

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 383 OF 2016S

STATE

vs

1. WAME BALEIMAKOGAI
2. NAPOLIONI LEILOMA
3. LUKE SOROVAKATINI
4. SANJAY LAL

Counsels : Mr. T. Tuenuku for State
Ms. L. Manulevu and Mr. K. Prasad for Accused No. 1
Ms. L. David for Accused No. 2
Ms. L. Ratidara for Accused No. 3
Mr. J. Reddy for Accused No. 4

Hearings : 25, 26, 27 and 28 June, 2, 4, 5, 6, 9, 10, 11 and 12 July, 2018
Summing Up : 13 July, 2018
Judgment : 16 July, 2018

JUDGMENT

1. On 27 June 2018, the following information, as amended later, was put to all accuseds, in the presence of their counsels:

COUNT ONE

Statement of Offence

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

Particulars of Offence

WAME BALEIMAKOGAI, NAPOLIONI LEILOMA and LUKE SOROVAKATINI between the 9th day of October, 2016 and the 10th day of October, 2016, at Waimaro, Tailevu in the Eastern Division, had carnal knowledge of **R.N.H.** without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

NAPOLIONI LEILOMA between the 9th day of October, 2016 and 10th day of October, 2016 at Waimaro, Tailevu in the Eastern Division, penetrated the mouth of **R.N.H.** with his penis without her consent.

COUNT THREE

Statement of Offence

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

Particulars of Offence

NAPOLIONI LEILOMA between the 9th day of October, 2016 and the 10th day of October, 2016 at Waimaro, Tailevu in the Eastern Division, penetrated the mouth of **O.R.** with his penis without her consent.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

WAME BALEIMAKOGAI, NAPOLIONI LEILOMA and SANJAY LAL between the 9th day of October, 2016 and the 10th day of October, 2016 at Waimaro, Tailevu in the Eastern Division, had carnal knowledge of **O. R.** without her consent.

COUNT FIVE

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to Section 209 of the Crimes Act, 2009.

Particulars of Offence

SANJAY LAL between the 9th day of October, 2016 and the 10th day of October, 2016 at Waimaro, Tailevu in the Eastern Division, assaulted **O. R.** by punching her mouth with intent to commit rape.

2. The case was then heard for 10 days before myself and three assessors. On 13 July 2018, I delivered my summing up to the assessors. On the same day, after deliberating for

approximately 1 hour, the assessors returned with a unanimous not guilty opinion on all the accuseds on all counts.

3. The law at this stage of the trial is section 237 (1), (2), (4) and (5) of the Criminal Procedure Act 2009, which reads as follows:

- "...237 (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
- (2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...*
- (4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –*
- (a) written down; and*
- (b) pronounced in open court.*
- (5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for... all purposes..."*

4. In Ram Dulare, Chandar Bhan and Permal Naidu vs Reginam [1956 – 57], Fiji Law Report, Volume 5, pages 1 to 6, page 3, the Fiji Court of Appeal, said the following, on an equivalent section of the then Criminal Procedure Code:

"...In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the King v. Joseph 1948, Appeal Case 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessors is that of the trial Judge and the trial judge alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors..."

5. In Sakiusa Rokonabete v The State, Criminal Appeal No. AAU 0048 of 2005, the Fiji Court of Appeal said as follows:

"...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts..."

6. I have reviewed the evidence called in the trial, and I have directed myself in accordance with the Summing Up I gave the assessors on 13 July 2018. The assessors' verdict was not perverse. It was open to them to reach such conclusion on the evidence. However, I am not bound by their opinion. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witnesses, I am bound to disagree with the unanimous guilty opinion of the three assessors.
7. My reasons are as follows.
8. The State's case against all the accuseds was based fundamentally on the verbal evidence of the two female complainants, that is, complainant no. 1 (PW1) and complainant no. 2 (PW2). PW1 gave evidence in the courtroom for approximately 4 days, and was vigorously cross-examined by defence counsels, on her allegations against Accused No. 1, 2 and 3 on counts no. 1 and 2. Likewise, PW2 gave evidence in the courtroom for approximately 4 days, and was also vigorously cross-examined by defence counsels, on her allegations against Accused no. 1, 2 and 4 on count no. 3, 4 and 5. During the trial, I have carefully listened to their evidence, carefully analysed them and generally observed their demeanour. In addition to the above, I had observed how they answered defence counsel's cross-examining questions, in an attempt to determine their credibility.
9. I am well aware that in a rape case, the complainant's verbal evidence does not need to be corroborated by independent evidence, coming from independent sources (see section 129 of the Criminal Procedure Act 2009). So, in a sense, medical evidence is not really essential to provide corroborative evidence, to support a complainant's allegation.
10. I accept that the two complainants got into the car the four accuseds were travelling in on 9 October 2016 after 9 pm. I accept that they willingly travelled with the four accuseds from Nausori Town, through Waidalice, Korovou Town and the secluded spot at Waimaro, Tailevu after 9 pm on 9 October 2016. I accept that when they reached the secluded spot in Waimaro, Tailevu, it was early morning on 10 October 2016. I accept that the four accuseds and the two

complainants were drinking in the car, yarning and listening to the car music. In my view, there was nothing wrong with young people enjoying each other's company at such time, but for drunk driving.

11. I accept that the secluded spot at Waimaro, Tailevu, at the material time, quickly became the crime scene. In their sworn evidence, Accused No. 2 and 4, accepted they were at the crime scene, at the material time. Accused no. 1 and 3 choose to remain silent. However, I accept PW1 and PW2's identification evidence that Accused no. 1 and 3, were at the crime scene, at the material time. I direct myself in accordance, with the three limbs mentioned in R v Turnbull [1977] Q.B. 224, as recorded in Archbold Criminal Pleadings Evidence and Practice, Sweet and Maxwell, 2012 edition, pages 1533 to 1534. I accept that both PW1 and PW2 had accused no. 1 and 3 under observation for more than 45 minutes from Nausori to Korovou and at the crime scene. During that time, both PW1 and PW2 were at arm's length with accused no. 1 and 3 in the car, and when having sex, at the crime scene. I accept that the lights from street lights in Nausori Town, along Nausori to Korovou, the lights in the car when the doors were open and the moonlight at the crime scene, all combined to expose accused no. 1 and 3's faces to PW1 and PW2. I accept this may be the first time PW1 and PW2 met accused no. 1 and 3 and a special reason for not forgetting their faces, was because of what they did to them that night.
12. I accept PW1 and PW2's evidence that when they arrived at the crime scene, all the accuseds got off the car and surrounded the two girls in the back seat. I accept PW1's and PW2's evidence that accused no. 2 then forcefully dragged PW2 out of the car. I accept accused no. 4's evidence that PW2 was shouting at the top of her voice, and as a result, accused no. 4 punched her mouth. I accept both PW1 and PW2's evidence that accused no. 4 punched PW2 in the mouth. I accept that this action was designed to intimidate PW2 and also to frighten her.
13. I accept PW1 and PW2's evidence that accused no. 1, 2, 3 and 4 had sexual intercourse with the two complainants, as alleged in count no. 1 and 4, without the two complainants' consent, and they knew PW1 and PW2 were not consenting to sex, at the time. I find accused no. 1, 2, 3 and 4 forced themselves on both complainants, at the material time, and couldn't care less whether or not they were consenting. I accept that Accused no. 2 raped PW1 approximately 3 times on the same night. I find that none of the accuseds asked the complainants for their consent to sex, at the material time, before they inserted their penis into their vagina.

14. As for accused no. 2, I accept PW1 and PW2's evidence that he inserted his penis into their mouths without their counsel, and he knew they were not consenting, at the material time.
15. On the whole, as to their allegations against all accuseds, I find PW1 and PW2's evidence as credible and I accept them. I reject accused no. 2's evidence that his sexual acts were consensual. To me, he was not a credible witness. I also reject PW4's denials.
16. Given the above, I reject the unanimous guilty opinions of the assessors. I find all accuseds guilty as charged on all the counts that relates to them, and I convict them accordingly.



Salesi Temo
JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Suva**
Solicitor for Accused No. 1 : **Legal Aid Commission, Suva**
Solicitor for Accused No. 2 : **Legal Aid Commission, Suva**
Solicitor for Accused No. 3 : **Legal Aid Commission, Suva**
Solicitor for Accused No. 4 : **J. Reddy, Barrister and Solicitor, Suva.**