

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 23 OF 2013

STATE

-v-

1. ILISONI WAQA
2. EPI NAVAKASILIMI
3. MECIU BACAUCAULEVU
4. WAISEA VULI
5. JONE SERUKALOU

Counsel: Mr. N. Niudamu for the State
Mr. R. Vananalagi for 1st, 3rd, 4th and 5th Accused
Ms. C. Choy for 2nd Accused

Date of Summing up: 23rd May, 2016

Date of Judgment: 27th May, 2016

(Name of the victim is suppressed. She is referred to as LV).

JUDGMENT

1. Accused were charged with following counts and tried before three assessors.

COUNT 1

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ILISONI WAQA on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of **LV**, without her consent.

COUNT 2

Statement of Offence

RAPE: Contrary to Section 44 (2) and 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ILISONI WAQA (as a secondary principal participant) and **EPI VAKASILIMI** (as the primary principal participant), on the 23rd day of January 2013 at Ra in the Western Division inserted his penis into the vagina of **LV**, without her consent.

COUNT 3

Statement of Offence

RAPE: Contrary to Section 44 (2) and Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ILISONI WAQA (as a secondary principal participant) and **MECIU NACAUCAULEVU** (as the primary principal participant) on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of **LV**, without her consent.

COUNT 4

Statement of Offence

RAPE: Contrary to Section 44 (2) and Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ILISONI WAQA (as a secondary principal participant) and **WAISEA VULI** (as the primary principal participant) on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of **LV**, without her consent.

COUNT 5

Statement of Offence

RAPE: Contrary to Section 44 (2) and Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ILISONI WAQA (as a secondary principal participant) and **JOPE SERUKALOU** (as the primary principal participant) on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of **LV**, without her consent.

2. Assessors unanimously found the accused not guilty on all the counts. I direct myself in accordance with my own Summing Up and review the evidence led in the trial.
3. Having disagreed with the opinion of the assessors, I proceed to give my reasons as follows.
4. Prosecution alleges that, in the early morning of 23rd of January 2013, accused persons took turns in penetrating Complainant's vagina without her consent.
5. 1st accused admitted that he had consensual sexual intercourse with the Complainant and therefore did not commit a rape. The only issue to be decided in respect of the case against the 1st accused therefore is whether the Prosecution had proved, beyond reasonable doubt, that the sexual intercourse took place without LV's consent.
6. 1st accused is charged on the 2nd, 3rd, 4th and 5th counts on the basis that he assisted, 2nd, 3rd, 4th and 5th accused to commit rape on the Complainant.
7. 2nd, 3rd, 4th and 5th accused completely deny that they had sexual intercourse with the Complainant. 2nd accused even took up the defence of *alibi*.
8. Prosecution called eight witnesses. Their case is substantially based on the evidence of the Complainant, LV. I am satisfied that the evidence she gave in Court is reliable and trustworthy. Although I am not required to look for corroboration of her evidence, I looked at all the supporting evidence to test the consistency and credibility of her version before coming to my final conclusion.

Recent Complaint Evidence

9. Complainant had not complained to police soon after the incident. Defence Counsel argued that she did not take two opportunities to report the alleged incident because she was never raped. I am unable to accept that contention.
10. Complainant in fact complained at the earliest opportunity to the lady (Lice) who invited her to have grog at her house on the 23rd of January, 2013. It was that lady who relayed the incident to Saula, the Deputy Chief of the village, on the 24th. Saula in turn informed the incident to the Rakiraki Police Station in the presence of the Complainant. Complainant herself at the same time reported the matter to Police over the phone. When she was asked why she failed to make a prompt complaint to police, she said that there was no transport, and no mobile phones. Police officers confirmed that there was no motorable road up to Maciu's house situated at the interior part of Nakorovu village. Complainant was taken to the Rakiraki Hospital on the same day where she informed the doctor Alma that she was raped. Her statement was recorded by the Police on the 25th January, 2013.
11. Both Saula and Dr. Alma gave evidence and confirmed that they received the relevant information from the Complainant. Both of them are independent witnesses. After this incident was reported to police Saula was under pressure to resign from his Deputy Village Headman post at a meeting called by the accused's family in which Seru Digo, the Village Headman, also participated.
12. Complainant was a total outsider to Nacara Settlement in that night. She had visited her aunt, Losena who is the mother of the 3rd accused for the first time. Jokaveti is Losena's sister. Defence Counsel's contention that she could have complained to Jokavaeti soon after the incident is not tenable. Complainant said that she was scared to go out in the dark. Some of the accused were still inside the house. Reaching Jokaveti's house to complain, crossing a river in the night, after an invasion on her body and soul, seemed nearly impossible.
13. Even if she had an opportunity to complain, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible.

The experience of the Courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others would react with shame, or fear or shock or confusion, do not complain or go to Police or any other authority for some time. It takes a while for self confidence to re-assert itself.

Consistency

14. Defence Counsel contended that Complainant's own previous statements are contradictory to her evidence and, in view of those contradictions, her evidence should be rejected. Their main focus was on the so called contradiction in her previous statement to police, and also to the doctor, where she is alleged to have stated that she was raped by seven people. In Court, she denied having stated to police that she was raped by seven people.
15. Director of Public Prosecution has filed the information only against five people. His Counsel says that police had made a mistake in recording her statement.
16. Complainant had mentioned Epi's name to police but his name is recorded as 'Levi'. Another name 'Osea' that appears in her statement to police was never transpired at the trial. She stated that names of Manu and Suka were mentioned to police as they also participated in the grog session and not as the ones who raped her. Meci confirmed that Suka was also arrested by police at his house along with him. But Suka was not charged. Therefore, possibility of making mistakes in recording the police statement cannot be ruled out. What is important here is that she had mentioned the names of the accused to police soon after the incident.
17. The conditions under which Complainant may have given her previous statements to police and to the doctor are quite understandable. I do not consider those contradictions material so as to affect the credibility of her evidence.

Probabilities/ improbabilities

18. Complainant had left for Nakorovou village to play volleyball, had grog with a lady (Lice) who invited her, and slept with a stranger, Amani, in the aftermath of the alleged rape incident. Defence Counsel contended that such a behavior is completely improbable and cannot be expected from a rape victim.
19. Although she left the house with Maciu's sisters for Nakorovou, she had in fact not gone to play volleyball. Maciu confirmed in his evidence that she had accepted the invitation by the lady for grog and did not go with him to play volleyball. Why she did not go with Macui and instead accepted an invitation of a total stranger was not adequately explained. One thing is clear. Complainant, by staying back, opened up a space to complain about the incident to the lady and to the Deputy Village Headman.
20. Complainant denied that she prepared breakfast and lunch at Maciu's place and had meals with them after the incident. It was never put to the Complainant that Meciu sent her to the river to collect '*ota leaves*' to prepare lunch as was said by Macui in his evidence.
21. Reasons for her having grog with strangers and sequence of events that led her to sleep with Amani without returning to the 'house of her ordeal' in the aftermath of the incident were adequately explained.
22. When she relayed the incident to the lady and to Amani they no doubt took the advantage of her situation. They brought a marriage proposal to the Complainant to marry Amani who was paying a visit to their place. Complainant accepted the proposal. Amani confirmed that she had agreed to marry him before going to bed.
23. Defence Counsel repeatedly cross examined the Complainant, surprisingly without any objection from the Prosecution, on the basis that she went a further step forward and kissed Amani and had sexual intercourse with him. Complainant having accepted that she slept with Amani denied that she had sexual intercourse with him. She displayed her honesty by admitting that she slept with Amani. She had every right to

deny that she had sex with Amani. She is not bound to answer in public about her past sexual relationships with people other than the accused in this case. It would have been better if the State Counsel, in the interest of justice, watched not only the interest of the State but also that of the Complainant before it is too late.

24. Amani was called by the Defence, again without any objection, to prove that the Complainant not only slept with him but also had sexual intercourse with her. Court had to intervene to stop Amani from exposing his sexual experience with the Complainant any further as it had nothing to do with the issue at hand in this case.
25. Contention of the Defence Counsel that Complainant's past sexual experience with Amani is relevant to the issue at hand and his application to further question Amani on that basis were refused by this Court in the interest of justice. Even for the purpose of impeaching the credibility of the Complainant, her previous sexual experience with a third person is immaterial in this case as she was entitled in law to suppress her previous sexual experience with others in court whether it predates or postdates the charge.
26. Even in judging the Complainant's past conduct as a rape victim, her sexual experience with Amani does not support the version of the Defence. She had slept with Amani only after an agreement of marriage that was brokered at that lady's place. Her conduct is quite natural and not unrealistic for her to behave so.
27. As a matter of policy, in order to discourage re traumatization of rape victims in court, it became necessary for the court to keep watch on it so that injustice could be averted.
28. Time has come for me to reverse the injustice caused to the Complainant. Assessors, despite my direction in the summing up, no doubt drew a negative inference as to Complainant's previous sexual relationship in coming to their conclusion when they heard Amani saying that he had sexual intercourse with her. There was a danger of assessors coming to the conclusion that she is a 'kind of person' who would be more likely to consent to the act of sexual intercourse.

29. There is no evidence of Complainant screaming or yelling when she was allegedly being raped. She had only cried. During the course of LV's evidence it was suggested to her that she could have shouted or otherwise objected to what the accused were doing. There is no classic or typical response to an unwelcome demand for sexual intercourse. The experience of the Courts is that people who are being subjected to non-consensual sexual activity may respond in variety of different ways.
30. According to the Complainant, her mouth was closed. She was the only girl in that house with five young men. The incident had happened after midnight in a remote area. Her conduct is not at all consistent with consensual sexual intercourse.
31. Complainant had stayed back with the accused for grog when she was under a duty to accompany Maciu's two sisters to Jokaveti's place and put them in sleep. Maciu had insisted her to stay and join the grog session with them. Her behavior of joining in the grog session with boys instead of going to sleep in the night does not convince me to accept the position that she had done so because she wanted sex from the boys or as a gesture displaying her consent to have sexual intercourse. Like any other girls of her age she would have wanted to socialize and drink with the people of opposite sex. She would have trusted his cousin Meciu. Further, she would have succumbed to Mecis's insistence.

Distress Evidence

32. Deputy Village Headman confirmed that Complainant was crying as she complained to him. Her admitted shame is quite understandable while reporting such an incident. Doctor Alma said that Complainant was 'emotionally upset' when she examined her on the 24th.
33. Some rape victims display obvious signs of distress, others will not. The reason for this is that every person has his or her own way of coping. Some people take alcohol to relieve themselves from stress and distress. Drinking grog with others after such an incident is not impossible in the Fijian cultural context.

Medical evidence

34. Doctor, having noted her injuries externally and internally, concluded that they were consistent with the history related by the complainant that she was raped. Finding of the doctor is consistent with a rape. She opined that with abrasions, lacerations and bleeding which was still noted on speculum examination were due to a blunt trauma. She found the vaginal injuries to be quite deep, that's right up to the cervix. She said *"such injuries would be possible if it's a traumatic consensual it would have to be very rough sexual intercourse to course these kinds of findings if it's consensual"*. Doctor also did not rule out that some of those traumas could be sustained from normal consensual sex, but not all of it.

Caution interviews

35. Accused, in their respective cautioned interviews, had made certain admissions. Giving evidence in Court, they challenged their interviews and took up the position that those admissions were obtained illegally by police, violating their constitutional rights. Accused maintained that they made those admissions involuntarily due to fear of police torture. They also alleged that parts of their interviews had been fabricated by police officers. Police witnesses vehemently denied those allegations.
36. I review my own finding and the reasons I had given when I decided to admit the caution interviews of the accused in evidence. My finding on constitutionality, fairness and voluntariness of the caution interviews were reinforced at the trial.
37. There is no basis for the allegation that some parts of the cautioned interviews had been fabricated by police. Why should the police officers fabricate even the standard of education of an accused? Most of the personal information, only privy to the accused, had been included in the in the respective interviews. I am sure that what contained in the cautioned interviews are true statements of the accused.

Demeanour

38. Defence Counsel suggested that Complainant even laughed while giving evidence and her demeanor is not consistent with a typical rape victim. It is impossible to predict how that individual will react, either in the days following the incident, or when

speaking publically about it in Court. The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence. It does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words demeanor in Court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concern.

Motive

39. I do not find any motive or reason to fabricate this type of an allegation against the Accused. Version of the Defence is that she had made up a story of rape to protect her name when a rumor was being circulated about her having sex with Waqa and Amani.
40. Deputy Village Headman denied having heard such a rumor in the village. Complainant was only a visitor to Nakorovou on that day and had nothing much to lose even such a rumor was in fact circulated. I am unable to comprehend why she wanted to implicated not one or two but five people including his cousin in a cleansing process.

Version of the Defence

41. Version of the Defense is completely unreliable and unbelievable. Although accused had nothing to prove in this case, it had failed to create any doubt in the Prosecution case.
42. According to the 1st accused, Complainant had come to him after his release from remand and had stayed with him for three months despite the serious false allegation had been made against him. He had asked her to leave only after three months when she 'hurt his feelings'. Seru Digo the Village Headman of the village at that time was called to support his claim. He said it was he who had asked her to go as there was a pending case against Ilisoni.

43. Digo is closely related to the accused persons and no doubt an interested witness. His deputy, Saula had reported the matter to police. He had to resign from his post after the incident. Digo, as the Village Headman, had not reported the matter to Police.
44. 1st accused's evidence that he was engaged in consensual sexual intercourse for a period of nearly four hours with two ejaculations when his cousins are also in that small house is unbelievable.

Defence of *Alibi*

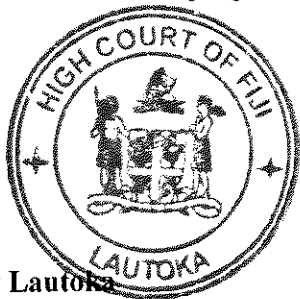
45. 2nd accused completely denied that he was at Maciu's place when the alleged rape incident occurred. However, he had never mentioned to police about his defence when he was interviewed. Police could have checked his *alibi* and interviewed his girl- friend and Nawaqa if he had informed the police that he was with her girlfriend at the time of the incident. The witness Nawaqa he called to prove his defence is his cousin who is no doubt an interested witness. Although the 2nd accused had no burden to prove his *alibi*, he failed to discredit the prosecution version that he was also with other accused in committing the crime at Nacara settlement between 4-5 a.m. on the 23rd January, 2013.

Identification


46. Although I am satisfied that the Complainant is an honest and trustworthy witness, I must be sure that, in the lighting condition that was prevalent at the time of the offence, she correctly recognized the accused who penetrated her before I could find them guilty. Since even an honest witness can be prone to make mistakes in identification, I considered her evidence in the context.
47. Although accused persons contradicted each other as to the time that kicked off the grog session, they agreed in their respective set of agreed facts that they were part of the grog session in the afternoon of 22nd January, 2013 at Maciu's house. Complainant said she joined them with the accused in the grog session during day time. She recognized each one of them in Court. There is no doubt that there was a reasonable foundation for dock identification although they had met there for the first

time. The issue is whether she correctly recognized the persons who penetrated her at the time of the offence.

48. Prosecution says that the incident happened in the early morning between 3-4 a.m. on the 23rd January, 2103. Pictures of the Maciu's house were tendered in agreement.
49. Accused agreed that the grog session took place inside the small house depicted in those photographs. According to the Complainant, moon light was coming from the beam and ceiling of the house. Maciu, having turned off the lantern, was lighting a match. Tomu confirmed that there was bright moon light although he could not recognize the people inside the house as a person who had not entered the house. Only people remained in the house with her, when Manu and Suka left to catch bat were the accused. Having considered all the evidence including my own finding on the caution interview of each accused, I am satisfied that the Complainant was not mistaken in recognising each accused at the time of the offence.
50. I watched accused and witnesses called on their behalf giving evidence in court. They were evasive and not straightforward. They were not consistent in their evidence. Defence failed to establish a reasonable doubt in the Prosecution case.
51. I reject the opinion of assessors which was not available in evidence led in trial. Prosecution discharged its burden and proved each element of the offence with which they were charged beyond reasonable doubt.
52. I find the accused guilty as charged and convict them accordingly.
53. That is the judgment of this Court.



At Lautoka
27th May, 2016


Aruna Aluthge
Judge

**Solicitors: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for 2nd Accused
Mr. R. Vananalagi for 1st, 3rd, 4th and 5th Accused**