

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
Date of Judgment : 18 September, 2019

JUDGMENT

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

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 17th day of March, 2015 and the 18th 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 17th day of March, 2015 and the 18th 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 17th day of March, 2015 and the 18th 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 17th day of March, 2015 and the 18th 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 17th day of March, 2015 and the 18th 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 17th day of March, 2015 and the 18th day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.

2. The three assessors had returned with a unanimous opinion that all the accused persons were not guilty as charged.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called the complainant whereas the first accused remained silent and did not call any witness, the second and sixth accused called one witness while the sixth accused gave evidence, the third accused gave evidence and called one witness, the fourth and fifth accused called one witness and the fifth accused gave evidence.
5. The complainant Selai Koroï informed the court that on 17th 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.

6. The complainant and Mere 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.
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.
15. 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.

16. 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.
17. 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 at Vurabere's house 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.
18. 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.
19. The complainant 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.

20. 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.
21. The complainant further stated that she swore at the accused persons for what they had done to her. 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 make her look like a victim and to get sympathy from the villagers.
22. The complainant also 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.
23. For the defence case the first, second and fourth accused persons chose to remain silent.
24. The third accused Tevita Vibote informed the court that on 17th 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.
25. 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.

26. 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 18th March. At this time the third accused was with Sevanaia Lalabalavu (second accused), Waisake Waidilo (fifth accused), Abo (first accused) and Labalaba (sixth accused).
27. 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.
28. 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.
29. 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.
30. 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.

31. 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 to Mere's house 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.
32. The fifth accused Waisake Waidilo informed the court that on 17th 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 they sat under a mango tree to drink wine.
33. 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.
34. At Vurabere's house he saw Josh, Aldo, Labalaba, Abo and the complainant drinking both joined the group. 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.
35. 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.
36. 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.

37. 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.
38. The sixth accused Nacanieli Labalaba informed the court that on 17th 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.
39. 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.
40. 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.
41. 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.
42. 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.

43. 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.
44. 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.
45. 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.
46. Kelera Vola Vitilau the witness called by the second and the sixth accused informed the court that on 17th 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.
47. 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.

48. 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 it was below her waist 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.
49. 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.
50. Mere Nabiau the witness for the third accused informed the court that on 18th 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.
51. 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.
52. 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.

53. The witness informed the court that the complainant told her that the six accused persons had tried to have sex with her.
54. 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.
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.
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.
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.
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.
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.
67. For the above reasons, I overturn the unanimous opinion of the assessors that all the six accused persons are not guilty of the count of rape they are individually charged with.

68. I therefore find all the accused persons guilty as charged and I convict them all of one count of rape each.
69. For completeness, the sixth accused Nacanieli Labalaba was also charged with one count of assault causing actual bodily harm as per the following information:

COUNT SEVEN

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to section 275 of the Crimes Act 2009.

Particulars of Offence

NACANIELI LABALABA, between the 17th day of March, 2015 and the 18th day of March, 2015 at Nadi in the Western Division assaulted **SELAI KOROI** thereby occasioning her actual bodily harm.

70. On 15th May, 2015 the sixth accused had pleaded guilty to the count of assault in the presence of his counsel. On 11th December, 2018 the sixth accused had agreed and admitted the following summary of facts read by the state counsel:

“On the 17th of March, 2015, at about 9pm, the complainant, Selai Koroi, 22 years old, unemployed of Solevu, Nadi and her friend Mere Nabiau were drinking juice near the Solevu beach.

The complainant later that evening joined a drinking party at the Vurabere while Mere went ahead. At the party, the complainant drank alcohol with the accused who is also her cousin, Nacanieli Labalaba 22 years (in 2015), farmer of Solevu Village, Nadi and some others until the wee hours of the morning. Soon after, the complainant slept she was woken up after a while and was shouting and crying on top of her voice.

The accused came to her and punched her on her face and told her to keep quiet. Hearing the complainant, Mere and Marika Momo, 29 year's old, farmer of Solevu Village, Nadi came to assist.

The matter was reported to the Nadi Police Station and investigations were carried out. The complainant was also taken to the hospital where the following injuries were noted (a copy of the medical report is attached and marked as NL2):

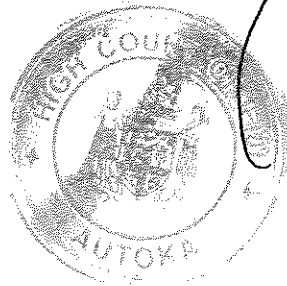
1. *Swelling noted on the right side of the cheek*
2. *Tenderness over right side of mandible (face)*

The accused was interviewed under caution by DC 3855 Setareki at the Nadi Police Station where he admitted slapping the complainant on her face twice. Attached and marked NL is a copy of his caution interview.

The Accused was subsequently charged for the offence of assault occasioning actual bodily harm."

71. On 26th February, 2019 this court after being satisfied that the sixth accused had entered an unequivocal plea on his freewill found the accused guilty and convicted him for one count of assault causing actual bodily harm.

72. This is the judgment of the court.



Sunil Sharma
Judge

At Lautoka

18 September, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

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