

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

**Criminal Case No.: HAC 45 of 2015**

**STATE**

**V**

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

**Counsel** : Ms. R. Uce for the State.  
: Ms. K. Vulimainadave for the first Accused.  
: Ms. A. Bilivalu for the second and sixth Accused.  
: Ms. L. Volau for the third Accused.  
: Ms. P. Reddy for the fourth and fifth Accused.

**Dates of Hearing** : 02, 03, 04, 05, 10, 11, 12 September, 2019  
**Closing Speeches** : 16 September, 2019  
**Date of Summing Up** : 17 September, 2019

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**SUMMING UP**

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**Ladies and Gentleman Assessors**

1. It is now my duty to sum up this case to you.

**ROLE OF JUDGE AND ASSESSORS**

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as

reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused persons are guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.
7. During the closing speeches, defence counsel for the second and sixth accused Ms. Bilivalu told you that Mere's boyfriend had told Mere and not the complainant that the six accused persons had sexual intercourse with the complainant. This assertion by the counsel was incorrect since the witness Mere had not answered this question. I therefore direct you to disregard this aspect of the submission.

## **BURDEN OF PROOF AND STANDARD OF PROOF**

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused persons. There is no obligation on the accused persons to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of all the accused person's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this court room.
11. You must decide the facts without prejudice or sympathy for either the accused persons or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

## **INFORMATION**

13. The accused persons are charged with the following offences: (a copy of the amended information is with you).

**COUNT ONE**

***Statement of Offence***

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

***Particulars of Offence***

**APOROSA DAUVUCU**, between the 17<sup>th</sup> day of March, 2015 and the 18<sup>th</sup> day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.

**COUNT TWO**

***Statement of Offence***

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

***Particulars of Offence***

**SEVANAIA LALABALAVU**, between the 17<sup>th</sup> day of March, 2015 and the 18<sup>th</sup> day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.

**COUNT THREE**

***Statement of Offence***

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

***Particulars of Offence***

**TEVITA VIBOTE**, between the 17<sup>th</sup> day of March, 2015 and the 18<sup>th</sup> day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.

**COUNT FOUR**

***Statement of Offence***

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

***Particulars of Offence***

**SEVANAIA VARANI**, between the 17<sup>th</sup> day of March, 2015 and the 18<sup>th</sup> day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.

**COUNT FIVE**  
***Statement of Offence***

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

***Particulars of Offence***

**WAISAKE WAIDILO**, between the 17<sup>th</sup> day of March, 2015 and the 18<sup>th</sup> day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.

**COUNT SIX**  
***Statement of Offence***

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

***Particulars of Offence***

**NACANIELI LABALABA**, between the 17<sup>th</sup> day of March, 2015 and the 18<sup>th</sup> day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.

14. To prove the above counts, the prosecution must prove the following elements of the offences of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Penetrated the vagina of the complainant “SELAI KOROI” with his penis;
  - (c) Without her consent;
  - (d) The accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.
  
15. In this trial all the accused persons have denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused persons who had penetrated the vagina of the complainant with their penis without her consent.

16. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
17. The first element of the offence is concerned with the identity of the persons who allegedly committed the offence.
18. The second element is the act of penetration of the complainant's vagina by the penis.
19. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
20. If you are satisfied that the accused persons had penetrated the vagina of the complainant with their penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused persons knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
21. In this case the complainant told the court that she was really drunk when the accused persons took turns in having sexual intercourse with her. The prosecution submits the complainant was so intoxicated that she had no capacity to consent to what the accused persons were doing to her hence she did not consent.
22. It is for you to decide considering the circumstances of the complainant whether she did not have the capacity to consent freely and voluntarily and out of her own freewill to what was being done to her due to intoxication.

23. You will have to look at the conduct of both the complainant and the accused persons at the time and the surrounding circumstances to decide this issue.
24. You must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for you to find the accused persons guilty of the offence of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused persons not guilty.
25. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
26. In this case, all the accused persons are charged with one count of rape each, you should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. You must not assume that because one accused is guilty of a count that the other must be guilty as well.

### **ADMITTED FACTS**

27. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.
28. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.

29. I will now remind you of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

### **PROSECUTION CASE**

30. The prosecution called one witness the complainant to prove the charges against all the accused persons.
31. The complainant Selai Koroi informed the court that on 17<sup>th</sup> March, 2015 she was at the Solevu Beach from 9pm to 11pm with her friend Mere. At 11pm Mere asked the complainant to accompany her to look for Mere's boyfriend Matia, both looked around the village but could not find Matia.
32. The complainant and Mere eventually ended up at the house of Vurabere. At Vurabere's house the complainant met her cousin Josh who invited her and Mere for a drink. The complainant saw all the six accused persons drinking beer inside the house she also joined them after a while Mere left. The complainant was wearing a black vest, brown shorts, red panty and a wrap-around 'sulu'. The drinking continued till the early hours of the next morning by this time the complainant was really drunk so she slept in the house.
33. 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.

34. 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.
35. 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.
36. 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.
37. 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.
38. 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.

39. 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.
40. 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.
41. The complainant stated that the second, third, fourth and the sixth accused persons were her cousins whereas the first and the fifth accused persons were her friends. The complainant had fallen asleep inside the house she explained when the first accused Abo was removing her shorts he had also removed her panty with her shorts and the reason why the complainant did not tell anyone about what the accused persons had done before sleeping at Mere's house was because she was feeling weak and she just wanted to sleep.
42. When cross examined by the counsel for the first accused, the complainant agreed the house she was drinking in that night was near a primary school. She disagreed that the first accused Abo had chased her from the house as she was about to sit down in the house. She also disagreed that in the morning of 18<sup>th</sup> March, when she started to shout, scream and swear at the first accused all the other accused persons came inside the house.
43. When the complainant came out of Vurabere's house it was early in the morning she maintained it was true that when she opened her eyes she saw the first accused pulling her shorts and that the first accused had sexual intercourse with her. The complainant did not make a false

complaint against the first accused although she was embarrassed and shy when she came out of the house that morning. The complainant maintained that the first accused had done whatever she had told the court.

44. In cross examination by the counsel for the second and sixth accused the complainant was referred to her police statement dated 20<sup>th</sup> March, 2015 second last paragraph on page one:

*“I was still shouting when my friend Mere and my uncle Marika who also lives in Solevu came to the house.”*

45. The complainant agreed in her evidence she had told the court that she was on the road when her uncle Marika and her friend Mere came. When asked which version was the truth, whether the one given in the police statement or the one given in court, the complainant stated the one mentioned in the police statement was the truth that her friend Mere and uncle Marika had come into the house she was in.

#### Ladies and Gentleman Assessors

46. I will give you directions on how to consider the inconsistency in the statement the complainant gave to the police when facts were fresh in her mind with her evidence in court later in this summing up at paragraph 123.
47. Upon further cross examination the complainant after drinking juice at the Solevu Beach arrived at Vurabere’s house at 12 midnight. She was unable to recall the time she went to sleep because she was too drunk but when she woke up it was daybreak. The complainant further stated when her shorts were pulled by the first accused she was awake but felt weak.

48. The complainant did not scream for the 30 minutes or so when all the accused persons took turns in having sexual intercourse with her since her whole body was weak and she was very drunk. Before all the accused persons had sexual intercourse with her Josh had left.
49. When it was put to the complainant that she did not resist or try to stand up and leave or shout or scream the complainant replied that she was weak and drunk and she couldn't move although her hands, legs and mouth were not restrained. The complainant stated that this was not the first time she had drinks with all the accused persons. The complainant maintained the incident she told the court had happened. She denied the suggestion that the only reason she said the second and the sixth accused had sexual intercourse with her was because she was embarrassed since she was the talk of the village that morning.
50. In cross examination by the counsel for the third accused, the complainant stated that she was with Mere from 9pm to 11pm on 17<sup>th</sup> March, 2015 and not that she had met Mere the next day at 7am. The complainant agreed she did not push any of the accused persons during the 4 to 5 minutes of sexual intercourse by each one of them since she was weak except for the first accused who she had pushed.
51. When the complainant felt pain in her vagina, she pushed the first accused and then yelled at all of them. The complainant had tried to scream but couldn't because she was weak she maintained all the accused persons did what she told the court. After yelling at the accused persons she was trying to come out of the house when suggested that she was not weak because she was able to shout for 15 minutes the complainant maintained her body was weak but she was able to yell and tried her best to shout so that she could get help.

52. The complainant also maintained that Mere and Marika came to the home of Vurabere to take her to Mere's house, she did not agree that Tevita and Labalaba were trying to stop her from swearing and breaking beer bottles and she also did not know that while she was yelling Kelera who lived in the other adjoining house of Vurabere had woken up and had come into the house. When suggested that she did not know that Kelera had come because she could not recall what had actually happened on the 17<sup>th</sup> and 18<sup>th</sup> March, 2015 the complainant stated that she clearly recalled what had happened.
53. The complainant agreed after all the alleged incidents she was crying and trying to wear her red panty and shorts. When suggested that she was wearing her panty all along the complainant denied this. Mere and Marika came into the house since the complainant was yelling and swearing at the top of her voice not because she was too drunk, but because she was frightened of the accused persons.
54. The complainant was not aware that when she was sleeping at Vurabere's house, all the accused persons were drinking outside the house. The complainant denied that she had brought the allegation against all the accused persons because she was embarrassed the other villagers had seen her yelling in a drunken state. The complainant maintained she knows what the accused persons did to her and she saw them.
55. When cross examined by the counsel for the fourth and the fifth accused, the complainant stated that in the evening of 17<sup>th</sup> March, she was at Solevu Beach drinking juice from 9pm to 11pm with Mere and not with Nayate.
56. The complainant denied she was already drunk when she reached Vurabere's house she maintained that sexual intercourse had taken place and she recalled it very clearly. Even though she was drunk and weak she was able to remember what had happened to her since her mind was alert.

57. The complainant did not kick, resist or move since she was feeling weak and she couldn't move. Although she did not cry or shout for help, the sexual intercourse by all the accused persons had happened. The complainant agreed after the accused persons had finished, she gained her strength. She denied that she was shouting and smashing beer bottles causing trouble because she was so drunk.
58. The complainant upon further cross examination stated that she swore at the accused persons for what they had done to her and she was asked by the third and the sixth accused to stop swearing and screaming. She agreed she had no control over what she was doing since she was so drunk.
59. When the complainant was shouting Mere and Marika came to take her and it was not the second, third and sixth accused who took her to Mere's house. When Mere and Marika came to take the complainant she did not tell them anything about what had happened because she was still drunk and not that because the incident did not happen. At Mere's house the complainant went to sleep when she woke up, she denied making up a story to blame the accused persons to look like a victim.
60. The complainant denied making a story to receive sympathy from the villagers after she was seen swearing in a drunken state and that her boyfriend Botei would leave her if he found out she was drinking with the six accused persons.
61. In re-examination the complainant stated that she was embarrassed and shy when she came out of Vurabere's house because of what the accused persons had done to her and when she had woken up, all the accused persons were inside the house.
62. The complainant clarified that Josh was sitting in the house when the accused persons started having sexual intercourse with her and then he

left. After yelling at the accused persons, the complainant was trying to come out of the house because Labalaba and Tevita were holding her hand.

63. That was the prosecution's case.

### **DEFENCE CASE**

#### Ladies and Gentleman Assessors

64. At the end of the prosecution case you heard me explain options to all the accused persons. They have those options because they do not have to prove anything. The burden of proving all the accused persons guilt beyond reasonable doubt remains on the prosecution at all times.

65. The first, second and fourth accused persons chose to remain silent and you should not draw any adverse inference from the fact that these accused persons decided to remain silent.

66. The second and the sixth accused called one witness, the third accused gave evidence and called one witness, the fourth and fifth accused called one witness, the fifth and sixth accused gave evidence. You must consider their evidence and give such weight as you think fit.

67. The third accused Tevita Vibote informed the court that on 17<sup>th</sup> March, 2015 at around 9pm he went to drink grog at Ravouvou's residence till 1am after this, he went to call the sixth accused Labalaba to drink some beer.

68. The third accused drank beer with the sixth accused at the community hall from 1am till 2.30am. Thereafter, they wanted to drink more on the way they met the complainant who was with another boy. The complainant is the cousin of the third accused she told them that there was drinking going

on at Vurabere's house. The third accused and Labalaba then went to Vurabere's house.

69. At Vurabere's house the third accused saw Sikeli, the complainant, Abo the first accused, Botei and some staff of Cloud 9 drinking beer. It was about 3am the third accused with Labalaba joined the group the drinking finished at about 7am the next morning that is on 18<sup>th</sup> March. At this time the third accused was with Sevanaia Lalabalavu (second accused), Waisake Waidilo (fifth accused), Abo (first accused) and Labalaba (sixth accused).
70. It was during this time the complainant caused a scene in the house she started throwing empty beer bottles around the house particularly on the floor and on the walls, so at this moment the third accused and the other accused persons went outside the house to continue drinking beside the mango tree.
71. The complainant was inside the house, after the drinks finished Abo the first accused was sent to bring some more drinks from inside the house. The third accused got a shock when the complainant started shouting and swearing at Abo.
72. The drinking was going on in one side of the house whereas Kelera and Anare were in the other side of the house sleeping but when the third accused went into the house the second time the complainant was on the other side of the house with Kelera and Anare.
73. Upon hearing the shouting and swearing by the complainant, the third accused, Sevanaia Lalabalavu and Labalaba ran into the house and told her to calm down but she continued swearing at them. Abo was on his way out of the house when the complainant started swearing at Abo who stood and stared at the complainant.



74. At this time, the third accused, Sevanaia Lalabalavu and Labalaba took the complainant outside the house to Mere's house. When the complainant went inside Mere's house the third accused left. On the way the complainant was drunk and she kept on swearing at them. The third accused denied committing the offence as alleged by the complainant he stated that he wouldn't do such a thing to his paternal cousin sister. He didn't know why the complainant had made the allegation against him.
75. When cross examined by the state counsel the third accused maintained that when he went to Vurabere's house with Labalaba that morning the complainant was already at Vurabere's house.
76. The third accused denied that during the drinking session the complainant had fallen off to sleep he added the complainant was causing problems so he, Waisake, Sevanaia Lalabalavu, Labalaba and Abo moved outside the house to drink whilst the complainant stayed inside the house.
77. The third accused also denied whilst the complainant had fallen asleep he and the other accused persons had surrounded her and then Abo had removed her shorts and panty. He also denied that all the accused persons including him had sexual intercourse with the complainant for about 4 to 5 minutes.
78. He agreed the door separating the house they were drinking in from the other house being the third door was closed. The third accused denied that the only reason the complainant was shouting and swearing at him and the other accused persons was because they were trying to hold her when she was trying to leave the house or because all of them had sexual intercourse with the complainant.
79. The third accused stated that they took the complainant outside the house and then took her to Mere's house he maintained Mere and Marika did not

take the complainant to Mere's house but he together with Lalabalavu and Labalaba had taken the complainant to Mere's house.

80. The third accused does not know why the complainant had come up with such an allegation against him he has no grudges or ill feelings against her. The accused maintained he did not have sexual intercourse with the complainant as alleged since they are closely related and he cannot do that sort of thing to her.
81. When questioned by the counsel for the first accused the third accused said he did not see the first accused kneeling down and having sexual intercourse with the complainant.
82. When questioned by the counsel for the second and sixth accused, the third accused confirmed that it was him, Labalaba and Sevanaia Lalabalavu who had taken the complainant to Mere's house. When the complainant was screaming and shouting inside the house, Labalaba and Sevanaia Lalabalavu were sitting with the third accused and others outside the house.
83. The third accused did not see Labalaba and Sevanaia Lalabalavu having sexual intercourse with the complainant as alleged. When the complainant was shouting, students from the school were standing near the fence and looking at what was happening.
84. When cross examined by the counsel for the fourth and fifth accused, the third accused stated when they had gone outside to drink, Aldo the fourth accused had gone to transport the workers to Castaway. When he had arrived at Vurabere's house at 3am Aldo the fourth accused was sleeping, but had woken up and left for work.

85. When the third accused, Sevanaia Lalabalavu and Labalaba took the complainant outside Waisake was sitting outside and Aldo was not around. He did not see the fourth and the fifth accused have sexual intercourse with the complainant.
86. The fifth accused Waisake Waidilo informed the court that on 17<sup>th</sup> March, 2015 at around 11pm he was drinking grog at Ravouvou's house with Sevanaia Lalabalavu and some others till around 1am. After the grog session finished, the fifth accused invited Sevanaia Lalabalavu for a drink of wine. Both went to the house of the fifth accused and from there they sat under a mango tree to drink wine.
87. It was after 3am that the wine finished whilst looking for some more drinks, both ended up at Vurabere's house. By this time, it was around 3 to 4am, the fifth accused saw that Aldo had fallen asleep.
88. At Vurabere's house he saw Josh, Aldo, Labalaba, Abo and the complainant drinking both joined the group in drinking. In the early hours of the morning, all went outside namely the fifth accused, Tevita, Labalaba, Sevanaia Lalabalavu and Abo. They were drinking outside till the complainant started shouting by this time it was after 7 in the morning.
89. Upon hearing this Labalaba, Tevita and Sevanaia Lalabalavu went inside the house to check on the complainant. After a while the complainant was brought outside the house she continued to shout and swear at everyone.
90. The fifth accused was sitting outside when the complainant was brought outside and taken to Mere's house by Labalaba, Tevita and Sevanaia Lalabalavu who were holding the complainant's hand the fifth accused followed them. He was 10 to 20 meters behind he did not go right up to Mere's house, but went half way only.

91. After the others came back from Mere's house all went to the house of the fifth accused and sat under a tree beside his house. He denied committing the offence as alleged by the complainant.
92. In cross examination by the state counsel the fifth accused agreed that the complainant was his friend he does not know whether Sikeli and Botei were also drinking at Vurabere's house. According to the accused when he first went inside the house to join the drinking party, Aldo was sleeping.
93. The fifth accused agreed that he was drinking at Vurabere's house with the other five accused persons and Josh but the complainant was already at Vurabere's house when he arrived.
94. The fifth accused does not know when the complainant slept he only knows that they had moved out of the house while the complainant was in the house. The accused denied that he and all the other accused persons had sexual intercourse with the complainant without her consent after Abo had removed the shorts and panty of the complainant. He also denied that the complainant was drunk and too weak to do anything.
95. He maintained that nothing had happened as alleged. The fifth accused agreed the complainant was shouting but all the time she had her shorts on. Mere and Marika did not come into the house since he was sitting outside the house the entire time.
96. The fifth accused maintained it was Labalaba, Sevanaia Lalabalavu and Tevita who had taken the complainant to Mere's house he does not have any grudges against the complainant and he does not know why she has come up with this allegation against him. The relationship between the complainant and the fifth accused was a good one.

97. When cross examined by the counsel for the first accused, the fifth accused stated that he did not see Ropate at Vurabere's house and he was not sure whether Ropate was there or not.
98. When cross examined by the counsel for the second and sixth accused the fifth accused stated when the complainant started shouting he was sitting outside with Sevanaia Lalabalavu, Labalaba and Tevita.
99. When cross examined by the counsel for the third accused, the fifth accused denied the third accused Tevita had sexual intercourse with the complainant as alleged.
100. The sixth accused Nacanieli Labalaba informed the court that on 17<sup>th</sup> March, 2015 at 9pm he was drinking grog at the village hall with some villagers. The grog session finished after 1am so he went home after a few minutes Tevita Vibote came with three cans of Woodstock beer and invited the sixth accused to go and drink.
101. Both went to the village hall verandah to drink it was almost 2.30am when the beer finished. They wanted to drink more so they went looking for some, on the way they met the complainant and Samu who told the sixth accused that they were drinking at Vurabere's house. The accused and Tevita reached Vurabere's house at around 3am.
102. When the sixth accused had met the complainant she was really drunk, at Vurabere's house he saw Abo, Aldo, Sikeli, the complainant, some staff of Cloud 9, Samu and Josh.
103. The sixth accused and Tevita joined the group drinking till the next morning. At sunrise everyone left except the sixth accused, Tevita, Abo, Waisake, Sevanaia Lalabalavu and the complainant. At 7am the complainant was very drunk and she started breaking beer bottles at this

time the witness, Tevita, Waisake, Abo and Sevanaia Lalabalavu moved outside leaving the complainant in the house.

104. As the drinking continued outside, Abo went inside the house to bring another bottle of beer when Abo entered, the accused heard shouting and swearing so Tevita, Sevanaia Lalabalavu and the sixth accused went inside the house. The sixth accused saw the complainant swearing and going through the partition door to the other side of the house and Abo was standing holding the beer bottle that he was supposed to bring outside.
105. The sixth accused told the complainant to keep quiet this is when Kelera and Anare woke up. He asked the complainant why she was shouting but she kept swearing as a result Anare and Kelera also joined in to calm the complainant. The sixth accused denied committing the offence he said he did not do anything as alleged.
106. In cross examination by the state counsel the sixth accused told the court that the complainant was his cousin and he had met her before going to Vurabere's house. The accused agreed the complainant was not cross examined by his counsel that he had met the complainant and she had told him about the drinking at Vurabere's house and that he and Tevita had followed the complainant to Vurabere's house.
107. He was not able to recall if Botei was at Vurabere's house that night. The sixth accused maintained that the complainant had broken beer bottles inside the house that is why they had to leave the house and go outside to continue drinking. According to the sixth accused the partition door can be pushed open since it was not locked the complainant after shouting from one side of the house and went into the adjoining house.
108. The sixth accused agreed he did not see the complainant push open the door he denied while drinking the complainant had fallen off to sleep. The

accused denied committing the offence as alleged by the complainant he also denied any of the other accused persons had committed the offence as alleged by the complainant according to the sixth accused nobody had sex with the complainant.

109. The accused stated when they went inside the house the complainant was swearing at Abo and then at them. He also stated that when inside the house they held the complainant's hand not to prevent her from leaving the house, but to bring her outside to take her to Mere's house. Mere and Marika did not take the complainant to Mere's house they did with Waisake following them.
110. The sixth accused had a grudge against the complainant from the time she had become his brother's girlfriend because she drank beer and would create trouble in the village. Apart from this, the accused had a good relationship with the complainant the accused does not know the reason why the complainant had come up with the allegations against all of them.
111. When cross examined by the counsel for the first accused, the sixth accused stated when he first met the complainant before going to Vurabere's house the complainant was drunk because he could smell alcohol on her when she was talking to him. When he went to Vurabere's house he did not see Ropate. When he entered the house after hearing the complainant's shout he saw Abo was holding one bottle of hot stuff.
112. The sixth accused stated that Abo had not pulled the shorts of the complainant and Abo did not have sexual intercourse with the complainant in the morning of 18<sup>th</sup> March.
113. When cross examined by the counsel for the third accused the sixth accused stated that he did not see the third accused have sexual intercourse with the complainant as alleged.

114. When cross examined by the counsel for the fourth and fifth accused the sixth accused stated that Aldo had left before sunrise that morning, when the sixth accused and others had gone inside the house after they heard the complainant shouting Waisake the fifth accused was sitting outside. When they were taking the complainant to Mere's house Waisake was following them. The sixth accused stated that both the fourth and the fifth accused did not have sexual intercourse with the complainant as alleged.
115. In re-examination the accused stated that his brother's name was Nayate. The reason why they did not take the complainant to her home was because they wanted to drink more so they left the complainant inside the house and continued drinking outside.
116. Kelera Vola Vitilau the witness called by the second and the sixth accused informed the court that on 17<sup>th</sup> March after 9pm she was sleeping at the other side of Vurabere's house, between 10 to 11pm Sikeli, Semi and some staff of Cloud 9 came and called her husband to join them for a drink but her husband did not go with them.
117. The drinking was in the adjoining house, after 2am she heard a girl's voice she knew it was the complainant since she recognized it from her laughter. The witness and the complainant are cousins at around 7am to 8am she heard shouting and swearing the witness saw the complainant throwing beer bottles and breaking them after that the complainant forcefully opened the door in the middle of the two houses and came to the side occupied by the witness.
118. The witness asked the complainant what the problem was but the complainant continued swearing and crying since the complainant's shorts were not properly worn the witness wanted to pull her shorts up, but the complainant did not want this to be done. The witness then told the complainant to wear a "sulu" so that she could go home.



119. After that Sevanaia Lalabalavu, Labalaba and Tevita came into the house from outside she told them to get the complainant to put on a “sulu” and to take her home.

120. In cross examination by the state counsel, the witness was referred to her police statement dated 21<sup>st</sup> March, 2015. The witness agreed she told the police everything she could remember that had transpired on the day she was referred to the third paragraph, last sentence of her police statement as follows:

*“I came closely to Selai and saw her wearing a black vest, bra and was only wearing a stripe pink panty. She was not wearing any shorts.”*

121. When it was put to the witness that she had told the police the above the witness did not agree and stated that this portion of her statement was not correct. The witness maintained that the complainant was throwing and breaking beer bottles on the other side of the house because when the complainant came into her side of the house she was holding a beer bottle and was throwing it.

122. The witness agreed most of what she told the court was not in her police statement and she further stated that it was a lie that Mere and Marika had taken the complainant to Mere’s house.

#### Ladies and Gentleman Assessors

123. The learned state counsel was cross examining his witness and the learned defence counsel for the second and sixth accused had cross examined the complainant at paragraphs 44 and 45 of this summing up about some inconsistencies in the statement this witness Kelera and the complainant gave to the police when facts were fresh in their minds with their evidence

in court. I will now explain to you the purpose of considering the previously made statement of the witness and the complainant with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness and the complainant are believable and credible. However, the police statement itself is not evidence of the truth of its contents.

124. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
125. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.
126. When cross examined by the counsel for the third accused, the witness stated when the complainant came to her side of the house her shorts was below her waist and the complainant was very drunk.
127. When cross examined by the counsel for the fourth and fifth accused, the witness agreed the complainant did not tell her the reason why she was swearing and crying and at this point in time the fourth accused Aldo and fifth accused Waisake were not present.
128. In re-examination the witness stated that her police statement was recorded by a police officer and she had told the officer everything that had happened but she does not know what was written since she did not read

her police statement. The witness stated that whatever she told the court was the truth.

129. Mere Nabiau the witness for the third accused informed the court that on 18<sup>th</sup> March, at around 7am she was at home when standing at the back door of her house she saw some students standing beside the school fence and looking towards Vurabere's house.
130. The witness saw and heard the complainant screaming and swearing, at this time she saw Lalabalavu, Tevita and Labalaba trying to pull the complainant towards her house. The complainant did not want to go with them she was yelling and swearing at them the witness saw this from 30 meters away. The complainant was brought to her house and she was very drunk.
131. When cross examined by the state counsel the witness denied drinking juice with the complainant on 17<sup>th</sup> March, between 9pm to 11pm. Matia was her boyfriend but she did not go with the complainant looking for her boyfriend that night. The witness denied going to the complainant's house and bringing the complainant to her house she maintained it was Sevanaia Lalabalavu, Labalaba and Tevita who had brought the complainant to her house.
132. The witness was not able to recall whether the three accused persons had left the complainant at the front or back door of her house or they had brought her inside the house. The witness was also unable recall if there was anyone following the three accused persons who had brought the complainant to her house. When it was suggested that she had made up her evidence the witness said she told the court whatever she could recall.
133. The witness informed the court that the complainant told her that the six accused persons had tried to have sex with her.

134. When cross examined by the counsel for the second, sixth, fourth and fifth accused the witness agreed the complainant did not tell her that the six accused persons had sexual intercourse with her.

#### Ladies and Gentleman Assessors

135. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

136. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant told the witness Mere that all the accused persons tried to have sexual intercourse with her when she was at the house of Mere left by the three accused persons in the morning of the alleged incidents.

137. This is commonly known as recent complaint evidence. The evidence given by Mere is not evidence of what actually happened between the complainant and all the accused persons since Mere was not present and did not see what had happened between the complainant and all the accused persons.

138. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told Mere about what all the accused persons had done to her although not in complete detail therefore she should be believed.

139. On the other hand, the defence says the complainant made up a false complaint against all the accused persons because she was very drunk and she did not know what she was doing or had no control over herself and so the complainant should not be believed. The defence is asking you to believe the witness Mere that none of the accused persons had sexual intercourse with the accused as alleged.
140. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
141. Jonacani Nayate the witness for the fourth and the fifth accused informed the court that on 17<sup>th</sup> March at around 7pm he was drinking with the complainant at Baravi settlement till after 1am.
142. In cross examination by the state counsel the witness stated that his relationship with the complainant had ended after this incident.
143. This was the defence case.

### **ANALYSIS**

144. The prosecution alleges that between the 17<sup>th</sup> day of March, 2015 and the 18<sup>th</sup> day of March, 2015 all the accused persons after drinking with the complainant at the house of Vurabere had forceful sexual intercourse with her. The complainant was drunk and feeling weak so she did not push, shout or yell until the first accused (who was the last one to have sexual intercourse) caused pain to the complainant.

145. The complainant was able to regain her strength and push the first accused at this time she started to cry and wear her shorts. The complainant was frightened of all the accused persons so she started to swear and shout at them. After a while Mere and her uncle Marika came and she went to the house of Mere.
146. The prosecution further says the complainant did not consent to have sexual intercourse with all the accused persons and the fact that the complainant did not yell or shout or resist does not mean that she was consenting.
147. On the other hand, all the accused persons deny the allegation made against them they say they did not commit the offences as narrated by the complainant. The defence is also asking you to disregard the evidence of the complainant since the accused persons did not do anything to the complainant that early morning.
148. The complainant was so drunk that she cannot be sure of what had happened furthermore, as a result of her intoxication she was yelling, shouting and swearing and breaking beer bottles without any reason. The complainant made a false complaint against all the accused persons since she was embarrassed and shy of what she had done that early morning.
149. The complainant was the talk of the village since she was seen to be drunk, shouting and swearing in front of school students and the other villagers hence she made a story implicating all the accused persons seeking sympathy as a victim and also to maintain her relationship with her boyfriend Botei.

## Ladies and Gentleman Assessors

150. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses give evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
151. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another he or she may be accurate in saying one thing and not be accurate in another.
152. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against all the accused persons have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

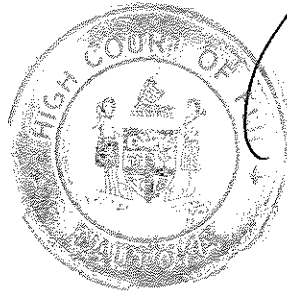
153. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
154. If you accept the version of the defence you must find the accused persons not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove all the accused persons guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
155. The accused persons are not required to prove their innocence or prove anything at all. They are presumed innocent until proven guilty.
156. In this case, all the accused persons are charged with one count of rape each, as mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. You must not assume that because one accused is guilty of a count that the other must be guilty as well.
157. Your possible opinions are:-
1. COUNT ONE - **RAPE:** GUILTY OR NOT GUILTY.
  2. COUNT TWO - **RAPE:** GUILTY OR NOT GUILTY.
  3. COUNT THREE - **RAPE:** GUILTY OR NOT GUILTY.
  4. COUNT FOUR - **RAPE:** GUILTY OR NOT GUILTY.
  5. COUNT FIVE - **RAPE:** GUILTY OR NOT GUILTY.
  6. COUNT SIX - **RAPE:** GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

158. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.



159. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



A handwritten signature in black ink, appearing to read "Sunil Sharma".

**Sunil Sharma**  
**Judge**

**At Lautoka**

17 September, 2019

**Solicitors**

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

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