

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

**Crim. Case No: HAC 14 of 2022**

**STATE**

vs.

**SOLOMONI QURAI**

**Counsel:** Mr. L. Baleilevuka with S. Tivao for the State  
Ms. L. David for the Accused

**Date of Hearing:** 30<sup>th</sup> May to 01<sup>st</sup> of June 2022

**Date of Closing Submission:** 02<sup>nd</sup> June 2022

**Date of Judgment:** 06<sup>th</sup> June 2022

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**JUDGMENT**

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**Introduction**

1. The Director of Public Prosecutions has charged the Accused for the following offence as per the Information dated 11<sup>th</sup> February 2022:

**COUNT ONE**

*Statement of Offence*

**RAPE:** contrary to Section 207 (1) and (2) (b) of the Crimes Act, 2009.

*Particulars of Offence*

**SOLOMONI QURAI** on the 26<sup>th</sup> day of December 2021, at Nasinu, in the Central Division, penetrated the vagina of **SALATA TAGIMURI**, with his fingers without her consent.

2. For the Accused to be found guilty of the count of Rape in the present case based on sub sections 1 and 2(b) of Section 207 that in addition to the date stated in the respective count the prosecution must prove beyond reasonable doubt, the following elements, that;
  - i) The Accused,
  - ii) Penetrated the vagina of the Complainant with his finger,
  - iii) The Complainant did not consent to the Accused to penetrate her vagina with his finger,
  - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his finger in that manner.

The slightest penetration of the complainant's vulva by the Accused's finger is sufficient to satisfy penetration.

3. Upon reading of the charge, Mr. Solomon Qurai understood and pleaded not guilty to the same. The prosecution led the evidence of 4 witnesses namely, the complainant Salata, her husband Viliame, Viliame's aunt Losena and his cousin Joseva and closed their case. As it appeared to me that there was a case to answer by the Accused, his options and rights were explained and the Accused was called upon to make his defence. The Accused opted to give evidence he called his partner Litia and closed the defence case. Then upon hearing the submissions of both the Defence and the Prosecution this was set for Judgement.

Burden of proof

4. The Accused is presumed to be innocent until he is proven guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The prosecution must prove the Accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the Accused's guilt, or if there be any hesitation in

my mind on any of the ingredient or on the of evidence led by the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The Accused has given evidence and called a witness in this case. Thus, if this court accepts the defence evidence or is unable to reject or accept the defence evidence, then too the Accused is entitled to a finding in his favour. Having so refreshed lets now consider the evidence placed before this court.

5. The following facts are admitted;
  - a. The complainant's name is Salata Tagimuri is also referred to as "Salata".
  - b. The name of the person charged is Solomon Quai is also referred to as "Solo".
  - c. Solo's middle finger on his left hand is bent.
  - d. Salata's husband is Viliame Naisake.
  - e. Solo's wife is Adi Lita Rokogalo Naisake.
  - f. Salata's husband and Solo's wife are biological brother and sister.
  - g. Salata and her husband have three children
  - h. On 25<sup>th</sup> – 26<sup>th</sup> December 2021, Viliame and his wife lived at Delaitokatoka Settlement in Salata at her husband's house.
  - i. On 25<sup>th</sup> December 2021 from about 9pm Salata was drinking alcohol with her sister-in-law and two other women at her home.

#### Facts and the Evaluation of Evidence

6. As stated above the prosecution led the evidence of 4 witnesses namely the complainant Salata, her husband Viliame, Viliame's aunt Losena and his cousin Joseva. However, Salata is the only direct eye witness as to the act of penetration by the finger and also to the fact of the Accused committing the said digital penetration of her vagina comes from her. Her husband Viliame is not an eye witness to the alleged act of rape but he narrates incidents and events before and immediately after the happening of the said act. Joseva and Losena they speak as regard the events outside the house before and immediately after the happening of the alleged act as they were in the adjacent shed where drinking was taking place. The presence of the said witness at the scene is not in dispute and is common ground. Certain items of circumstantial evidence emanate from the other witnesses.

7. Taking into consideration the totality of the evidence of both the prosecution as well as the defence, the following facts are not in dispute and is common ground. On the 25<sup>th</sup> December, 2021 a drinking session of Kava, Rum and other liquor had taken place in a shed about 25 feet away from Viliame's house. This drinking party had commenced in the evening of the 25<sup>th</sup> and continued to the early hours of the 26<sup>th</sup>. Somewhere close to mid-night, Viliame and Salata have returned to their house leaving the Accused, his wife Litia, aunt Losena, cousin Joseva and two neighbours. After a short while Litia too has left the party and gone into the house. Thereafter Joseva has brought the music box up to the porch door and handed it over to the Accused at the porch who has taken it into the house but the Defence position is that Joseva brought it into the house. Accused then had come out again and gone back to bring the small speaker so there can be music at the drinking session. According to Joseva and Losena the Accused did not return.
  
8. Salata and Viliame testified that after coming into the house Salata had a bath because she was having her menstruation period after which she has come only in a towel and taken the little daughter into their room. Viliame has put two queen size mattresses on the ground. They have been placed in parallel positions close to the door. Salata with the child has been on the right side of the mattress and Viliame on the left side mattress when you look at the door from the room. According to the description given by both the witnesses, Salata had been on the mattress just opposite to the door with her feet towards the door. Viliame had been more to the left on the mattress more to the inside the room away from the door.
  
9. Salata only in a towel has fallen asleep while breastfeeding her child and Viliame too has fallen asleep on the left side of the mattress. The two mattresses were placed close to each other. Shortly after Salata had so fallen asleep, she had been awakened by a pain she felt in her vagina. When she woke up she had felt someone inserting two fingers into her vagina which according to her own words is that she felt the fingers moving in and out of the hole. As she woke up she felt this and then she realized someone was holding and was trying to separate her legs. Then she had managed to kick that person on the chest whilst being on the mattress and push the person and then sat up. She had then seen a figure falling backwards with one finger bent in the

left hand and seen the haircut and the build whom she had identified and recognized as being the Accused, Qurai. She had got on her feet and shouted 'Bila, Bila' and called out of the window for her husband thinking that he was out in the tent. Hearing this Viliame who was in the room has immediately woken up when Salata is said to have told him that '*Qurai just ran outside he did something to me, he touched me*'. Salata had seen Qurai going towards the passage sitting room and towards the kitchen where the bathroom was. Salata could see him only going towards the toilet but she could not see any further, Viliame has immediately run out and seen Qurai in the bathroom with the upper body bear and the trousers down with his penis erect. When Viliame was going towards the sitting room Qurai has opened the door of the bathroom and said '*Tabale what happened, Tabale who is it somebody just went outside from the house because the door was open*'. According to Salata she had heard Qurai telling '*Tabale someone ran this way*'. According to Salata, then Viliame has come to the room and switched on the light taken some keys to the porch. Then Viliame and gone out to the shed and asked those who were there as to who came into the house and touched his wife. He had asked this in a high tone more than once. Aunty Losena had told that it was Qurai who had been in and out of the house. After that Joseva had come towards the house with Viliame and wanted to punch the Accused. However, Viliame had not allowed this, he had come in and then seen the Accused hugging his sister Litia and sleeping in the sitting room.

10. Viliame has punched, and kicked and woken up Litia and told her that Qurai has touched his wife and what he has done to her. The Accused had been apparently sleeping and Viliame says that he was "bluffing" and was just pretending to show his wife that he had been sleeping with his wife for some time. Viliame says he then switched on the room light. After waking up Litia Viliame and Salata have told what the Accused had done and Litia had alleged to have touched Accused penis and also smelt his hands. However, as the Accused was not waking up and was pretending to sleep, Viliame had decided to talk to him the following morning. He had gone back to the room with his wife but, Salata had been reluctant to stay in the house with Qurai. The following morning Viliame has woken up and come to the sitting room and seen only his sister was there and the Accused was not to be seen. Accused had been outside at a neighbour's house. Viliame has gone there and asked him if he did this. Qurai has remained silent. The

Accused and the sister was told to leave the house and Viliame and Salata had gone to the police and reported this matter.

### Defence Evidence

11. After the defence was called the Accused Solomoni Qurai gave evidence and also called his wife Litia Naisake as a witness. Taken their evidence in its totality they narrate the same events as narrated by the prosecution witnesses. On the basic events and the sequence there is not much of a difference. The differences and the deviations of the defence vis-à-vis prosecution evidence are as follows.
  
12. The Accused states that the music box was brought into the house by Joseva and that both the Accused and Joseva returned to the shed. The prosecution witnesses' evidence is that Joseva brought it up to the porch and handed it over to the Accused and Joseva returned. Apart from this the Accused admits going into the house shortly before Viliame came out of the room but the Accused specifically takes up the position that he did not go into Salata's room or peep nor did he touch her as alleged or insert the finger to her vagina. The Accused's version is that he went straight to the toilet and whilst in the toilet smoking, Viliame came and opened the door when the Accused had told Viliame that he heard someone running. The Accused then says that he came out of the toilet saw Viliame in an aggressive voice asking those who were in the tent if anyone came to the house and who touched his wife. The Accused had then gone next to Litia who was sleeping in the sitting room and removed his Bula shirt and slept next to her. He says he was sleepy and wanted to sleep. The Accused also takes up the position that the front wooden door was open and the gate to the porch was not locked.
  
13. The Accused then goes on to say that though he was lying down and trying to fall asleep he in fact had not fallen asleep but he could hear what was happening around. He had heard Viliame kicking and punching Litia and trying to wake her up. He goes on to say that he was sleepy and that he turned to her side and went to sleep and don't recall what they were talking about or what Viliame was telling Litia. Then the Accused claims to have fallen asleep and woken the following morning. He specifically states that he spoke to his wife in the house. Litia had asked him if something happened to Salata last night, and Accused says she asked

him thus, “*did you went to the room and touch her*” and to tell the truth. Then the Accused had told her that he just left the toilet and slept beside her. Then Litia has told that she is going to talk to Viliame and Salata. The Accused claims that he stayed in the house when Salata and Viliame came to the sitting room that morning and Viliame had asked him “*Tabale, didn’t you come inside the room last night?*” The Accused had said no and told Viliame that he left the drinking had come straight to the toilet and then ‘*heard someone went pass the kitchen and the living room*’ and that he called his wife. The Accused had further clarified this and said he heard someone pass the kitchen and the living room to go outside. However Viliame had asked them to leave the house as he has to sort out something and go to the station. The Accused and Litia have come out to the porch, discussed with her to go to his family house in Kinoya. Then he had gone to the neighbour’s and sat there for a while to which place Viliame had come again and asked, “*didn’t you know who came inside the house last night?*” The Accused has once again told him that he was sitting in the toilet the door was closed and he could not see and heard someone pass by as it was a wooden floor. Thereafter the Accused had left for Kinoya with Litia. The Accused denies the allegation and also denies going to the room and touching Salata. Accused admits that he has a bent finger.

14. At the end of his evidence in chief, the Accused had been asked if he knows of any reason as to why Salata is blaming him for this, the Accused had responded by saying that “*because me the only inside the house because the doors were wide open that night and when we were having our drinking session at the shed*”. Finally the Accused admits that his relationship between Salata and Viliame was good. This is basically what the Accused said.
15. His wife Litia too basically narrates the incident as summarized above subject to certain variations and differences of which the important once are as follows. She also states that the music box was brought by Joseva. She goes on to say that the lights on the porch and the passage were switched off. The Accused does not say so. One of the major differences is that Litia says that after Viliame came out of the room and went towards the shed she went into the room and spoke to Salata and upon inquiring Salata had told her that ‘*someone came inside the room and peeped at me*’...‘*and it is him the build is Qurai*’. Litia also says that

she came out punched Qurai and then asked Qurai if he went into the room and peeped inside and his response was there was a person who came pass by and asked if it was Litia. But Qurai does not say so. After this Litia claims to have told Viliame that if it is really Qurai to call the police or do something or beat him up. Litia says further that Salata was not sure it was because of the build she thinks it was Qurai that came into the room. Litia says that Salata said the build was all like him and that person is dark. Her position is that her brother Viliame did not do anything to Qurai because he wasn't sure that it was really Qurai. Litia says that Salata was drunk and dizzy and that she says so because Salata's face was red and she was sleepy and that they together have finished 40 ounces of Rum and she herself was really drunk. However, that night after all this she had slept and her evidence is that in the morning when she woke up at 8 o'clock, Qurai was not there. He was in neighbor Mere's house. Litia has gone there once again asked him and the Accused has denied again. Thereafter, Viliame had come and spoken and told them to leave. According to Qurai he spoke to Litia and Viliame whilst in the house.

#### Analysis of the Defence Evidence

16. As seen in the evidence of the prosecution witnesses I observed *inter se* differences and contradictions between the Accused and Litia. For instance the following morning Qurai says he spoke to Litia and Viliame in the house. However Litia says that when she woke up Qurai was not at home. The conversation takes place according to her in the neighbour's house. This is what the prosecution witnesses too said. Then Qurai says that Litia accompanied Salata into the house that night. However Litia does not say so, her position is that she remained in the tent when Salata and her husband walk to the house. Likewise there are certain discrepancies of this nature. However, as I observed earlier all the witnesses including the Accused and Litia were drinking and partying for several hours running into the early hours. Only Viliame consistently said that he did not have alcohol but kava was drunk in moderation. Thus, by mid night and even the following morning the effect of alcohol in their minds cannot be excluded. I don't say that they were in a state of extreme intoxication impairing their cognitive faculties to a non responsive level. It is that all events during an extended period may not be registered with the same and similar accuracy between them. In this back drop and considering the normal human variations in remembering and



observing and recalling events, these differences in the sequence of events does not affect the credibility of the defence witnesses on that ground alone.

17. As analyzed above, by and large the defence as well as the prosecution are not at variance on the sequence of events and incidents during the relevant period. Therefore, there is a common story and sequence of events that has come out from both the defence as well as the prosecution. However, the Accused totally denies the allegation. Litia claims that she had fallen asleep immediately after Qurai went into the toilet and claims that she is unaware as to what was happening until she was punched and awakened by Viliame. It is thus necessary to consider the narration of facts by the Accused and Litia as to the incidents immediately before and after the time the act is alleged to have taken place. Let me now start with Qurai. He comes into the house shortly after mid-night and maybe around 1.30 a.m. whatever time that be, before this time he had been in and out of this house admittedly to bring the music box and take the small speaker. The Accused was able to remember and narrate the happenings immediately before he came into the house; the manner in which Salata, her husband and aunty Lo behaved and their conversations. If that be so, he could not have been in an extreme state of intoxication impairing his cognitive faculties. Then he comes into the house goes into the toilet and even has the presence of mind to smoke a cigarette. Then, when Viliame suddenly comes and opens the toilet door Qurai immediately and spontaneously responds by saying that *he heard footsteps of somebody running from the kitchen towards the sitting area*. Then Qurai admits going up to a point and observing Viliame talking to others in the tent in a high voice. Next he claims to have gone to his wife in the sitting room and lies down and though not a sleep is so sleepy and tired was unable to wake up and see what the commotion around is. When one considers this sequence of events and if he was so alert a moment ago is it possible and consistent with the normal course of human conduct to be unable to open his eyes and see and then to just fall asleep when evidently there is some commotion or an incident that has happened within the house? Especially if Qurai in fact heard someone running out and as claimed by him he even had called out to Litia upon hearing the said footsteps. If that be so isn't it unusual and peculiar for him to just lie down and hug his wife and pretend to be a sleep? If his wife was up a

moment ago when he came in, the normal course of conduct of a reasonable person would be to immediately alert her and ask her if she heard or saw anybody running out. He had spontaneously told this to Viliame. Then why not tell Litia? This is more so because, Litia was sleeping in the sitting area from which place the Accused claims to have heard the footsteps running out, but he does not do so.

18. That being so, Viliame comes and punches and shakes Litia in an attempt to wake her up. There is some exchange of words between Litia and Viliame. Even swearing. Viliame wants her to ask Qurai something implicating Qurai. When this commotion and incidents were taking place just next to him Qurai claims to have heard someone shaking her head and felt his wife been shaking and some conversation taking place. He just keeps his eyes closed and continues to remain so. Is this probable and normal conduct of a person who is even to some degree under the influence of liquor? The Accused claims that though he drank that he was not drunk. He claims to have been alert as to hear footsteps and was able to even comprehend that the said footsteps was that of a person running from the kitchen through to the sitting room towards the porch. A person who was so alert and conscious could not in the normal course of event completely get into the state of inaction and nonresponsive immobility due to sleepiness as claimed by the Accused. This to my mind is further compounded by the fact that shortly before the Accused comes to lie down he was aware of some incident excitement and aggressive conversations taking place. Therefore the conduct of the Accused is unrealistic not in line with normal human behavior of a reasonable person in that situation. It is certainly, extremely unusual and not normal to pretend to be sleeping when all these were happening.
19. Therefore the conduct of the Accused as stated by him is improbable to my mind and it is so improbable that it in all probabilities he is lying. Why is he so lying? Because the truth may be detrimental. If not the only other alternate position or inference is that he was pretending to be a sleep because he was of a guilty mind. Why he did not immediately ask Litia if she saw anyone running is because in fact he did not hear anything like that. It is highly probable

that when Viliame confronted him Qurai spontaneously made out a false story of hearing someone running out. Why should he make such a false story? The only inference is that he has something to hide and he was of a guilty mind. In these circumstances the evidence of the Accused that he heard footsteps is not true, and is false. It is no more than a cunning falsity concocted in the spur of the moment to save himself. Then his conduct as claimed by him is not normal and natural and is only consistent with acting with a guilty mind. Thus to my mind the Accused is lying when he says he heard footsteps and his denial that he went into the room is false. To that extend the Accused's evidence is false and untrue. I reject his evidence of denial and hearing of footsteps in its totality.

20. As far as Litia is concerned in the same vein she claims to have been extremely alert especially within the 45 minutes that preceded Qurai going into the toilet. She has been so alert that she was carefully following and observing Qurai's movements, going to the shed and then even observed him coming and standing between the porch and driveway she had even called him in. Not stopping at that she even claims to have gone around in the house checking doors and windows, closing doors and observing and ensuring that nothing in the house is lost. All these show how she has behaved during the 45 minutes just before Qurai came into the house. She says though she was lying down when Qurai came in she was not asleep. However, she does not say anything about hearing of any footsteps of a person running through or pass the sitting room which according to Qurai should have happened shortly after he went into the toilet. Litia repeatedly says that she fell asleep and was in such a deep sleep she does not know as to what happened until Viliame came and punch and hit her on her head and woke her up. This is not probable and not consistent with normal and natural course of human conduct. A person who was so alert cannot possibly fall into such a deep sleep within just a few minutes. It is more probable then not that she fell asleep and was in a deep sleep when Qurai came in, to that extend her evidence is improbable and is more probable that she is lying as to what happened at that moment. If not the only other necessary inference is that she was awake and did hear everything but the footsteps and takes up the tactical position that she was asleep so she could conceal the truth. Either way Litia is not truthful, to that extent I can safely conclude that Litia's evidence is untrue and false.

21. In the above circumstances the defence evidence especially in respect of the denial and the happenings immediately during and after the alleged incident is false and is rejected in its totality.
22. Merely because the defence evidence is determined to be false and being rejected that does not in any way prove the charges against the Accused. The burden of proving all ingredients of the charge continues to be with prosecution which is beyond reasonable doubt.

#### Evaluation of Prosecution Evidence

23. The prosecution led 4 witnesses, I have observed certain contradictions and omissions *inter se and per se* many of these are on peripheral and on the happenings during that day. However the contradictions in respect of the happenings immediately before and after the alleged incident will have to be considered with due care and attention especially as regards light, what Litia said as to seeing of a person identifying and matters related to such issues. I will first consider credibility of the evidence of Salata and Viliame.
24. In considering the credibility I would consider the promptness and spontaneity. Salata has insistently cried out and called Viliame and told him that Qurai has touched her. May not have been all the details of the act but the fact of something being done to her by Qurai had been told. Viliame had immediately asked the Accused and others and informed of such an incident. Litia had been awoken up and was informed by both Viliame and Salata that the Accused has touched her meaning inappropriately. Thus immediate informing others satisfied the promptness in evaluating her evidence. As to probability of her story considering the manner of sleeping and the act alleged to have been committed I see no improbability. There are certain contradiction and omissions which I have already considered and has concluded that those contradictions and omissions have arisen not due to the utterance of falsehood but due to faulty memory. The defence did suggest to Salata that she is falsely implicating Qurai because she was jealous of Qurai and Litia, as admitted and also revealed in evidence Salata and Viliame have invited their sister and the Accused and was in the process of even helping them to construct a house on Viliame's land. On that day too Qurai and wife were invited to the party and in fact at one stage Salata has been dancing

and has invited the Accused Qurai to join. When Salata was somewhat high in spirits it was Litia who brought her back to the shed. Going beyond that Litia that night looked into the welfare by checking the room and doors and windows of the house. Both Qurai and Litia admitted that their relationship as at that day was good. Therefore, I see no reason to infer that Salata and Viliame had any reason to falsely implicate and the suggestion is baseless.

25. As far as demeanor and deportment is concerned I observe both Salata and Viliame especially under cross examination responded promptly and the manner of them narrating incidents was very descriptive for instance Salata explaining the way in which she kicked and the person was thrown backwards as well as Viliame narrating how he woke up when Salata screamed and how he tried to wake up Litia clearly indicated that they were narrating something which they have actually experienced, this nature was observed right throughout their evidence. They were forthright and candid in responding to the questions and Viliame did sometimes become a bit emotional. Thus, overall the witnesses' demeanor was consistent with that of truthful witnesses.
26. Viliame and Salata have invited and allowed the Accused and Litia to live in their house and Viliame had even volunteered to help them to build the house. On the 25<sup>th</sup>, it being Christmas day all have been drinking and enjoying, towards the night, Salata appears to have been somewhat high, appears to have been dancing to music along with her father-in-law and some others. In the course of which she even has invited Qurai to join in the dancing. This evidence comes from the defence. In these circumstances it is established that Salata and Viliame had a good relationship with Qurai and Litia, this is not in dispute. Further when Viliame was told Qurai had touched his wife's private parts he had immediately confronted Qurai but in the spur of the moment when Qurai said he had heard someone run out Viliame has gone out and asked others. When Viliame was asked as to why he went and asked others if his wife has told him that Qurai has touched her, Viliame's spontaneous answer was that he didn't believe that Qurai would do a thing like that to his wife. This clearly shows that Viliame did not act maliciously towards Qurai and he treated them well. Some total of aforesaid is that Viliame and Salata did not have any reason or any propensity or any reason to falsely implicate or maliciously to act against Qurai or Salata. To a great extent, the

defence witnesses in their evidence accept this position.

### Credibility and Reliability

27. In the aforesaid circumstances, I am of the view that witnesses Salata and Viliame are credible and truthful witnesses. Merely by deciding that the evidence of these two witnesses is credible will not be sufficient to determine the testimonial trustworthiness of a witness. In considering the testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the credibility or veracity and the other is the accuracy and reliability. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, an honest witness, may, however, still be unreliable. [vide; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526); 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288]

### Recognition and Identity of the Accused

28. In the present case, both the credibility of the complainant and the reliability of her evidence were attacked in cross-examination. Thus, I will consider credibility and reliability of witness Salata separately. Thus, I will now consider the accuracy and the reliability of the identity and the recognition made by Salata. I am mindful that Salata being a truthful witness still could have genuinely believe that she identified Qurai. Thus, I should now consider if Salata had the occasion and the opportunity to observe the person and recognize him as she claims. Firstly, let's consider the issue of light. At the point of the incident the room light was off. Salata claims that she saw the Accused after kicking and he falling backwards. Then she has seen him walking along the passage towards the kitchen. The light in the sitting area and the kitchen have been on. Salata claims to have seen by the light of these two bulbs

falling onto their room. Litia admits that from the sitting area a certain part of the room can be seen. Thus, if there was a light on in the sitting area it certainly can directly come into the room and illuminate the immediate area around and near the door where Salata was sleeping. That being so it is extremely probable that light from the sitting room as well as the kitchen area did fall into the room at least to the area where Salata was sleeping by the door.

29. However, according to Viliame when he woke up he says it was dark. Thus, if Viliame found it dark, how could Salata have light? As narrated above, and admitted by Litia the room door was placed in a particular angle and position a part of the room was directly in line with the sitting room light. But she says that the balance half of the room or the inside cannot be seen. According to the evidence Viliame was sleeping in the inner part of the room. In this set-up it is extremely probable that Viliame when he woke up he was in the dark and the light was towards the door and the passage beyond. Accordingly I see no contradiction or inconsistency between the evidence of Salata and Viliame as regards light. Accordingly the evidence proves that there was sufficient light in the door area of the room for a person to identify. Salata has immediately told Viliame that it was Qurai and Litia admits that when she spoke to Salata soon after the incident she confirmed that from the body shape, hair cut she had identified it to be Qurai. Between the time of incident and the time Salata spoke to Litia I see no opportunity or reason for her to have added anything more to what she saw.
30. Qurai was a person known to Salata, she could recognize him. He is no stranger. The identifying features she had immediately narrated the bent finger in the left hand, haircut and the build. These were observed immediately near the door soon after the incident and she had the opportunity and occasion to observe him within 1 to 1½ feet, face to face. Thus, she had the opportunity to observe these features and recognize the Accused in the first instance. Then she also had the second chance of seeing the Accused immediately thereafter he went towards the kitchen along the passage. Considering these two opportunities she had sufficient occasion opportunity and light and was able to observe what she saw and recognize Qurai.
31. It is admitted that she drank and she was after so consuming liquor. The evidence does

indicate that she was somewhat intoxicated that night. Thus was she able to observe and recall what she saw? If one considers that she had the alertness to kick the intruder to get up and shout for help and also to talk to Litia immediately thereafter and narrate the identifying features, it shows that Salata though after liquor was sufficiently alert in her faculties to observe, recall and recount what she had seen. Accordingly I hold Salata's evidence is reliable and accurate and safe to act upon.

32. Since we just considered the evidence of identity now it is necessary to consider Viliame's evidence as to what he heard from Salata. Viliame says that Salata did tell him immediately that it was Qurai. However Viliame meets Qurai immediately and does ask him but when Qurai told him that he heard some footsteps going out, Viliame immediately goes to the tent and ask those who were there who came to the house and touched his wife. If Salata told Viliame that it was Qurai, why should Viliame go out and ask who came into the house? Does it mean that he infact did not know the exact identity of the person who came in and is that why he ask so? This question was put to Viliame and his position was that Salata did tell it was Qurai but as he treated him as a brother and gave him accommodation he could not believe that Qurai would do something like this to his wife. Considering the circumstances namely when suddenly you are woken up and told by his wife that Qurai touched her and immediately set out and meet Qurai and ask him. Qurai very cunningly tells that he heard someone run out. Viliame treating Qurai as his own brother and not imagining in his wildest dreams that Qurai would do a thing like this will certainly get into a state of confusion and uncertainty. Thus Viliame running out and asking others in that form is natural and normal and can be expected. This is exactly what Viliame told court when he was so asked. This explanation is reasonable and possible. Hence this conduct does not create any doubt or suspicion on the evidence of Salata's identity and recognition of the Accused.

#### Losena and Joseva

33. Let me now consider the evidence of Losena and Joseva. If I may start with Losena, in giving evidence she was extremely excitable and did demonstrate some kind of dislike towards the Accused. The evidence did reveal that she did not talk to the Accused at the party. However,



she was talking to Litia to that extent I will be somewhat cautious in considering her evidence. The next factor is that a large number of omission and contradiction emanated in cross examination. Undoubtedly she was drunk at that time. Apart from this I observed that she exaggerates what she claims to have seen. The witness who exaggerates is not by that reason alone a witness who lies. Such a witness adds a little more to the truth. Considering the demeanor her state of intoxication I don't feel safe to accept and act upon her evidence.

34. As for Joseva, I would first and foremost consider his demeanor. What I observed is that though he is Viliame's cousin he was not enthusiastic or eager to give evidence. He narrated the minimum but did not utter any falsehood even when he was asked to point out the Accused in open court, I saw some reluctance and inhibition on his part to directly look at the Accused and point him out. He had to gather courage in order to point out the Accused in court. I felt that he was somewhat intimidated by the Accused. This being so, his evidence was mainly on taking the music box into the house and the moments of the Accused going into the house to bring the small speaker and not coming. In addition to this some evidence of light in the porch and the driveway was led through him. Considering the totality of his evidence I am of the view that he was not a partial witness but neither was he a willing witness, but whatever he said was true. Therefore I accept his evidence as reliable.

### Conclusion


35. I have rejected the evidence of the Accused and their defence that it was a false allegation. I have accepted the evidence of the prosecution witnesses' except Losena as being credible, reliable and truthful witnesses. I have considered the possibility of a mistaken identity and concluded that the identity made by Salata is reliable. However I will now consider the possibility of an outsider coming in based on the Accused's assertion that he heard the footsteps. Firstly, I have already considered Qurai's evidence and decided it is improbable. However, let me consider further to see if there be any doubt that may arise. Out of the 6 witnesses from both sides it is the Accused and only the Accused who has heard the footsteps. Very strangely Litia who was in the sitting room remained silent and did not say she heard or saw anyone pass by. The evidence is that the only access to the house that was

used was the front porch and the way into the house was from there. There is overwhelming evidence that the grill gate was operated with a latch and the door lock could be open by putting the hand through the louver. The inmates of the house have known this and not outsiders and the Accused and Litia have known how to open the grill latch as well as the wooden door from outside. Litia's evidence was that she ensured that all doors and windows are secure and that it was her routine to check these. Litia had been awake for 45 minutes preceding the arrival of the Accused into the house. The light in the sitting room was on. In these circumstances it almost impossible for an outsider to have come into the house without been seen by Litia. Further Joseva who was outside has not seen any person coming in except the Accused. Joseva admits that he was not attentively observing the porch right along. However considering the location of the tent, the house and the porch and the lights there was a high probability of any outsider being observed and seen if a person attempted to go into the house. In all these circumstances the position taken up by the Accused of hearing footsteps indicating that there was an intruder is extremely improbable and fanciful. Thus, I safely conclude the defence evidence or the suggestions have not created any doubt on the prosecution evidence.

36. Thus, I hold that the prosecution had proved beyond reasonable doubt that a finger was inserted to the vagina of Salata as narrated by her. This was done without her consent; and it was the Accused, and the Accused himself and no other who had come into Salata's room and so inserted his finger. In the circumstances, of this case I hold that the Accused knew that Salata was not consenting to the Accused inserting his finger into her vagina. This act has been committed by the Accused in the early hours of 26<sup>th</sup> December 2021 at Nasinu in the Central Division. I hold that all these ingredients have been proved beyond reasonable doubt by the prosecution.
37. Accordingly, I find the Accused's denial is false and not true and the defence has not been able to create any reasonable doubt in the prosecution case.
38. Thus, I find the prosecution has proved the Accused's guilt of the count of Rape as charged

beyond reasonable doubt.

39. Accordingly, I hold that prosecution has proved count of rape as charged beyond reasonable doubt and I find the Accused Solomon Quai guilty of the said count of Rape, as charged in the Amended information, and convict for the same.



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**Justice K.M.G.H.Kulatunga**

**At Suva**

06<sup>th</sup> June 2022

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused