

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[CRIMINAL JURISDICTION]**  
**CRIMINAL CASE NO. HAC 062 OF 2016**

**BETWEEN** : **STATE**

**AND** : **NACAGILEVU NAULUMATUA**

**Counsel** : **Mr. Chand R. & Mr. Sing A. for the State**  
**Ms. Vulimainadave for the Accused**

**Hearing on** : **17<sup>th</sup> of March 2020 – 19<sup>th</sup> of March 2020**

**Summing up on** : **18<sup>th</sup> of June 2020**

**Judgment on** : **01<sup>st</sup> of July 2020**

**JUDGMENT**

1. The accused, Nacagilevu Naulumatua is charged with 8 counts of Rape, and 2 counts of Indecent Assault alleged as detailed below to have committed on Raijieli Nabuka who is related to him as a step-daughter.
2. The details of the offences that he was charged by the Director of Public Prosecutions are as follows;

**COUNT 1**  
**(Representative Count)**  
***Statement of Offence***

INDECENT ASSAULT: Contrary to 154 (1) of the Penal Code Cap 17.

***Particulars of Offence***

Nacagilevu Naulumatua, between the 01<sup>st</sup> day of January, 2005 and the 31<sup>st</sup> day of January, 2010 at Lautoka in the western division, unlawfully and indecently assaulted Raijieli Nabuka, on more than one occasion.

**COUNT 2**  
**(Representative Count)**  
***Statement of Offence***

INDECENT ASSAULT: Contrary to 212(1) of the Crimes decree No. 44 of 2009.

***Particulars of Offence***

Nacagilevu Naulumatua, between the 01<sup>st</sup> day of February, 2010 and the 31<sup>st</sup> day of December, 2011 at Lautoka in the western division, unlawfully and indecently assaulted Raijieli Nabuka, on more than one occasion.

**COUNT 3**  
**(Representative Count)**  
***Statement of Offence***

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

***Particulars of Offence***

Nacagilevu Naulumatua, between the 01<sup>st</sup> day of January, 2012 and the 31<sup>st</sup> day of December, 2012 at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

**COUNT 4**  
**(Representative Count)**  
***Statement of Offence***

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

***Particulars of Offence***

Nacagilevu Naulumatua, between the 01<sup>st</sup> day of January, 2014 and the 31<sup>st</sup> day of January, 2014 at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

**COUNT 5**  
**(Representative Count)**  
***Statement of Offence***

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

***Particulars of Offence***

Nacagilevu Naulumatua, between the 01<sup>st</sup> day of February, 2014 and the 31<sup>st</sup> day of December, 2014 at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

**COUNT 6**  
**(Representative Count)**  
***Statement of Offence***

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

***Particulars of Offence***

Nacagilevu Naulumatua, between the 01<sup>st</sup> day of January, 2015 and the 31<sup>st</sup> day of January, 2015, at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

**COUNT 7**  
**(Representative Count)**  
***Statement of Offence***

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

***Particulars of Offence***

Nacagilevu Naulumatua, between the 01<sup>st</sup> day of February, 2015 and the 31<sup>st</sup> day of October, 2015, at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

**COUNT 8**  
**(Representative Count)**  
***Statement of Offence***

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

***Particulars of Offence***

Nacagilevu Naulumatua, between the 01<sup>st</sup> day of November, 2015 and the 30<sup>th</sup> day of November, 2015, at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

**COUNT 9**  
**(Representative Count)**  
***Statement of Offence***

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

***Particulars of Offence***

Nacagilevu Naulumatua, between the 01<sup>st</sup> day of January, 2016 and the 31<sup>st</sup> day of January, 2016, at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

**COUNT 10**  
***Statement of Offence***

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

***Particulars of Offence***

Nacagilevu Naulumatua, on the 21<sup>st</sup> day of February, 2016 at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka.

3. The accused pleaded not guilty to the charges and the ensuing trial lasted for 3 days. The complainant Raijieli Nabuka and Ms. Seini Nuku gave evidence for the prosecution while the accused remained silent without giving evidence, exercising his constitutional right.

4. At the conclusion of the evidence and after the directions given in the summing up, the three assessors unanimously found the accused guilty to the alleged two counts of Indecent Assault and 8 counts of Rape.
5. I direct myself in accordance with the law and the evidence led in this case, inclusive of which I have discussed in my summing up to the assessors.
6. The sole witness to substantiate on the alleged incidents is the PW1, Raijieli Nabuka. I am mindful that the law requires no corroboration. Therefore it can be acted on the evidence of a sole witness. However, if we are to rely on a sole witnesses' evidence we must be extremely cautious of the credibility and the dependability of such evidence.
7. PW2, Seini Nuku is a close relative of the accused. Thereby she is an aunt of Raijieli Nabuka. She has asked the mother of Raijieli Nabuka to accompany her to the police station to lodge the complaint. She is not an eye witness to any of the alleged incidents.

### **Analysis**

8. Raijieli Nabuka's mother left with another man in September 2015, leaving her with the accused. It is evident that Raijieli Nabuka was given a choice to go with the at that time mother. She has decided to stay with the accused. The explanation provided by Raijieli Nabuka was that she wanted to stay with Aunt Seini. That explanation has a few issues. There is nothing before me to indicate that she knew she will be left with aunty Seini then. Furthermore, Raijieli Nabuka says that she wanted to be treated the way Aunty Seini treats her children. There is a hardly anything to indicate that she knew how aunty Seini treated her children by then. Therefore, her explanation would be improbable. If she has been abused since 2005, and raped since 2012, would she elect to stay with the accused, when she had the opportunity of getting away from him?
9. It is to be noted that all the rape allegations are from 2012 onwards and Raijieli Nabuka was born in 1999. Therefore the consent of Raijieli Nabuka is an essential ingredient of the alleged offence of rape. Though Raijieli Nabuka states that she did not consent, it is apparent that she has taken it as a part of her life. I am mindful that the consent should be freely and voluntarily given. It is the duty of the prosecution to establish beyond a reasonable doubt that she gave the consent under such circumstances. There is nothing to indicate that the accused obtained her consent by force of deception. If she has given the consent on the wrong belief that it's a part of her life, in absence of any material to conclude that the accused was aware of such, would the accused be liable for rape is an arguable point. But the stance of the prosecution is that the accused did the alleged acts without the consent of the accused.

10. In law, the prosecution has to prove the absence of consent and the accused is not required to prove the presence of consent. If the PW1 was unaware of being abused, it is impossible for her to have resisted to such. Therefore the evidence of the PW1, that she resisted the accused is to be disbelieved and discredited. Her evidence is not divisible or separable as the truth and the lie. Then the question would be the reliability of her evidence. As she was the sole witness as to the all these allegations, I feel it is too dangerous to rely on her evidence.
11. I disdain the act of the accused as immoral for him to have sexual intercourse with his step-daughter at any time. However it is not an offence punishable by law if his version is accepted that he has had sex with her after she was 16 years of age.
12. I am also mindful that the accused bears no burden to prove his innocence. Therefore even if he has lied or given incorrect instructions, it should not be considered against him. His conduct would not strengthen the prosecution case. The burden of proof should always be with the prosecution.
13. In my view, it would be unsafe for the court to rely on the evidence of the PW1. Therefore, I am compelled to disagree with the unanimous opinion of the assessors.
14. In the result, I find the accused not guilty of all the counts.
15. I acquit the accused Nacagilevu Naulumatua of all 10 counts.
16. This is the Judgment of the Court.



**Chamath S. Morais**  
**JUDGE**

***Solicitor for the Prosecution : Office of the Director of Public Prosecution, Lautoka***  
***Solicitor for the Accused : Office of the Legal Aid Commission, Lautoka***