

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

**Criminal Case No.: HAC 48 of 2015**

**STATE**

**V**

**SERUPEPELI DAWAI**

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

**Dates of Hearing** : 10, 11 April, 2019  
**Closing Speeches** : 16 April, 2019  
**Date of Summing Up** : 16 April, 2019  
**Date of Judgment** : 16 April, 2019

---

**JUDGMENT**

---

1. The Director of Public Prosecutions charged the accused by filing the following information:

*Statement of Offence*

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

*Particulars of Offence*

**SERUPEPELI DAWAI**, on the 26<sup>th</sup> day of February, 2015 at Nadi, in the Western Division, penetrated the vagina of **LICE TINANIVALU** with his penis, without the consent of the said **LICE TINANIVALU**.

2. The three assessors had returned with a split opinion by a majority of two is to one that the accused was guilty of the offence of rape.
3. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called two witnesses. The accused did not give evidence but called one witness for the defence.
5. The complainant informed the court in the evening of 25<sup>th</sup> February, 2015 she went with her cousin sister Miriama to Nawaka. On the way to Nawaka Miriama purchased 6 cans of Rum and Cola.
6. At Nawaka the complainant drank grog with Miriama's aunt, after the grog finished she started drinking Rum and Cola with Miriama. At 9.30pm Miriama and the complainant went to Deep Sea Night Club.
7. At Deep Sea Night Club Miriama purchased 5 bottles of Fiji Bitter. Later they were joined by her cousin brother Waqa after the drinks finished it was 1 am the next day, at this time Waqa left. Miriama then went to drink at the other table with her boyfriend the accused.
8. At this time the night club was closing so the complainant, Miriama, the accused and his three friends went to another liquor shop. Here the accused purchased 6 bottles of beer they all started drinking except the complainant.

9. From here all went to After Dark Night Club, they drank more beer until 5 am. While going home in a carrier Miriama informed the complainant that she wanted to accompany the accused to Dratabu. The complainant did not want to go but Miriama insisted that the complainant go with her. By this time it was Miriama, the accused, his friend Petero Yalimaiwai and the complainant.
10. All went to a house at Dratabu. It was dark inside, no lights were on. The house belonged to the accused. She further informed the court that they had reached the vacant house at around 5 am that morning. Miriama and the accused slept on the mattress which was on the floor while the complainant and Petero were talking on the wooden bed, after a while he left.
11. On the bed was a pillow the complainant laid down on the bed with her face resting on her both hands on the pillow. Miriama and the accused were sleeping on the mattress about 2 metres away from her.
12. The complainant was not sleeping but had closed her eyes. After a while she felt someone coming near her, this person came and used a white bed sheet to block her mouth and covered her eyes then turned her over and wrapped her hands with the same bed sheet. This person then started removing her pants and panty. The complainant was struggling to push him away but she couldn't, at this time he punched her thighs.
13. The complainant could not see anything she was crying calling Miriama, she was trying to push this person away by trying to free her hands but by this time he had pulled her panty and pants to her knees. At this time this person was trying to spread her legs but could not. After a while he inserted his penis into her vagina. The complainant was unable to move around and her thighs were very painful.

14. The complainant was crying this person had sexual intercourse with her which lasted for about 15 minutes. She was also having her menstruation she was lying down and could not do anything since her mouth was blocked and her eyes were covered. The complainant kept on trying to free herself until Miriama started calling her boyfriend the accused. The complainant was trying to breathe because the cloth around her face was tight when Miriama called out this person stopped.
15. The complainant smelt liquor on this person by this time the cloth around her face had gone loose. As soon as Miriama came and lifted the white bed sheet that was covering both of them this person stood up, she saw the accused Miriama's boyfriend Seru was wearing his pants and she knew he was the one who had sexual intercourse with her. Miriama then pulled the complainant who stood up and was crying. The complainant wore her panty and her pants at this time she saw blood stains on her pants and the bed as well.
16. The complainant left the house with Miriama they went to Nawaka since she wanted to change her blood stained clothes. After changing her clothes the complainant reported the matter to the police. The complainant also said when she entered the house it was dark, however, there is a corner of the house that was not in good condition through which light came inside so people can be seen clearly and it was day break at around 6 am.
17. The final prosecution witness Miriama Nayavusoata on 25<sup>th</sup> February, 2015 was with her boyfriend the accused, Lice, Petero and another man. They have been drinking and clubbing. It was in the early hours of the morning on the 26<sup>th</sup> that the witness and the group went from After Dark Night Club to Dratabu. At Dratabu the other man left them.

18. All went into the vacant house belonging to the accused. Petero and Lice sat on the bed while the witness and the accused went to sleep on the floor. She was sleeping with the accused behind the bed.
19. The witness woke up at about 6 am because someone pulled her hand, when she opened her eyes she saw her bag was open and her phone was missing. At this time she saw Petero standing she asked him about her phone. He denied taking her phone. At this time the phone alarm started ringing she had set the alarm for 6 am and it was coming from Petero. Petero threw the phone at her and ran outside.
20. After Petero left the witness started looking for the accused. As she turned around she saw the accused lying next to Lice, she heard Lice calling her name. The witness moved closer to the bed and saw the complainant and the accused having sexual intercourse.
21. The witness called the accused but he was not responding so she lifted the bed sheet, she saw Lice's eyes and mouth were covered with a bed sheet and her hands were tied. The accused then rolled over and started wearing his shorts. At this time Lice was crying she pulled the accused away from Lice who stood up crying and wore her clothes. The witness heard the accused was asking for forgiveness from Lice.
22. Since it was daylight, both left the house and went to Nawaka. Lice had her shower and changed her clothes since it was blood stained. Thereafter the complainant reported the matter to the Police.
23. The defence witness Petero Yalimaiwai informed the court that on the night of 25<sup>th</sup> February, 2015 he was drinking with the complainant, the accused, Miriama and one Sailosi at Deep Sea Night Club, afterwards they went to a liquor shop to drink more and then finally ended up at After Dark Night

Club. They left After Dark Night Club at about 4am in the morning of 26<sup>th</sup> February.

24. From the night club they all went to Dratabu Village to a vacant old house. There was no electricity in that house so when they went inside it was dark. In the house was a wooden bed. The witness and the complainant went straight to the bed while Miriama and the accused went to sleep on the floor.
25. The witness asked the complainant if he could have sex with her the complainant refused thereafter both slept on the bed. The witness woke up at 7 am he then woke the accused and told him that he was going home and then he left for home.
26. After carefully considering the evidence adduced by the prosecution and the defence I accept the evidence of both the prosecution witnesses as credible and reliable. The complainant was able to recall and coherently narrate what had happened to her during the early hours of the morning on 26<sup>th</sup> February, 2015.
27. I accept the complainant told the truth in court and her demeanour was consistent with her honesty. The complainant was also able to withstand cross examination as well. This court accepts that a bed sheet was used by the accused to cover the mouth and the eyes of the complainant and also to wrap the same around her hands.
28. When Miriama started calling the accused he stopped having sexual intercourse with the complainant and tried to hide. The incident happened around 6 am in the morning at day break. This court also accepts the complainant and Miriama had clearly seen it was the accused who had forceful sexual intercourse with the complainant.



29. Both prosecution witnesses knew the accused and had spent time together hence they were able to recognize the accused clearly. I accept that there was enough light in the house to aid such recognition. The accused did not dispute that he had asked for forgiveness from the complainant when he was seen by Miriama. In view of the above Turnbull directions were not necessary in this case.
30. I also accept the undisputed evidence of Miriama that the alarm on Miriama's phone had started ringing at 6 am.
31. Miriama was also a truthful witness she was also in a position to see the accused because she went near the bed where the complainant and the accused were. Miriama saw the complainant's eyes, mouth and hands tied and/or wrapped by the bed sheet.
32. Miriama who was the girlfriend of the accused told the court that she saw the accused sleeping with the complainant who was crying and calling her. After lifting the bed sheet Miriama saw the accused having sexual intercourse with the complainant and then rolling over the complainant and wearing his shorts.
33. Miriama was also not shaken in cross examination. In cross examination both the prosecution witnesses were referred to some inconsistencies between what they told the court with their police statements. The inconsistencies were not significant to affect the reliability of their evidence.
34. On the other hand Petero Yalimaiwai did not tell the truth in court. This court does not accept that he slept with the complainant that morning or left the house at 7am. In any event the phone alarm of Miriama was scheduled for 6 am which was not disputed by the defence.

35. At the time the alarm had started ringing the accused was already on the bed with the complainant. After Petero had left, Miriama started looking for the accused she turned around she could not find him near her but saw him on the bed with the complainant having sex.
36. Petero was a friend of the accused his demeanour in court was not consistent with his honesty he was not serious in court he was observed to be smiling, giggling and was too casual in narrating his evidence in fact he never appeared to be serious in whatever he was saying in court. He was also not forthright in cross examination and it appeared to me that he was parroting whatever he had memorized. He was very anxious to finish his evidence and appeared to be rushing. This court rejects the evidence of Petero that he slept on the bed with the complainant and that he left the house at 7 am in the morning. This court accepts that it was the accused who had forceful sexual intercourse with the complainant without her consent as alleged.
37. The defence has not been able to create any reasonable doubt in the prosecution case. This court rejects the defence of denial as implausible and untenable considering the totality of the evidence.
38. I am satisfied beyond reasonable doubt that the accused on 26<sup>th</sup> February, 2015 had penetrated the vagina of the complainant with his penis without her consent.
39. I also accept that the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
40. I agree with the majority opinion of the assessors that the accused is guilty of one count of rape as charged.



41. In view of the above, I find the accused guilty of one count of rape as charged and I convict him accordingly.

42. This is the judgment of the court.

  
**Sunil Sharma**  
**Judge**  


**At Lautoka**

16 April, 2019

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**