

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. MACIU NACAUCAULEVU**
- 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

Dates of Hearing: **16th – 20th of May, 2016**

Date of Summing Up: **23rd May, 2016**

[Name of the victim is suppressed. She is referred to as LV]

SUMMING UP

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called

upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.

2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused persons are innocent until they are proved guilty. The burden of proving their guilt rests on the Prosecution and never shifts.

8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of their guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. You apply that test to the case against each accused. That is an important matter. As you are aware five accused are jointly charged with the same offence. The law recognizes that more than one person may be charged together committing a crime. In this case it is alleged that the 1st accused was involved with other persons in the commission of the crime. In view of this allegation, it is convenient to deal with their cases together in one trial.
10. However, they are still entitled to have their charges considered separately. In doing this you must carefully distinguish between the evidence against one accused and the evidence against the other. You must not for instance, supplement the evidence against one accused by taking into account evidence referable only to another. I will further deal with this matter later when I discuss the admissibility of caution interviews of the accused.
11. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this Court room. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
12. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
13. As Assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

14. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.
15. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. I have given you a copy of set of agreed facts. You should accept those agreed facts as accurate and truth. They are of course an important part of the case.
16. The charges against the accused are as follows:

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.

17. I will now deal with the elements of the offence. A person rapes another person if:
- (a) The person has carnal knowledge with or of the other person without other person's consent; or

- (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
- (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

18. The elements of the offence of Rape in this case are that:

- a. accused,
- b. penetrated the vagina of LV with his penis
- c. without her consent

19. Other parts of the offence are irrelevant to the facts of this case.

20. Consent as defined in Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

21. Proof can be established only through evidence. Evidence can be direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence as to what she saw, heard or felt.

22. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed. Prosecution must prove beyond reasonable doubt that each accused save as the 1st accused penetrated the vagina of the Complainant. The Defence did not challenge that the accused persons did take part in the grog session in the

afternoon of 22nd January, 2013 at Tevita Rakai's house. But they adduced evidence and cross examined the prosecution witnesses on the basis that some of the accused were not present during the period of the alleged incident of rape. The alleged incident occurred at night in the dark.

23. In these circumstances I must warn you of the special need for caution before convicting any of the accused from 2nd to 5th on the correctness of this identification. The reason for this is the danger that a wrong identification will cause a miscarriage of justice and there have been cases where this has happened. It is not a question of a witness being untruthful but mistakenly believing the person seen at the crucial time was the accused. With this genuine belief a mistaken witness can nevertheless be a convincing one. I am not saying that is necessarily the case here. I am explaining the reason for the special care with which you must approach this case.
24. You must consider the case against each accused separately and decide whether the evidence for identification is reliable and should be accepted or whether it is unsatisfactory and should be rejected or leaves you in doubt. To do this, you must examine all the circumstances and determine the strength or quality of the identification. It is for you to assess the value of evidence that has been given. To do this, you must closely examine the circumstances in which the identifications came to be made. Generally this will include such matters as:
- How long did the witness have the person under observation? Was it a significant period or just a fleeting glimpse?
 - At what distance?
 - In what light?
 - Was the view impeded or obstructed in any way?
 - Was the accused a person known to the witness?
 - Had the witness ever seen the accused before and if so how often?
 - How long elapsed between the original observation and any subsequent identification of the accused as that person?

- How was the subsequent identification made?

25. If after the consideration of all that evidence, the quality of the identification remains good, the danger of mistaken identification is lessened but the poorer the quality the greater the danger.
26. This is a case of sexual nature. You must bear in mind that because a person has a certain sexual reputation or a certain disposition in sexual matters or has had certain sexual experiences, you must not draw the inference that, he or she is the 'kind of person' who would be more likely to consent to the act of sexual intercourse. You must consider the evidence led in this trial and form your own opinion if the Complainant in our case in fact consented.
27. You must also bear in mind that because a person has a particular sexual reputation or disposition in sexual matters or has had certain sexual experiences, he or she is less worthy of belief than a person without those features.
28. I will now deal with the summary of evidence in this case.

Case for the Prosecution

LV, the Complainant

29. Prosecution called the Complainant, LV, as their first witness. She is originally from Batiki, Lomaiviti. She was visiting her aunt in Nakorovou village with Jokaveti. First they arrive at Rokovuaka with two men, namely Junior and Robert and Junior's wife. Then her aunt Nani comes to pick her up at Junior's place. On Tuesday the 22nd of January 2013, She comes to Jokaveti's sister, aunty Nani's place in Nakorovou settlement.

30. On 22nd, leaving their two daughters (Kinisi and Mereisi) and son, Meciú (who is also known as Tubuna) behind in their house, aunty Nani and her husband leave for Nausori around 9 a.m. for marketing. After her uncle and aunty had left, around 3 p.m., LV was about to leave the house with her two cousins. Meciú asks her if he could drink grog with her. She agrees and starts drinking grog with Ilisoni Waqa, Meciú, Vuli, Manu, Suka, Jone and Epi. They come to know each other at the grog session on the same day.
31. After having grog, Manu and Suka leave the house to catch bat. LV goes to sleep between 1 and 2 a.m. in that same small house but a little bit on top, far from the others, while the grog session was still in progress. Whilst she was lying down, Ilisoni Waqa comes, and asks her if he could have a talk with him. He then joins the other boys. In a short while, he comes back to her and calls the other boys. Ilisoni sits on her legs, holds on to her and ties her hands and legs. She tries to scream but Meciú blocks her mouth. Ilisoni undresses her. All of them undress themselves, take their penises, penetrate her vagina, taking turns. Ilisoni Waqa inserts his penis into her vagina first followed by Vuli, Meciú, Epi, and Jone whilst she was crying.
32. They used a lantern to light the grog session. Meciú turned it off and the house turned dark. There was, however, light coming from the moon and Meciú was lighting the match. They were having sexual intercourse with her for 1 – 2 hours. Each of them taking turns not that long.
33. Whilst she was crying aunty, Jokaveti's son, Tomu, arrived after 7 a.m., and saw her crying. He asked her, what is wrong? She did not reply. Jone, Vuli, Epi had already left while Ilisoni Waqa and Meciú were still with her when Tomu arrived.
34. She left the house in the morning and was staying with one family in a nearby house. On the 23rd January, 2013, the Village Headman came to that house. The lady of the house informed the Village Headman about the incident. Then she reported the matter to the Village Headman, crying. He then called the Police.

35. Complainant recognized the accused and made a dock identification of each accused who penetrated her.
36. Under Cross-examination, she confirmed that there was no any other person that took part in having sexual intercourse apart from the five accused she identified in Court.
37. Complainant admitted making a statement to police on the 25th of January 2013. She denied mentioning the name Levi to police. She also denied satiating that Meli and Suka also raped her. She however admitted stating Epi's name, instead of Levi, as a person who raped her. She admitted mentioning the names of Meli and Suka to Police as they also formed part of the grog session, but not as the ones who raped her.
38. Complainant admitted that a lady of a nearby house invited her to her house when she was going past her house with Maciu's two sisters towards Nakorovou around 9 a.m. to do cleaning in Maciu's another house. Then she said she stayed with that lady and went after lunch. She denied making breakfast before leaving the house.
39. She admitted sating to police on the 25th January, 2013 that she went to play volleyball on the 23rd. Explaining the contradiction, she said that she went to play volleyball but it did not take place. She admitted having grog and lunch with that lady and her nephew, Amani. She also admitted sleeping over in that lady's house with Amani on the same bed sharing the same blanket but denied kissing or touching or having sexual intercourse.
40. She later admitted that the Village Headman visited her on the 24th and not on the 23rd as had told earlier. She said later that the Village Headman came to another house just near the house where she slept on the 23rd and went to that house on the 24th to complain. Village Headman told her that 'they were joking about her' and asked her what happened that night.
41. Village Headman called the Rakiraki Police Station and informed the incident. 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. She said she was ashamed so she told the Village

headman what happened. She remained silent when she was asked as to why she failed to inform police on the 25th of January that she had slept over at those couple's house before the Village Headman came on the next morning.

42. Complainant denied returning to Ilisoni Waqa in Korovou village a few weeks after the incident happened when Ilisoni and rest of the accused were bailed out. She denied having consensual sex with Ilisoni Waqa.
43. She said that moon light was coming from the gaps in the ceiling and the beam.
44. Complainant told Court that Jone, Vuli and Epi had left by the time Tomu arrived in the morning. She had told police that, when Tomu arrived, 'the 7 boys were laughing and smoking'. When questioned about this, she said that Suka and Manu were not there when Tomu arrived.
45. She had told Police that Ilisoni, Manu and Suka stayed back and slept with her in the house after the rape incident. She also told that Ilisoni Waqa was lying beside her for 2 hours. She did not take that opportunity to run away and report the incident to Jokaveti or somebody because she was scared in going out alone.
46. She had told police that she came to Junior's house on 18th of January 2013. She told Court that she came to Junior's house on 21st January, 2013. She told court before lunch that aunty Nani or Jokaveti that came to take her from Junior's house. She told after lunch that it was Tubuna's mum, Losena that came to pick her. Explaining the contradiction, she told later that she had three aunties in Nakorovou and she forgot Losena's name and she meant aunty Losena when she referred to Nani in the morning.
47. She admitted that aunty Losena came and took her away from Amani because she (Losena) did not like her arrangement to marry Amani. Amani's aunty Kini's had arranged the marriage and had promised to keep her because she loved her.

48. Complainant denied that Epi and Waisea had left around 10 p.m. on the 22nd of January 2013. She told that Epi also included in the boys who had forceful sexual intercourse with her. She could not recall if she had informed the doctor that she was raped by 7 men when she went to be examined by the doctor.
49. She said, under re-examination, that Manu and Suka had gone to catch bat when this incident happened. She also said that, on her way to play volleyball, she reported the incident of rape to the woman in the couple's house where they had grog. That woman told her to stay at home and, whilst staying there, this woman and the family made the arrangement for her to marry Amani.
50. She told that three aunties of her, Losena, Jokaveti and Lo were married to Nakorovou Village. She started having grog with Meciu, Ilisoni Waqa, Suka. Epi, Jone and Manu joined later.

Dr. Seleima Alma Tuvou Nacuva

51. Doctor Seleima, having seven years' experience with post graduate qualifications is attached to the CWM hospital. She had examined the Complainant at 10 p.m. on the 24th January, 2013 at the Rakiraki Hospital.
52. Whilst giving evidence, she referred to the Police Medical Examination Form (PE1) she filled upon examination of the Complainant, a copy of which has been given to you. Doctor described the history related by the Complainant and her initial appearance when she was brought before her. Complainant appeared emotionally upset but was co-operative and communicative well.
53. Doctor had noted approximately 0.2 cm abrasions below the urethral meatus she had some abrasions inside the labia folds and, on speculum examination, the cervix was noted to be bleeding slightly with 0.2 cm x 0.3c.m. Abrasions noted around the cervical ores.

The lateral vaginal vault both sides had 0.3 cm. x 0.5 cm lacerations which noted to be bleeding on the contact. She had some bruises in the middle aspect of her thigh.

54. Explaining her professional opinion, doctor said and I quote:

“An abrasion is a break of an ampafilia which is the layer of the skin; she also had laceration that indicates that the break is deeper than that, so in my opinion with abrasions, lacerations and bleeding which was still noted on speculum examination, I attributed that to blunt trauma”.

55. Doctor, having noted her injuries externally and internally, concluded that they were consistent with the history related by the complainant that she was raped. She confirmed that the bleeding she noted originated from the injuries and not from normal menstruation.

56. Under Cross-examination, doctor said that the patient specifically told that she was raped by 7 men. Doctor conceded said that it is possible to have a small abrasion of 0.2cm in a consensual sex. She also did not rule out the possibility of having abrasions inside the labial folds as a result of consensual sex and said:

“That’s quite deep, that’s right up to the cervix but it will 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”.

57. Doctor also did not rule out that some of those traumas could be sustained from normal consensual sex, but not all of it.

Tomu Senidave

58. In the evening of 22nd of January 2013, Tomu was drinking grog at Tevita’s house in Nakorovou with Epi Navakasilimi, Meciu Nacaucavevu, Ilisoni Waqa, Waisea Vuli, Jone Serukalou, Suka Davenaivalu, Manueli and Luisa.

59. They started the grog session after 3.00 p.m. He left for father's house across the river to have dinner after 2 a.m. on 23rd and came back to Tevita Rakai's house after 3.00 a.m. When he reached Tevita Rakai's house he could hear LV crying, and asked them what they did to LV. No one replied. LV did not talk to him. House was dark. He did not recognize who was inside the house. After that he went back home.
60. Under Cross-examination, he said that LV was lying when she told Court that he was not present with others drinking grog. He said that it was a full moon that particular morning. However, it was too dark for him to see who all were inside the house.
61. Under Re-examination Tomu said that he spoke to LV on the 23rd morning, after 10 a.m., and had a conversation with her. She was making breakfast at that time.

Saula Madraiyawa

62. In January 2013, he was the 2nd headman of the village. On the 24th of January 2013, at around 12.15 he went to his farm in Delaibeqa close to Jope's house. When he was about to reach his farm he saw a girl in a sad mood at Jope Nacagi's house. That girl was LV. He asked her what happened. She told him that nobody should be around to hear what she was going to tell him. Then she informed him that she was raped. He borrowed Kini's phone and called Rakiraki Police station. Luisa was informing the police what happened.
63. Under cross examination, he said that he did not hear any rumour being spread around in the village that she was raped. She informed him that she was raped by Ilisoni Waqa, Epeli Navakasimili, Waisaea Vuli, Jone Serukalou and Meciu Nacocolevu. LV told him that if he did not do anything about her complaint she will report the matter and report about his failure to inform the Police.
64. After the incident he was no longer the assistant Chief. The family of the accused called a meeting in the village for him to be asked. He was told to excuse from the assistant Village Headman position because people in the village were saying what he did was wrong. In the meeting he blamed Ulaiasi for reporting the matter to police because he

was really scared that they might do something to him. He admitted that mentioned in his previous statement to police the phrase 'seven youths' although he had mentioned only 5 names in Court.

Police Constable Paul

65. Constable Paul was the police officer who arrested the accused on the 25th January 2013 and also the officer who interviewed 1st and 3rd accused on the same day at the Rakiraki Police Station. He said that the accused were afforded their constitutional rights on their arrest and at their interviews. Accused were treated fairly. They gave their interviews voluntarily. They were not assaulted, threatened or coerced and were not given any promise or inducement to obtain admissions. He read in evidence the English translation of the interview he recorded from the 1st and 3rd accused.
66. Under cross examination, he denied assaulting, threatening or violating constitutional rights of the accused during arrest, transportation or interview. He also denied having fabricated their interviews.

Police Detective Petero Drukulevu

67. Constable Petero interviewed the 2nd and 4th accused on the 25th January 2013 at the Rakiraki Police Station. He said that the accused were afforded their constitutional rights at their interviews. Accused were treated fairly. They gave their interviews voluntarily. They were not assaulted, threatened or coerced and were not given any promise or inducements. He read in evidence the English translation of the interview he recorded from the 4th accused. He denied fabricating interviews of the accused.

PC Solomone

68. Constable Solomone interviewed Jone Serukalou, the 5th accused, on the 25th of January, 2013 at the Rakiraki Police Station. He said that the accused was afforded his constitutional rights at his interview. Accused was treated fairly and. He gave his interview voluntarily. He was not assaulted, threatened or coerced and was not given any

promise or inducement to obtain admissions. He read in evidence the English translation of the interview he recorded from the 5th accused.

69. Under cross examination, he denied assaulting, threatening or violating constitutional rights of the accused during the interview. He also denied having fabricated the interviews.

Corporal Sovaia

70. On the 25th of January 2013 when she was stationed at the Rakiraki Police Station, she translated the interview of Epi Vakasilimi into English. She read English translation in evidence.

That's the end of the Prosecution's case.

71. At the end of the prosecution case, you will remember, that I gave the accused their rights in defence; their right to remain silent, right to give evidence and call witnesses on their behalf and to address Court through their Counsel. I explained to them that they have nothing to prove in this case. They chose to exercise their right to give evidence and call witnesses on their behalf.

Defence Case

1st Accused Ilisoni Waqa

72. 1st accused Ilisoni Waqa elected to give evidence and called witnesses on his behalf. Waqa said that the grog session started after 8 p.m. with Meciu and Suka at Tevita Raki's house. While they were drinking, Tubuna's mum told Kinisi, Mereseini and LV to go and sleep at Jokaveti's house. After having dinner around 8 p.m., LV left with the two girls. LV returned and joined the grog session on his invitation. Epi, Waisea, Manu, Jone Serukalou were also having grog inside the house. LV was just lying down and telling stories to them. Grog session finished after 10.00 pm.
73. After the grog session finished, Epi and Waisea left. Meciu, Jone, Suka and Manu stayed back. They went to sleep where they were having grog. LV came and woke him up. He

stood up and lied beside LV. Then he 'fixed her'. He approached her, and told her that he liked her. She gave consent. Half an hour chat ensued. Then she undressed herself. He had sexual intercourse twice with her.

74. In the first session, sexual intercourse lasted for 1 ½ hours before ejaculation. He then had a pause. During the break he went outside, drank water and came back to start the second session. Second session lasted for two hours. After the second ejaculation, they lied together on that same place. When he woke up after 6.00 a.m. Meciui, Suka and Jone and Manu were still there. Luisa was still lying down.
75. When he was granted bail after seven months in remand, LV came back to the village and stayed with him for about 3 months in his house in the bush. When the topic about the rape allegation against him was taken up she was laughing because she knew that she was lying. After 3 months, he told her to go because she hurt his feelings.
76. On 25th of January, 2013, Police team led by Paul came and arrested him without explaining the reason for arrest. Officer Manasa handcuffed and loaded him into a police twin cab. Vehicle stopped at Veidakai in the middle of the road. Paul came out of the vehicle and assaulted on his sole and feet with a police baton.
77. When Paul was conducting the interview, he denied the rape allegation. Then he stood up and come around and punched the side of his ribs. He was also threatened to rub chillies on his face. Paul was forcing him to admit the allegation.
78. Under cross examination, Waqa said that he came to know about Tubuna's mom telling LV to go and stay with aunty Jokaveti's house only when he overheard Kinisi and Mereseini informing LV. When he came there, Tubuna's mother was not home. He denied having had forceful sexual intercourse with LV.
79. He denied having grog with Tomu. He admitted telling police that Tomu was also drinking grog with him due to fear of police torture. He told police that Epi came there

around 5 p.m. due to the same reason. When he was having sex with LV for 2 -3 hours his cousins were still sleeping.

80. When he was taken to Lautoka Magistrates Court the next morning he was limping. He he did not inform the Magistrate about police assault or his injury. He did not know that he could have complained.

2nd Accused Epi Navakasilimi

81. Epi was residing with his cousin Ilisoni Nawaqa. After playing volleyball, he went down to Maciu's place in Nacara with a friend around 5 p.m. on the 13th January, 2013. Ilisoni, Maciu and LV were drinking grog when they reached there after 6 pm. Suka, Waisea, Manu and Jone joined them later. Around 10 p.m., he finished drinking grog and went home with Waisea.
82. He went straight to his girlfriend's house and accompanied her to his cousin Nawaqa's place. They arrived there after 11 p.m. He asked for a pair of pillows and blanket and went to sleep in a small house just beside Nawaqa's house and slept there till 5 am. In the morning, he dropped his girlfriend at her place and came back.
83. On the 25th of January 2015, he was arrested along with Waisea at his house near Nacara Junction without informing the reason for arrest. Policeman Petero interviewed him at the Rakiraki Police Station. He was by Officer Petero and two other policemen forcing him to answer the questions. When he was denying the allegation, Paul came beside him and punched the side of his ribs and hip using a Police baton telling why you lying.
84. He said he was not given the interview statement to be read back. His answers including his level of education had been fabricated by police. He signed the caution interview because police officers forced him to sign. He completely denied the allegation. Under cross examination, he denied that he was present in Nacara settlement after 10 pm that night drinking grog with the boys and LV.

3rd Accused Maciu Nacaucaulevu

85. On 22nd January, 2013, he started drinking grog with Suka and Waqa in his house around 8 p.m. After having their dinner, his two sisters went to sleep at Jokaveti's house with LV. LV came back and joined them in gorging. After 5 minutes LV went to lie down at top side of the house and was telling stories. When the grog finished around 10 pm., he saw LV and Waqa lying down on the top side of the house. He fell off to sleep.
86. When he woke up on the 23rd morning around 6 a.m. LV was preparing Roti for breakfast. He sent LV to go and look for ota leaf for lunch. Jone, Manu and Suka and his two sisters had breakfast and lunch together. After lunch, he went to play volleyball in the village with LV. On their way to volleyball court, Kini invited LV for them to drink grog together at her place. He proceeded to the volleyball court leaving LV behind. When he was released from remand, he saw LV living with Waqa together.
87. In the early morning of 25th of January, 2013 a police team came to his house. He was hand cuffed and taken into custody without explaining the reason for arrest. Then police officers called Suka also who was inside the house and cuffed him together. They walked down to the Police vehicle where he saw Jone and Manu inside. He was interviewed by Paul at the Rakiraki Police Station. During the interview Paul was asking questions with regard to a rape allegation. When he was denying the allegation, he stood up and punched on the back of his head. He was also nudging both sides of his ribs. He made admissions in his caution interview not on his own free will but due to fear of assaults and threats. Meci denied raping LV.
88. Under cross-examination, he denied that he started drinking grog at 3.00 pm. He also denied inviting LV to stay back to drink grog when she was about to go to Jokaveti's house with his two sisters.

4th Accused Waisea Vuli

89. Waisea joined the grog session at about 9.30 pm, Ilisoni Waqa, Epi, Suka, Maciu and LV were drinking grog. After drinking grog, he and Epi went back home around 10 p.m. He denied raping LV.
90. On the 25th of January, 2013 Police came to pick him up. Officer Paul arrested him without explaining the reason for arrest. Police Officers were verbally abusing along the way and threatening to whack at the police station. At the Rakiraki Police Station, a police officer verbally abused him.
91. Officer Petero interviewed him on the porch of the Rakiraki Police Station. He saw Officer Paul holding on to Maciu's t-shirt collar and punching his head and forcing Maciu to admit the offence. Petero also threatened him during the interview. Under cross examination, he denied raping LV.

5th Accused Jone Serukalou

92. Jone was having grog with other boys at Meciu's house. When the grog finished at around 10 p.m. he was lying down. He denied raping LV after the grog session.
93. Police offices came to his aunt's place on the 25th January 2013 to arrest him. Officer Paul or Manasa did not explain why they arrested him. He got into the police vehicle. Paul was verbally abusing and forced to admit to the offence on their way to the police station.
94. He was interviewed at the Rakiraki Police Station. His admissions in the caution interview were obtained by force. He was verbally abused. He was taken with Waisea to the room where Mathew was being interviewed to show how Meciu was being punched by Paul.

95. Under Cross Examination, Jone said that after the grog he went to bed around 10 p.m. He was sleeping with Ilisoni Waqa. He denied that Ilisoni assisted him in raping LV after the grog finished.

Seru Digo Dave

96. Ilisoni Waqa, is his cousin. All the accused are related to him. He was the Village Headman of Nakorovou in January 2013. LV came see him after accused were taken to the Police Station Station.
97. He saw LV staying with Ilisoni Waqa when he went to his house in the settlement; they were staying together for 3 months. He told LV to go back because his cousin is a suspect of the case.
98. Under Cross-examination, Seru said that he did not make an effort to go and visit Nacara as the Village Headman to see LV after his cousin Ilisoni was taken into custody. He saw Ilisoni and LV living together in the village after Ilisoni's remand period was over.
99. He did not know if his deputy Saula was sacked after this incident though he was present during the village meeting. He did not make any effort as a Turaga ni Koro to report the to the Police that the complainant is back in the village with Ilisoni Waqa as he was not the Village Headman at that time.

Ilisoni Nawaqa

100. In January 2013, he was residing at Nakorovou with his wife, children and Epi. Epi is his cousin. On the 22nd January 2013, Epi came home at about 11.00 pm. with his girlfriend. They called him and asked for a pillow and a blanket and went to sleep in a house beside his house. Epi woke up in the next morning at 5.00 a.m. and took his girlfriend back to her place.

Amani Delai

101. On the 23rd of January 2013, he was at home with the girl LV. LV was on her way to play volleyball in the village when her aunty invited her for a bowl of grog at his house. He drank grog and was talking with her till midnight. They were together and shared the same bed and blanket. Bed was provided by his grandmother and small aunty Kini. Both slept there till the next morning. On the following day, her aunty came and took her. She was angry because he was staying with LV.
102. Under Cross Examination, Amani said he did not know to whom the house where he was drinking grog belonged. He had just come there for a visit from Tailevu, Wainibuka.
103. I have summarized evidence which I thought important to you in the light of arguments of the Counsels of both parties. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should remind yourselves of all that evidence and from your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.

Analysis

104. Prosecution called eight witnesses. Their case is substantially based on the evidence of the Complainant, LV. If you are satisfied that the evidence she gave in Court is reliable and trustworthy you can safely act upon her evidence in coming to your conclusion. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a Rape case. The case can stand or fall on the testimony of Complainant depending on how you are going to look at her evidence.
105. Prosecution alleges that, on the 23rd of January 2013, accused persons took turns in penetrating complainant's vagina without her consent. 1st accused admitted that he had consensual sexual intercourse with the Complainant and therefore did not commit a rape. You have to be sure that the Complainant had given her consent freely and voluntarily.

106. 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. 2nd, 3rd, 4th and 5th accused completely deny that they had sexual intercourse with the Complainant. Therefore, you have to consider and evaluate the evidence against each accused distinctly and separately and decide whether each accused is guilty of rape as charged.
107. Although corroboration is not required to satisfy yourself about the credibility of the Complainant's evidence, you may, however, consider whether there are items of evidence to support her evidence, if you think that it is safe to look for such supporting evidence to test the consistency and credibility of the Complainant's story of Rape.
108. If you are satisfied that LV told the truth and her evidence is believable, then you have to consider whether the Prosecution has discharged its burden and proved each element of the offence of Rape beyond reasonable doubt.
109. As I said earlier, proof of identification is crucial. Complainant said she was having grog with the accused during day time. Accused agreed in their respective set of agreed facts that they were drinking grog in the afternoon of 22nd January, 2013 at Maciu's house. She recognized each accused in Court. Prosecution says that the incident happened in the early morning between 3-4 a.m. on the 23rd January, 2103. You have to be sure that the Complainant recognized the boys who penetrated her without any mistake.
110. According to her, 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. You saw the pictures of the Maciu's house. Having considered all the evidence and your own finding on the caution interview of each accused, you decide whether the Complainant was not mistaken in identifying the accused at the time of the offence.
111. 2nd accused took up a specific defence of alibi. He claimed that he was not present at Maciu's house at the time of offence and that he was at his cousin, Ilisoni Nawaqa's

place with his girlfriend. He called Ilisoni Nawaqa as his alibi witness. Prosecution says that the 2nd accused's defence is contradictory to his previous statement he gave at the caution interview. It is up to you to decide the credibility of the defence and what weight you attach to it. Please remember, even if you do not believe his defence and completely reject it, burden to prove that he was in fact present at the crime scene at the crucial time remains with the Prosecution. 2nd accused is under no obligation to prove his defence of alibi or prove anything at all.

112. You have to consider whether there is a delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident. If there is a delay, that may give room to make up a story, which in turn could affect reliability of the story. If the complaint is prompt, that leaves no room for fabrication. If there is a delay, you should see whether there is a reasonable explanation for such delay.
113. Complainant had not complained to police soon after the incident. Defence Counsel took up the position that she failed to take two opportunities and did not complain to Jokaveti or anybody because she was never raped. Alleged incident occurred on the 23rd of January 2013. She had reported the matter on the 23rd to the lady who had grog with her. She had complained to the Deputy Village Headman, Mr. Saula, Dr. Alma and to the Police on the 24th. Deputy village headman and doctor gave evidence. You have to see whether she had given an acceptable and legitimate explanation for not complaining to Jokaveti soon after the incident. It is up to you to form your own opinion on her explanation.
114. 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. There is, in other words no classic or typical response. A late complaint does not necessarily signify a false complaint, any more than

an immediate complaint necessarily demonstrates a true complain. It's a matter for you to determine what weight you attach to it. You need to consider what the complainant herself said about her experience and her reaction to it.

115. You consider whether Complainant was telling a story in Court on the same lines and had maintained the consistency of her version without variations and contradictions or whether she is shown to have given a different version elsewhere. You must remember that merely because there is a difference, variation contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding witness's credibility.
116. Defence Counsel contended that she contradicted her own previous statements on certain points. I am not going to deal with each one of them. Their main focus was on the so called contradiction in her previous statement to police, and also to the doctor, where it is stated that she was raped by seven people. In Court she denied having stated to police that she was raped by seven people. Director of Public Prosecution has filed the information only against five people and his Counsel says that police had made a mistake in recording her statement. It is up to form your own opinion on that. You need to consider the conditions under which she may have given her previous statements and see whether her previous statements are in fact contradictory to her evidence in court. If you consider them as contradictions, you have to consider if they are material enough to affects the credibility of her evidence.
117. 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.

118. You have before you the cautioned interviews of each accused in which they had made those admissions. You heard accused giving evidence in Court. It is for you to assess what weight should be given to those cautioned interviews. If you are not sure, for whatever reason, that those admissions are true, you must disregard them. If, on the other hand, you are sure that they are true, you may rely on them.
119. Remember, admissions made in caution interviews are admissible only against the person who had made those admissions. If an accused had implicated one or several of his co-accused in his caution interview, you must completely disregard those parts in evaluating evidence against the co-accused.
120. The Prosecution alleges that the sexual intercourse happened without Complainant's consent. 1st accused says it happened with her consent. 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 consent.
121. I must repeat hear what the law says in respect of 'consent'. Consent as defined in Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a woman with a necessary mental capacity to give such consent. Submission without physical resistance by a person to an act of another person shall not alone constitute consent. You must evaluate evidence in light of this legal framework. The submission of free choice to repeated demands is not to be confused with consent. For example, submission achieved by persistent psychological coercion so that free choice was overborne will not amount to consent freely given. On the other hand, reluctant but free agreement is not the same thing as submission, and still consent, even if reluctantly given. It is for you to decide whether, in the context of this particular scenario, consent was freely given by LV.
122. You have to consider how probable or improbable is the evidence given by LV. That is whether what she was talking about in his or her evidence is probable in all the circumstances of the case. Or, whether what the witness talked about in her evidence is

improbable given the circumstances of the case. There is another important factor that you should consider. That is whether she had behaved in a natural or rational way in the circumstances that she was talking of.

123. Complainant did not scream or yell when she was allegedly being raped. She had only cried. You might wonder why she did not scream or yell if she was actually being raped by five people. She said that her mouth was closed. The incident had happened after midnight in a remote area. You consider whether her conduct is probable in not resisting, screaming or complaining.
124. 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. This is an argument which you should consider with care when you make your final assessment. You should not assume that there is any 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.
125. Complainant had gone to play volleyball, had grog with neighbors and slept with a stranger, Amani, on the following day of the incident. Defence Counsel contended that such a behavior is completely improbable and cannot be expected from a rape victim.
126. 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. It is up to form your own opinion on that. Conversely, 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. You watched LV giving evidence in Court. It is up to you to decide whether you could accept her version or not.
127. Defence Counsel suggested that Complainant even laughed while giving evidence at certain points and her demeanor is not consistent with a typical rape victim. It is of

paramount importance that you do not bring to your assessment any preconceived views or stereotypes as to how a witness in a trial such as this should react to the experience. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in Court or at the Police Station. 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.

128. You have to consider whether LV had 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. Complainant herself admitted that she was ashamed when she complained to the Deputy Village Headman. However, deputy village headman denied having heard such a rumor in the village. It is up to you to form your own opinion on that.
129. According to the 1st accused he had had consensual sexual intercourse with the Complainant twice for a period of nearly three hours in that night.
130. Complainant had come to him when he was released from remand and had stayed with him for three months. Seru Digo the Village Headman of the village at that time was called to support his claim. Digo is closely related to the accused persons. His deputy, Saula had reported the matter to police. He had to resign from his post after the incident. Digo had not reported the matter to Police because he did not receive credible information.
131. Amani had slept with the Complainant and had drunk grog with him after the incident. Complainant had accepted the marriage proposal and had agreed to marry Amani.
132. 2nd accused completely denied that he was at her place when the alleged rape incident occurred. 3rd, 4th accused also denied having sexual intercourse with the complainant. It is

up to you to evaluate their evidence and decide what weight you should give to their evidence and come to your own opinions.

133. You watched the Accused and their witnesses giving evidence in Court. What was their demeanor like? How did they react to being cross examined and re-examined? Were they evasive? How they conducted themselves generally in Court?
134. It is up to you to decide whether you could accept the version of the Defence and that version is sufficient to establish a reasonable doubt in the prosecution case. If you accept the version of the Defence, then you must not find the accused guilty. Even if you reject the version of the Defence still the Prosecution should prove its case beyond reasonable doubt.
135. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused are not required to prove their innocence, or prove anything at all. In fact, they are presumed innocent until proven guilty.
136. If you accept the version of the Prosecution, and you are satisfied that the Prosecution has proved the case in respect of each accused beyond reasonable doubt, so that you are sure of accused's guilt you must find them guilty. If you do not accept the version of the Prosecution's, and you are not satisfied beyond reasonable doubt, so that you are not sure of the Accused's guilt, you must find them not guilty as charged.
137. Ladies and Gentleman Assessor it is for you to determine the case of each Accused separately on a consideration of all the evidence and applying the directions that I have given to you.
138. That concludes my summing up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and form your individual opinions on whether the charge has been proved against each Accused. I remind you that

you must consider the case against each accused separately. On your return you will be asked to separately state in Court your opinion in respect of each accused in turn as to whether the accused guilty or not guilty of the charge.

139. Your possible opinion would be as follows:

1st Count - 1st accused guilty or not guilty?

2nd Count – 1st accused guilty or not guilty?
2nd accused guilty or not guilty?

3rd Count - 1st accused guilty or not guilty?
3rd accused guilty or not guilty?

4th Count – 1st accused guilty or not guilty?
4th accused guilty or not guilty?

5th Count - 1st accused guilty or not guilty?
5th accused guilty or not guilty?

140. Would you now please retire to consider your opinion? When you have made your decisions would you please advise the Court Officer and the Court will reconvene to receive your opinions?

141. Any re-directions?



AT LAUTOKA
On 23rd May, 2016


Aruna Aluthge
JUDGE

**Counsels: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for the Accused**