

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 74 of 2016**

**STATE**

**V**

- 1. TOMASI VAKALOLOMA**
- 2. SAVENACA VALU**
- 3. WATISONI BARO**
- 4. TEVITA GUSUDRADRA**

**Counsel** : Ms. L. Bogitini for the State.  
: Mr. T. Varinava for the first Accused.  
: Ms. V. Narara for the second Accused.  
: Ms. J. Manueli for the third Accused.  
: Ms. E. Radrole for the fourth Accused.

**Dates of Hearing** : 16, 17, 18 March, 2020

**Closing Speeches** : 18 March, 2020

**Date of Summing Up** : 19 March, 2020

**Date of Judgment** : 27 April, 2020

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**JUDGMENT**

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*(The name of the complainant is suppressed she will be referred to as "DV")*

1. The Director of Public Prosecutions charged all the accused persons by filing 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***

**TOMASI VAKALOLOMA**, on the 4<sup>th</sup> day of March, 2016, at Sigatoka in the Western Division penetrated the vagina of “DV” 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***

**SAVENACA VALU**, on the 4<sup>th</sup> day of March, 2016, at Sigatoka in the Western Division penetrated the vagina of “DV” 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***

**WATISONI BARO**, on the 4<sup>th</sup> day of March, 2016, at Sigatoka in the Western Division penetrated the vagina of “DV” 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***

**TEVITA GUSUDRADRA**, on the 4<sup>th</sup> day of March, 2016, at Sigatoka in the Western Division penetrated the vagina of “DV” with his penis without her consent.

**COUNT FIVE**

***Statement of Offence***

**ASSAULT WITH INTENT TO COMMIT RAPE**: Contrary to section 209 of the Crimes Act 2009.

***Particulars of Offence***

**TOMASI VAKALOLOMA**, on the 4<sup>th</sup> day of March, 2016, at Sigatoka in the Western Division assaulted “DV” by pushing her on her chest with intent to commit rape.

**COUNT SIX**

***Statement of Offence***

**ASSAULT WITH INTENT TO COMMIT RAPE**: Contrary to section 209 of the Crimes Act 2009.

***Particulars of Offence***

**SAVENACA VALU**, on the 4<sup>th</sup> day of March, 2016, at Sigatoka in the Western Division assaulted “DV” by punching her on her right chin with intent to commit rape.

**COUNT SEVEN**

***Statement of Offence***

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

### ***Particulars of Offence***

**SAVENACA VALU**, on the 4<sup>th</sup> day of March, 2016, at Sigatoka in the Western Division assaulted “DV” by twisting her right ankle thereby causing her actual bodily harm.

2. After the prosecution closed its case, this court acquitted the second accused Savenaca Valu of the seventh count of assault causing actual bodily harm. In respect of the fourth accused Tevita Gusudradra this court acquitted him of the offence of rape but proceeded on the lesser offence of attempt to commit rape.
3. The three assessors had returned with a unanimous opinion that the first, second and third accused persons were guilty of the offence of rape and that the fourth accused was guilty of the lesser offence of attempt to commit rape. The assessors also returned with a unanimous opinion that the first and the second accused were guilty of the offence of assault with intent to commit rape as well.
4. I had adjourned to consider my judgment unfortunately this judgment could not be delivered on the 20<sup>th</sup> March since the Lautoka City was under a lockdown from Covid-19 virus.
5. I direct myself in accordance with my summing up and the evidence adduced at trial.
6. The prosecution called three witnesses, for the defence all the accused persons remained silent and did not call any witness.
7. The complainant informed the court that on 3<sup>rd</sup> March, 2016 at around 7.00 pm she went to the Deep Sea Nightclub to listen to music, here she met her nephew who was drinking with some of his friends. The complainant joined them, and they all shared six bottles of beer.

8. The complainant saw all the four accused persons drinking in the same nightclub at a different table, she knows all the accused persons since she was living in their village.
9. The drinking ended when the nightclub closed at 1.00 am the next day. The complainant was not drunk whilst standing outside the nightclub, the first accused Tomasi came in a 7 seater van and asked the complainant to get in and that they will drop her home.
10. The first accused was with Watisoni Baro, Tevita Gusudradra and Tevita's cousin Namoumou. While the van was moving, Savenaca Valu also got in. The van was driven past the Sigatoka Hospital into a gravel road and up a hill. The complainant had boarded the van because she had trusted all the accused persons who were her friends. When the van went into the gravel road, she asked Tomasi where they were going to. Tomasi replied that they were going to drink half bottle of gin before going home the complainant accepted the explanation so she went with them.
11. At the hill, Tomasi, Watisoni, Tevita and Namoumou started drinking the half bottle of gin, Savenaca joined the group as well, by this time it was about 2.30 am. The complainant drank three nips from the bottle cap.
12. The complainant was sitting in between Tomasi and Savenaca after a while Namoumou stood up and left. The complainant was okay and she was able to recognize everyone sitting. After a while Tomasi and the complainant left the group and walked down the road, as they were walking Tomasi told the complainant to hide since Namoumou was coming.
13. After sometime Savenaca came to where the complainant and Tomasi were hiding. When Savenaca came, he started yelling and asking Tomasi if he had sex with the complainant. Upon hearing this, the complainant thought

they were crazy so she sat down. At this time, Tomasi pushed the complainant on the grass with both his hands making her lie on her back.

14. The complainant tried to push Tomasi away and was struggling with him at this time Savenaca said “we won’t kill you, you won’t be dead, we just have sex with you that’s it”. At this time, the complainant was concerned since she realized they wanted to have sex with her.
15. Savenaca started to pull both her legs, her right ankle was swollen since she had sprained her ankle at home. The complainant continued to struggle at this time Savenaca punched her on her right chin and removed her <sup>3</sup>/<sub>4</sub> pants and underwear.
16. Tomasi after removing his <sup>3</sup>/<sub>4</sub> pants and undergarments came on top of the complainant and inserted his penis into her vagina and had sexual intercourse with her for about 2 to 3 minutes. By this time, it was early morning around 4am the complainant was able to see clearly that it was Tomasi who was having sex with her. The complainant did not consent to have sexual intercourse with Tomasi.
17. After Tomasi had finished, Watisoni came and removed his pants the complainant tried to stop Watisoni by screaming at him to stop and was trying to fight back and get up, however, Watisoni came on top of her and was able to insert his penis into her vagina and had sexual intercourse with her for about 3 minutes. The complainant did not consent to have sexual intercourse with Watisoni.
18. After Watisoni had finished, Savenaca came on top of the complainant after removing his pants and undergarments he inserted his penis into the complainant’s vagina and had sexual intercourse for about 2 to 3 minutes. The complainant did not consent to have sexual intercourse with Savenaca. The complainant was crying and lying down but the accused did not care and had sexual intercourse with her.

19. Savenaca then called out to Tevita who was standing at a short distance to come over. According to the complainant Tevita looked confused and was undecided whether to come or not. Savenaca called Tevita two times, it was on the third occasion that Tevita came, removed his pants came on top of the complainant and tried to have sexual intercourse with her. The complainant was crying and telling Tevita to stop otherwise she will tell the police. Tevita was trying to insert his penis into the complainant's vagina for a few seconds but could not since she was moving and twisting.
20. After Tevita stood up, the complainant stood up wore her pants and told Tevita that she was going to the police station to report the matter. Tevita replied "how much money you want" the complainant refused the offer, she was crying and hurt, as she started walking she met Tevita's cousin Namoumou who had woken up by now. The complainant walked with Namoumou to the Sigatoka Police Station. The complainant reported the matter to the police thereafter she was medically examined.
21. Dr. Taina Ravasua informed the court that she graduated with an MBBS degree from the University of Fiji in 2013.
22. The doctor recalled in the year 2016 she was based at the Sigatoka Hospital. On 4<sup>th</sup> March, 2016 the doctor had examined the complainant. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.
23. The specific medical findings were:
  - (a) No pallor meaning the patient was not anaemic;
  - (b) Moist oral mucosa meaning the patient was well hydrated;
  - (c) Chest was clear;
  - (d) Heart was normal;
  - (e) Abdomen was soft.

- (f) Right ankle was painful and swollen.

The doctor had also noted her observations on the diagram at appendix 1 as follows:

- (a) Bruise on the right chin of the patient;
- (b) Some bruise on the ankle, incision of the right toe less than 0.5cm.

#### Vaginal Examination

- (a) Speculum examination opening the vagina and visualizing the inside of the vagina. The cervix was normal including the vagina, there was no bleeding noted in the cervix or the vaginal walls. The doctor also did not see any vaginal laceration or any discharge, however, there were 1 or 2 grass particles noted on the side of the vaginal wall.
  - (b) There was a minor laceration less than 0.5cm at 5 o'clock position and there was no active bleeding. According to the doctor the injuries noted were less than 24 hours ago since the injuries looked fresh. The possible causes of the bruise/ laceration on the right cheek could be by blunt trauma or hitting something hard or a punch.
24. The doctor stated that with the history given by the patient it was possible that the patient could have been assaulted or punched or forced to do something she did not want to do. As for the grass particles seen in the vaginal walls the doctor stated that it could have been due to sex on the grass. The doctor had also observed that the back and front of the patient's pants were dirty with mud stains on it.
25. The final prosecution witness WPC Akisi informed the court that on 4<sup>th</sup> March, 2016 she was at the Sigatoka Police Station and she had completed the medical examination form of the complainant in particular the first



page and had also accompanied the complainant to the Sigatoka Hospital. The witness recognized her writing in prosecution exhibit no. 1. At the hospital the complainant was attended by Dr. Taina. This was the only report of rape received that morning.

26. From the line of cross examination the defence took the position that all the accused persons did not commit the offences as alleged. None of the accused persons penetrated the vagina of the complainant with their penis without her consent or attempted to rape the complainant or assault the complainant with intent to commit rape.
27. The defence contended that the evidence of the complainant was not probable in the circumstances as narrated by her. The medical report also did not connect any of the accused persons to the allegations.
28. The complainant had boarded the van on her own freewill and inside the van she had sat beside the first accused and also during the drinking session on the hill she was sitting with the first accused and drinking.
29. Furthermore, the doctor did not state anything at D14 of the complainant's medical report under the heading "professional opinion" suggesting that the doctor was unable to ascertain the cause and age of the injuries. Also the doctor did not see any discharge in the complainant's vagina which suggests that there was no sexual intercourse at all.
30. The accused persons also contended that the manner in which the complainant had described the alleged rape, a minor laceration to the vagina was not possible.
31. The fourth accused also contended that he did not at any time attempt to have forceful sexual intercourse or have any intention to have forceful sexual intercourse with the complainant without her consent that morning.

32. After carefully considering the evidence adduced I accept the evidence of the complainant as truthful and reliable, she was able to clearly state what the accused persons had done to her during the early morning of 4<sup>th</sup> March, 2016. The complainant was coherent and concise in her narration and was able to withstand cross examination and was not discredited.
33. I have no doubt in my mind that the complainant told the truth in court. All the accused persons and the complainant are known to each other as fellow villagers and friends.
34. There was no suggestion by any of the accused persons that the complainant had any motivation to implicate them or make a false allegation against them.
35. The demeanour of the complainant was consistent with her honesty despite passage of time she was able to recall what had happened to her. I also accept her explanation that the reason why she was able to remember what the accused persons had done to her was because they had forceful sexual intercourse with her which she was not able to forget.
36. The complainant almost immediately reported the matter to the police. I also accept the evidence of WPC Akisi that she had taken the complainant to the hospital after the matter was reported. Although the name of the complainant in the police medical examination form exhibit 1 is different there is no reason for me to doubt that it was not the complainant who was medically examined on 4<sup>th</sup> March.
37. Dr. Ravasua also gave a detailed account of her examination of the complainant and there is no reason why the medical findings and observations of the doctor cannot be accepted by this court as credible.

38. I reject the defence assertion that by not stating her professional opinion under D14 of the complainant's medical examination form the doctor was unable to ascertain the cause and age of the injuries. This court accepts the doctor's explanation that at appendix 1 of the medical report she had documented her opinion. A perusal of the medical examination form supports what the doctor had told the court.
39. This court accepts the doctor's evidence that penetration by three men could leave a minor laceration as she had noted at appendix 1. This court also accepts that even though the doctor did not see any whitish discharge from the patient's vagina did not mean there was no sexual intercourse.
40. The defence of denial is not plausible in view of the evidence adduced. All the prosecution witnesses were reliable and truthful. The defence has not been able to create a reasonable doubt in the prosecution case.
41. This court is satisfied beyond reasonable doubt that the first accused on the 4<sup>th</sup> day of March, 2016 had pushed the complainant "DV" with both his hands on her chest making her lie on her back with intent to commit rape and the second accused had punched the complainant on her right chin with intent to commit rape. On this date the first, second and third accused persons had also penetrated the vagina of the complainant "DV" with their penis without her consent.
42. The first, second and the third accused persons knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
43. This court is also satisfied beyond reasonable doubt that on 4<sup>th</sup> March, 2016 the fourth accused had attempted to penetrate the vagina of the complainant "DV" with his penis.

44. On the totality of the evidence what the fourth accused did went beyond mere preparation to commit the offence of rape.
45. The second accused stands acquitted for the seventh count of assault causing actual bodily harm.
46. In view of the above, I accept the unanimous opinion of all the assessors that the first, second and third accused persons are guilty of the offence of rape and the fourth accused is guilty of the lesser offence of attempt to commit rape. I also accept the unanimous opinion of the assessors that the first and second accused persons are also guilty of one count each of assault with intent to commit rape.
47. For the above reasons, I find all the accused persons guilty as mentioned above and they are convicted accordingly.
48. This is the judgment of the court.



  
**Sunil Sharma**  
**Judge**

At Lautoka

27 April, 2020

**Solicitors**

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

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