

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

**CASE NO: HAC. 341 of 2015**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

- 1. SEMI BENJAMIN**
- 2. VERO VAKARIRI**
- 3. JOPE VAKALOLOMA**

**Counsel** : Ms. S. Tivao with Ms. S. Sharma for State  
Ms. L. David for 1<sup>st</sup> Accused  
Ms. R. Boseiwaqa for 2<sup>nd</sup> and 3<sup>rd</sup> Accused

**Dates of Hearing** : 10<sup>th</sup> - 19<sup>th</sup> April 2017

**Date of Summing up:** 20<sup>th</sup> April 2017

**Date of Judgment** : 21<sup>st</sup> April 2017

**JUDGMENT**

1. The accused persons were charged with the following offences;

**FIRST COUNT**

*Statement of Offence*

**RAPE:** contrary to section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**SEMI BENJAMIN** on the 25<sup>th</sup> day of October 2015, at Nasinu in the Central Division had carnal knowledge of Adi Viva Roditora without her consent.

## SECOND COUNT

### *Statement of Offence*

**RAPE:** contrary to section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009.

### *Particulars of Offence*

**SEMI BENJAMIN** on the 25<sup>th</sup> day of October 2015, at Nasinu in the Central Division, on an occasion other than the First Count had carnal knowledge of Adi Viva Roditora without her consent.

## THIRD COUNT

### *Statement of Offence*

**RAPE:** contrary to section 207(1) and (2)(c) of the Crimes Decree No. 44 of 2009.

### *Particulars of Offence*

**SEMI BENJAMIN** on the 25<sup>th</sup> day of October 2015, at Nasinu in the Central Division, penetrated the mouth of Adi Viva Roditora with his penis without her consent.

## FOURTH COUNT

### *Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210 (1)(a) of the Crimes Decree No. 44 of 2009.

### *Particulars of Offence*

**SEMI BENJAMIN** on the 25<sup>th</sup> day of October 2015, at Nasinu in the Central Division, unlawfully and indecently assaulted Adi Viva Roditora by touching her breasts.

## FIFTH COUNT

### *Statement of Offence*

**RAPE:** contrary to section 207(1) and (2)(b) of the Crimes Decree No. 44 of 2009.

### *Particulars of Offence*

**VERO VAKARIRI** on the 25<sup>th</sup> day of October 2015, at Nasinu in the Central Division, penetrated the vagina of Adi Viva Roditora with his finger without her consent.

## SIXTH COUNT

### *Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210 (1)(a) of the Crimes Decree No. 44 of 2009.

### *Particulars of Offence*

**VERO VAKARIRI** on the 25<sup>th</sup> day of October 2015, at Nasinu in the Central Division, unlawfully and indecently assaulted Adi Viva Roditora by touching her breasts.

## SEVENTH COUNT

### *Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210 (1)(a) of the Crimes Decree No. 44 of 2009.

### *Particulars of Offence*

**JOPE VAKALOLOMA** on the 25<sup>th</sup> day of October 2015, at Nasinu in the Central Division, unlawfully and indecently assaulted Adi Viva Roditora by touching her breasts.

2. A finding of not guilty was recoded in respect of the second accused on count five pursuant to section 231(1) of the Criminal Procedure Act 2009.
3. The assessors have returned with the unanimous opinion that the first accused is guilty of the first, second and the third counts; the first accused is not guilty of the fourth count; second accused is not guilty of the sixth count; and the third accused is not guilty of the seventh count.
4. I direct myself in accordance with the summing up delivered to the assessors on 20<sup>th</sup> April 2017 and the evidence adduced during the trial.
5. The prosecution led the evidence of three witnesses including the complainant.
6. The complainant's evidence was riddled with a number of improbabilities and inconsistencies. Her evidence was that around 12.30pm on 25/10/15 she was threatened by the 1<sup>st</sup> accused whom she met on her way from the church that he will stab her; she was told not to ask for help or to do anything; because of that threat she followed him from there until they went near a black taxi at Caubati; she was pulled into the black taxi at Caubati and taken to Nasole; and then she was taken inside a pink house where the alleged incidents took place.
7. The following improbabilities were noted in the evidence presented by the prosecution *inter alia*;



- a) The complainant's house was six houses away from the church. The 1<sup>st</sup> accused threatened the complainant around 12.30pm near the church steps and due to that threat she followed him by foot up to Caubati;
- b) Before leaving for Caubati, she sat on the steps smoking a cigarette and waited for the 1<sup>st</sup> accused when the accused was inside the 'blue house' for more than 7 minutes without running to her house or asking for help;
- c) She didn't want to smoke but she smoked the cigarette the 1<sup>st</sup> accused gave even when he was not around just because he told her to do so;
- d) She did not ask for help from Kolinisau and the two boys whom she knew very well, who went past her while she was waiting for the 1<sup>st</sup> accused;
- e) The 1<sup>st</sup> accused made her follow him by foot until they reached Caubati to make her get into the taxi when the same taxi was there near the church where the accused initially threatened her. In other words the 1<sup>st</sup> accused took the risk of walking with the complainant whom he is taking against her will, a fairly long distance passing people and houses to get the complainant inside the taxi which was available to him near the church where he initially threatened the complainant;
- f) When he was removing the complainant's clothes she was just standing there and was looking at whatever he was doing. She was nervous and scared because it was the first time for a guy to remove her clothes;
- g) the 1<sup>st</sup> accused took the complainant whom he was holding against her will to a shop to buy cigarettes after he committed the four offences he is charged with. It took about 25 minutes to reach the shop and they had to walk past houses and people;
- h) the complainant did not run away or ask for help but was standing at the corner of the shop when the 1<sup>st</sup> accused was buying the cigarettes simply because the accused told her not to;
- i) However, around 4 o'clock she went out of the house and she asked a man she met on the road to help her. Her evidence does not explain the change of circumstances that led her not to be scared of the threats at this point in time; and

- j) According to her evidence there was considerable amount of force used on her hands and on her head. She said she was pulled on several occasions, the 1<sup>st</sup> accused held her hands tightly when he first penetrated her vagina with his penis, she was slapped and more importantly she was thrown against a concrete wall where she hit her head. However, according to the second prosecution witness who is the doctor who examined her around 9.00am the following day, there were no bodily injuries apart from his findings on her pelvic area.
8. I noted the following inconsistencies in the complainant's evidence *inter alia*;
- a) In her evidence in chief she said she was pulled into the black taxi. She agreed that she told the police that she 'got in' at the back of the taxi. Then when she was questioned regarding the statement to police, she said that was after the 1<sup>st</sup> accused pulled her. She also admitted that she did not mention in her statement to the police that she was pulled into the taxi;
  - b) In her evidence in chief she did not say that she was assaulted by the accused persons when she was smoking. During cross-examination she said the accused persons assaulted her when she refused to smoke marijuana. She said she did not tell the police that they assaulted her because she had so much in her mind and she missed some events;
  - c) She admitted during cross-examination that she told the police that the 1<sup>st</sup> accused brought her inside the bedroom. She said that was after he pulled her. Then when she was asked whether he pulled her or did he bring her to the bedroom, she said he pulled her. Then when it was suggested that she had lied to the police she said she missed out on that part;
  - d) In her evidence in chief the complainant initially said that the 1<sup>st</sup> accused ripped off her clothes. She admitted that she told the police that the 1<sup>st</sup> accused removed her dress and her panty. She said she had so much on her brain and therefore she just said he removed her clothes instead of saying ripped. Then she said, by saying 'ripped off the clothes' she meant that the clothes were removed;




- e) In her evidence in chief the complainant said she tried to shout when the 1<sup>st</sup> accused penetrated her vagina on the first occasion and then the 1<sup>st</sup> accused covered her mouth with a pillow. During cross-examination she admitted that she had not mentioned in her statement to police that she tried to shout and that the 1<sup>st</sup> accused covered her mouth with a pillow. She said she missed out on that because she had so much in her brain at that time;
  - f) In her evidence in chief she said that the 1<sup>st</sup> accused lay down facing upwards and pulled her head towards his penis. During cross-examination she admitted that she told the police that when she woke up, the 1<sup>st</sup> accused was pushing his penis in her mouth;
  - g) She agreed that in her statement to the police she had not mentioned about lying next to the 2<sup>nd</sup> accused before she went with the 1<sup>st</sup> accused to buy cigarettes. She said she missed out on that part; and
  - h) Her evidence was that the 3<sup>rd</sup> accused sucked her breasts. During cross-examination she admitted that she told the police that the 3<sup>rd</sup> accused was touching her breast and her bum.
9. Her explanation for most of the inconsistencies was that she missed out since there was so much on her brain. I did not find this explanation convincing given the manner in which she gave the explanation. It appeared to me that the complainant was twisting her story and was trying to improve her version based on the questions she is being asked.
10. In my view, the complainant's version of events is not reliable given the improbabilities and the inconsistencies in her evidence.
11. On the other hand, the accounts given by the accused persons seem reliable though there were few inconsistencies between the evidence of the three accused persons.

12. According to the complainant's evidence, she had come across several individuals on 25/10/15 from the time she met the 1<sup>st</sup> accused and until the time she left the pink house. This court only had the opportunity to hear the evidence of the second witness for the 1<sup>st</sup> accused as an individual who had seen the complainant while she was with the 1<sup>st</sup> accused on that day. It was apparent that this defence witness was an uninterested party in this case. Her evidence was that the girl who came with the 1<sup>st</sup> accused to her shop on 25/10/15 did not appear frightened or scared and that girl and the accused were laughing and joking around. The prosecution did not take up the position that this girl the witness referred to was not the complainant. I'm mindful that the evidence of the 1<sup>st</sup> accused was that he went to the shop with the complainant twice and that from the evidence of the aforementioned witness it was not clear which occasion she was referring to. However, an accused does not have the burden of proving his case beyond reasonable doubt. In my view, the aforementioned evidence of the second witness for the 1<sup>st</sup> accused is capable of creating a doubt on the complainant's version when considered with the improbabilities and the inconsistencies. Nevertheless, this evidence supports the version of the three accused persons that the complainant stayed with the 1<sup>st</sup> accused on her free will.
  
13. All in all, I am inclined to hold the view that the complainant's evidence on each count is not credible and reliable. The account she gave of what took place on 25/10/15 is doubtful considering all the evidence led in this case. Therefore, I find that the prosecution had failed to prove the charges against the three accused persons beyond reasonable doubt.
  
14. The 1<sup>st</sup> accused admitted penetration in the three rape counts but he denied touching her breast. It is pertinent to note that the three assessors have opined that the first accused is guilty of the three rape charges but he is not guilty of the offence of sexual assault. According to the complainant the 1<sup>st</sup> accused touched her breasts before he penetrated her vagina on the first occasion. The assessors have not believed the complainant's evidence that the 1<sup>st</sup> accused touched her

breasts without her consent, but have believed her evidence that the 1<sup>st</sup> accused penetrated her vagina without her consent. Given the circumstances and the nature of evidence in this case it is not open to come to such a conclusion. The conduct of the first accused though morally unacceptable, does not satisfy the disputed elements of the offences he is charged with.

15. For the reasons given above, I cannot agree with the unanimous opinion of the assessors in respect of the first three counts. I agree with the unanimous opinion of the assessors in respect of the fourth, sixth and the seventh counts.
16. In the circumstances, I find that;
- a) the first accused is not guilty of the first, second, third and fourth counts;
  - b) the second accused is not guilty of the sixth count; and
  - c) the third accused is not guilty of the seventh count.
17. The three accused persons are acquitted accordingly.



  
Vinsent S. Perera  
JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitors for the 1<sup>st</sup> Accused : Legal Aid Commission, Suva.  
Solicitors for the 2<sup>nd</sup> & 3<sup>rd</sup> Accused: Legal Aid Commission, Suva.