

**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**

<b>Counsel</b>	:	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.
<b>Dates of Hearing</b>	:	02, 03, 04, 05, 10, 11, 12 September, 2019
<b>Closing Speeches</b>	:	16 September, 2019
<b>Date of Summing Up</b>	:	17 September, 2019
<b>Date of Judgment</b>	:	18 September, 2019
<b>Date of Sentence</b>	:	04 October, 2019

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**SENTENCE**

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1. In a judgment delivered on 18<sup>th</sup> September, 2019 this court found all the accused persons guilty and convicted them of one count of rape each as charged. Furthermore, this court had already found the sixth accused Nacanieli Labalaba guilty and convicted him of one count of assault causing actual bodily harm on 26<sup>th</sup> February, 2019 as per the following 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 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.

**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 17<sup>th</sup> day of March, 2015 and the 18<sup>th</sup> day of March, 2015 at Nadi in the Western Division assaulted **SELAI KOROI** thereby occasioning her actual bodily harm.

2. The brief facts were as follows:

On 17<sup>th</sup> March, 2015 the victim Selai Koroi was drinking with all the accused persons in a house in their village. The drinking continued till the early hours of the following morning. By this time the victim was really drunk so she slept.

3. The victim 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.

4. 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.

5. After him, the fourth accused also known as Aldo came, and had sexual intercourse with the victim. Thereafter, Waisake, the fifth accused and the sixth accused, Labalaba came, and had sexual intercourse with the victim.

6. Finally, the first accused Abo came and had sexual intercourse with the victim, 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 victim 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.

7. According to the victim 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 victim 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.
8. When the victim 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 victim was shouting on the road for about 15 minutes after a while her friend Mere and her uncle Marika came. The victim's uncle Marika came and shouted at Labalaba and Tevita to release the victim's hand.
9. Thereafter, the victim 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.
10. The victim did not answer at this time Mere's aunt Rusila came and chased the two away she then slept. When the victim woke up she told Mere about what all the accused persons had done to her. The victim did not consent to have sexual intercourse with all the accused persons.
11. Furthermore, in respect of the seventh count which concerns the sixth accused only (to which the sixth accused had pleaded guilty) the brief facts were as follows:
12. While the victim was shouting and crying on top of her voice, the sixth accused Nacanieli Labalaba punched the victim on her face and told her to keep quiet.

The matter was reported to the Nadi Police Station and investigations were carried out. The victim was also taken to the hospital where the following injuries were noted:

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 victim on her face twice. The sixth accused was subsequently charged for the offence of assault causing actual bodily harm.

13. All the counsel filed their written sentence, victim impact statement and mitigation submissions for which this court is grateful.
14. Counsel for the accused persons presented the following personal details and mitigation on behalf of the accused persons as follows:

First accused [Aporosa Dauvucu]

- a) He was 25 years of age at the time of offending;
- b) First offender;
- c) Cooperated with the police;
- d) Married with two children aged 4 years and 8 months respectively;
- e) Construction worker earns about \$280.00 per week;
- f) Sole bread winner of the family.

Second accused [Sevanaia Lalabalavu]

- a) He was 32 years of age at the time of the offending;
- b) Married with two children aged 10 and 5 years respectively;
- c) Unemployed but a subsistence farmer;
- d) Cooperated with the police.

Third accused [Tevita Vibote]

- a) He was 31 years of age at time of the offending;
- b) First offender;
- c) Married with a child;
- d) Employed as a Boatman earning \$200.00 per week;
- e) Sole bread winner in the family;
- f) Accused did not use any violence or aggression on the victim.

Fourth accused [Sevanaia Varani]

- a) He was 22 years of age at the time of the offending;
- b) First offender;
- c) Boat Captain;
- d) Financially supports his elderly parents and younger sister.

Fifth accused [Waisake Waidilo]

- a) He was 33 years of age at the time of the offending;
- b) Self-employed;
- c) First offender.

Sixth accused [Nacanieli Labalaba]

- a) He was 23 years of age at the time of the offending;
- b) Married with one child who is 4 years of age;
- c) First offender;
- d) Professional Rugby Player;
- e) Cooperated with police.

15. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj v The State, CAV 0003 of 2014* (20 August, 2014) that the personal circumstances of an accused person has little mitigatory value in cases of sexual nature.

## **AGGRAVATING FACTORS**

16. The aggravating factors are as follows:

a) Breach of Trust

The victim and the accused persons are known to each other all are from the same village. The second, third, fourth and sixth accused persons are the cousins of the victim whereas the first and the fifth accused persons were her friends.

The victim was drunk, vulnerable and unsuspecting she was outnumbered by the accused persons who breached the trust of the victim by what they did to her. The accused persons were six and the victim was alone. The accused persons by their actions displayed a gross breach of trust. The offence of rape has become very prevalent nowadays almost always committed by persons known to the victim.

b) Victim Impact Statement

According to the victim impact statement the victim has been emotionally and psychological affected by what all the accused persons had done to her. The victim was affected in the following ways:

- a) She was embarrassed and blamed herself for what had happened;
- b) She feels scared and fearful has flashbacks about what the accused persons did to her;
- c) The victim and her family had to leave the village for their safety from 2015 till 2018;
- d) The villagers looked down upon her and blamed her for the incident and for bringing shame to the village by reporting the incident.



17. This court accepts that no expert evidence was led in respect of the emotional and/or psychological effect on the victim. However the contents of the victim impact statement cannot be ignored in light of the victim's evidence. The harm caused to the victim was a direct result of what the accused persons had done her (*see State vs. Afzal Khan, criminal case no. HAC 75 of 2016*).
18. The maximum penalty for the offence of rape is life imprisonment the accepted tariff for the rape of an adult is a sentence between 7 years to 15 years imprisonment.
19. In *Mohammed Kasim v The State (unreported) Cr. Case No. 14 of 1993; 27 May 1994*, the Court of Appeal had stated:

*"We consider that at any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than the starting point."*
20. On 18<sup>th</sup> September, 2019 when all the accused persons were found guilty of the offence of rape this court had asked counsel if they wanted a sentence hearing, none of the counsels were in favour of this suggestion. Counsel (both prosecution and defence) opted to rely on their submission.
21. In the submissions filed the state counsel specifically asked for a non-parole period to be imposed considering the nature and gravity of the offence committed and the circumstances of the offending.

22. The Supreme Court of Fiji in the recent judgment of *Nacani Timo vs. The State, Criminal Petition no. CAV 0022 of 2018 (21<sup>st</sup> August, 2018)*, as a matter of practice requires a sentencing court to give the accused an opportunity to be heard before a non-parole period was imposed.
23. Although the accused persons through their counsel had waived their rights to a sentencing hearing, however, in fairness to the accused persons, this court on its own volition has looked at the requirements of section 18 (2) of the Sentencing and Penalties Act.
24. When fixing a non-parole period the court must look at the nature of the offence committed and the past history of the offender. The state counsel in her written submissions seeks a non-parole period to be imposed since this was a case of exceptional circumstances – the victim and the accused persons were from the same village, known and related to each other.
25. The manner in which the offence was committed was serious which was committed within a village by a group of men having forceful sexual intercourse with a victim who was drunk and weak.
26. In the absence of any detailed submissions made by the accused persons, this court is of the view that any submissions on behalf of the accused persons would have been premised on the basis of the past history of the offenders. This court accepts that all the accused persons are of good character and first offenders (although accused two has an unrelated previous conviction) should be given an opportunity to rehabilitate themselves.
27. This court has to weigh one limb of the legal requirement under section 18 (2) of the Sentencing and Penalties Act with the other. This was a gang rape by people who were known and related to the victim within the precinct of a

village they were living in, instead of protecting the victim they committed a heinous act on her.

28. In weighing the nature or gravity of the offence committed and considering the circumstances of the offending that unfolded in evidence, this court is of the view that a non-parole period be imposed. However, taking into account the fact that all the accused persons are young offenders and of good character they should be given an opportunity to rehabilitate themselves in this regard a non-parole period which is too close to the head sentence will not be justified.
29. Bearing in mind the objective seriousness of the offence committed I take 8 years imprisonment (lower end of the tariff) as the starting point of the sentence. I add 5 years for the aggravating factors, bringing an interim total of 13 years imprisonment.
30. Although the personal circumstances and family background of the accused persons have little mitigatory value, however, I accept their good character has substantive mitigating value. Although the second accused Sevanaia Lalabalavu has one unrelated previous conviction dated 12<sup>th</sup> October, 2015 I consider him to be a first offender for the purposes of this sentencing.
31. I further reduce the sentence by 1 year for good character and mitigation. The sentence is now 12 years imprisonment for all the accused persons.
32. I note that all the accused persons have been in remand for about 2 months and 8 days. I exercise my discretion to further reduce the sentence for the remand period by two months and 15 days in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence of imprisonment is 11 years 9 months and 15 days.

33. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
34. In respect of the sixth accused for the count of assault causing actual bodily harm he is sentenced to 5 months imprisonment which will be served concurrently with the sentence of rape.
35. Under section 18 (1) of the Sentencing and Penalties Act, I impose 9 years as a non-parole period to be served before the accused persons are eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of all the accused persons which is just in the circumstances of this case.
36. Rape not only affects the physical integrity of a victim, but violates the human dignity, leaving lifelong scars of psychological devastation bringing about a sense of self blame and hopelessness which does not heal easily even long after the physical injuries have healed.
37. All of you have committed a serious offence against the victim who was your cousin, friend and a fellow villager. I am sure it will be difficult for her to forget what you had done to her. You have not only brought shame to yourselves, but also to your family and your village, your actions can best be described as disgusting, selfish and lustful, for your sexual gratification you had no regard for the safety, pain and sufferings of the victim.

38. All of you took advantage of the victim's physical condition, vulnerability and the fact that she was alone. You cannot be forgiven for what you have done to the victim.
39. This court will be failing in its duty if a long term deterrent custodial sentence was not imposed. According to the victim impact statement the victim continues to be emotionally and psychologically affected by the incident.
40. In summary, I pass a sentence of 11 years 9 months and 15 days imprisonment for one count of rape each of the accused persons have been convicted of with a non-parole period of 9 years to be served before they are eligible for parole. For the sixth accused Nacanieli Labalaba the sentence of 5 months imprisonment for Assault Causing Actual Bodily Harm is to be served concurrently with the sentence of rape.
41. 30 days to appeal to the Court of Appeal.



**Sunil Sharma**  
**Judge**

**At Lautoka**

04 October, 2019

**Solicitors**

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

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