

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

**Crim. Case No: HAC 173 of 2020**

**STATE**

vs.

**SAMISONI NAQELO**

**Counsel:** Mr. J. Singh for the State  
Ms. R. Nabainivalu for Accused

**Date of Hearing:** 31<sup>st</sup> July 2023  
**Date of Closing Submission:** 02<sup>nd</sup> August 2023  
**Date of Judgment:** 20<sup>th</sup> September 2023

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**JUDGMENT**

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1. The Director of Public Prosecution charged the Accused with one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act and two counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are:

**COUNT 1**

*Statement of Offence*

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

*Particulars of Offence*

**SAMISONI NAQELO**, on the 5<sup>th</sup> day of June, 2020 at Namaridrika, Nagonicolo, Naitasiri, in the Eastern Division, assaulted **MEIVA SERUKALOU** thereby causing actual bodily harm to the said **MEIVA SERUKALOU**.

**COUNT 2**

*Statement of Offence*

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

*Particulars of Offence*

**SAMISONI NAQELO**, on the 5<sup>th</sup> June, 2020 at Namaridrika, Nagonicolo, Naitasiri, in the Eastern Division, inserted his penis into the anus of **MEIVA SERUKALOU** without her consent.

**COUNT 3**

*Statement of Offence*

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

*Particulars of Offence*

**SAMISONI NAQELO**, on the 5<sup>th</sup> June, 2020 at Namaridrika, Nagonicolo, Naitasiri, in the Eastern Division, had carnal knowledge of **MEIVA SERUKALOU** without her consent.

2. The Accused pleaded guilty to the first count of Assault Causing Actual Bodily Harm and not guilty to the two counts of Rape. Hence, the matter proceeded to a hearing in respect of the two counts of Rape. The hearing commenced on the 31st of July, 2023 and concluded on the same day. The Court heard the evidence of the Complainant for the Prosecution and the evidence of the Accused for the Defence. Subsequently, the learned Counsel for the Prosecution and the Defence made their respective closing submissions. Having perused the

evidence presented during the hearing and the respective closing submissions of the parties, I now pronounce the Judgment on this matter.

### **Burden and Standard of Proof**

3. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

### **Elements of the Offence**

4. The main elements of Rape as charged under count two are that:
  - i) The Accused,
  - ii) Penetrated the anus of the Complainant with his penis,
  - iii) The Complainant did not consent to the Accused to penetrate her anus with his penis,
  - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.
  
5. The main elements of the Rape as charged under count three are that:
  - i) The Accused,
  - ii) Penetrated the vagina of the Complainant with his penis,
  - iii) The Complainant did not consent to the Accused to penetrate her vagina with his penis,
  - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.

6. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed these offences to the Complainant. There is no dispute about the identification. The Accused and the Complainant are known to each other.
7. Evidence of the slightest penetration of the vagina/anus of the Complainant with the Accused's penis is sufficient to prove the element of penetration.
8. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
9. The Complainant must have the freedom to make a choice. It means she must not be pressured or forced to make that choice. Moreover, the Complainant must have the mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
10. If the Court is satisfied that the Accused had penetrated the vagina/anus of the Complainant with his penis and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.

### **The Admitted Facts**

11. The Accused tendered the following admitted facts pursuant to Section 135 of the Criminal Procedure Act.

- a) *Complainant Meiva Serukalou was 26 years and resided at Namaridrika Settlement, Nakorosule, Naitasiri.*
- b) *Accused Samisoni Naqelo 43 years of age and also residing at the same address as the Complainant.*

#### **Count 2:**

- c) *On the morning of 5 June 2020, Meiva and Samsoni were at their farm at Namaridrika.*
- d) *On the same morning Meiva and Samisoni had an argument.*
- e) *Later in the day on 5 June 2020, Meiva and Samisoni were at their farm house.*
- f) *While at their farm house, Meiva and Samsoni had sexual intercourse whereby Samisoni penetrating her vagina with his penis.*

#### **Count 3:**

- g) *On 5 June 2020, at their farm house, Samisoni had sexual intercourse with Meiva by penetrating her vagina with his penis.*

#### **Medical Examination:**

- h) *On 6 June 2020, Meiva Serukalou was medically examined by Maikeli Cabemaiwai, a nursing practitioner at the Vunidawa Hospital.*
- i) *On the same day a medical report was rendered by Maikeli Cabemaiwai.*
- j) *The existence of the medical report is not in dispute.*

### **Prosecution's Case**

12. The Complainant and the Accused were living together in June 2020 in Namaridrika. On the 5th of June 2020, they went to their farm and weeded the dalo plants. After that, as the Complainant claims, she had gone to have a bath. When she returned with her 'sulu' wrapped around her body, the Accused had asked her not to wear anything. He then asked her to bend down and then penetrated her anus. After penetrating her anus, the Accused penetrated her vagina with his penis. The Complainant claimed that she did not consent for the Accused to penetrate her anus and then the vagina with his penis in that manner.

### **Defence's Case**

13. In his evidence, the Accused admitted that he penetrated the Complainant's anus with his penis and then her vagina with his penis with her consent. According to the Accused, they argued in the morning over the Complainant having "suki", and he slapped her. However, they then went to their farm and weeded dalo plants. They then apologized to each other for the issue they had in the morning. The Complainant then said for them to have sex. The Accused then engaged in sexual intercourse with the Complainant penetrating her anus and then her vagina with his penis.

### **Evaluation of the Evidence**

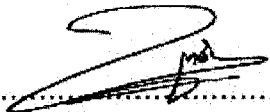
14. In view of the evidence presented by the Complainant and the Accused and the admitted facts, the main contention in this matter is whether the Accused penetrated the anus and vagina of the Complainant without her consent. There is no dispute between the parties the physical elements of the two counts of Rape. The Complainant claimed she did not consent, while the Accused said it was a consensual sexual encounter between them.
15. In view of the evidence presented by the Accused and the Complainant, it appears that the different versions of evidence presented by the Complainant and the Accused. In such circumstances, the Court must consider the whole of the evidence adduced in the trial,

including the evidence of the Accused, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed these crimes. The task of the Court is not to decide who is credible between the Complainant and the Accused. (*Liberato and Others v The Queen* ((1985) 159 CLR 507 at 515), *R v Li* (2003) 140 A Crim R 288, at 301, *Goundar v State* [2015] FJCA 1; AAU0077.2011 (the 2nd of January 2015))

16. I shall now proceed to evaluate the evidence with the applicable law. In doing that, the Court must first look into the credibility or the veracity of the evidence given by the witnesses and then proceed to consider the reliability or accuracy. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide; *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, *State v Solomon Qurai* (HC Criminal - HAC 14 of 2022)).
17. I observed certain inconsistencies in the evidence of the Complainant. She initially explained that she was in pain, as her head and back were paining when the Accused penetrated her anus. She then testified that she felt pain in her body and anus. During the cross-examination, the Complainant said she was in pain because the Accused assaulted her. During the re-examination, the learned Counsel for the Prosecution did not clarify whether the pain she felt was due to the penetration of her anus with the Accused's penis or the assault he did before the incident.
18. During the evidence in chief, the Complainant testified that she told the Accused that she was in pain, but he continued penetrating her anus. However, during the cross-examination, the Complainant answered affirmatively, stating that she only told him that she was in pain when he penetrated her anus with his penis, and the Accused then penetrated her vagina, suggesting that he did not continue penetrating her anus when she told him that she was in pain. Once again, this issue was not clarified during the re-examination, leaving a reasonable doubt whether the claim of the Complainant that the Accused continued penetrating her anus when she told him that she was in pain is credible and reliable.

19. Furthermore, the Complainant admitted during the cross-examination that she sat on his hip when he was lying down on his back, letting his penis penetrate her vagina. This evidence suggests that the Complainant actively participated in this sexual encounter. There is no clarification whether she was forced or threatened to sit like that on the hip of the Accused for him to penetrate her vagina with his penis, leaving a reasonable doubt whether she consensually participated in this sexual engagement with the Accused.
20. Considering the reasons discussed above, there is a reasonable doubt whether the Complainant consented to the Accused to penetrate her anus and then her vagina with his penis. Therefore, I find the Prosecution failed to prove the two counts of Rape beyond a reasonable doubt.
21. In conclusion, I find the Accused not guilty of two counts of Rape as charged in the Information and acquitted of the same accordingly. Moreover, I am satisfied that the Accused pleaded guilty to the first count of Assault Causing Actual Bodily Harm of his own free will without any force or threat. I accordingly find him guilty of the Assault Causing Actual Bodily Harm as charged under count one of the Information and convict of the same.



  
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Hon. Mr. Justice R. D. R. T. Rajasinghe

**At Suva**

20<sup>th</sup> September 2023

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.