taken place. According to this witness, he saw the

complainant sitting right inside the room and at this time, the second accused was sitting near the door. According to the evidence, this was after the first accused allegedly raped the complainant and 1<sup>1</sup>/<sub>2</sub> minutes after the second accused went inside that room. The third prosecution witness also saw the complainant when the complainant came out of the waiting shed and he saw her going towards the quarters with the second accused. Thereafter, the second prosecution witness saw the complainant walking near her quarters and the complainant responded when she said 'mata'. Then the second prosecution witness also saw the complainant going to the complainant's room.

8. These two witnesses have seen the complainant at a time where the complainant says she had a blackout. The aforementioned evidence of the second and the third prosecution witnesses do not suggest that the complainant was in a state where she did not have the capacity to consent when they saw her.
9. More importantly, the third prosecution witness who saw the complainant immediately after the incident involving the first accused and while the second accused was inside the room which the alleged incidents had taken place, did not mention in his evidence about observing anything unusual in relation to the complainant.
10. In order to prove the offence of rape the prosecution should not only prove that the complainant did not consent but should also prove that the accused knew or believed that the complainant did not consent or that the accused was reckless as to whether or not the complainant consent. Whether the accused knew, believed or was reckless about the complainant's consent can only be decided based on the circumstances under which the alleged penetration took place. In this case the complainant says that she cannot remember anything immediately before and after the act of penetration. If there was evidence that the complainant was unconscious in the sense that she was motionless and was not performing any controlled functions, then there is no question that she was not in a position to give her consent. In this case, there was no evidence that she was in such a state.

11. According to the evidence in this case, the complainant was responding to the environment where she was talking with others and was walking, though she says that she cannot remember.
12. The first accused clearly says that he had consensual sexual intercourse with the complainant. His account of what happened at the Liquids night club was corroborated by another witness who is a corrections officer.
13. According to the third prosecution witness, the second accused was having a conversation with the complainant 1<sup>1/2</sup> minutes after the second accused went inside the room the complainant was in, and the second accused told the third prosecution witness soon after he came out of that room that the complainant told him to lick her.
14. Considering all the evidence led in this case, I am inclined to hold the view that the complainant's evidence in relation to the two charges was not reliable.
15. With regard to the first count, there is a reasonable doubt whether the complainant consented for the first accused to have sexual intercourse with her and in the event the complainant did not consent, whether the first accused knew or believed or was reckless about the complainant not consenting. With regard to the second count there is a reasonable doubt whether there was penetration in view of the evidence of the third prosecution witness.
16. Given the duration of time and other circumstances under which the second accused was inside the room with the complainant at the time in question and especially when the third prosecution witness was standing outside the waiting shed, the complainant's evidence concerning the second count seems improbable.
17. In the circumstances, I find that the prosecution has failed to prove the charges against the two accused persons beyond reasonable doubt.

18. I agree with the unanimous opinion of the assessors that the two accused are not guilty and I acquit them accordingly.



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitor for the 1<sup>st</sup> Accused : Pacific Chambers, Barristers & Solicitors, Suva.  
Solicitor for the 2<sup>nd</sup> Accused : Legal Aid Commission, Suva.