

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 56 OF 2014

BETWEEN : **STATE**

AND : **1. EPELI NARARA**
2. LIVAI SAUKURU
3. MAIKA TUIDRAVU
4. PAULIASI DEGEI
5. SAIRUSI TAMANISOLEVU
6. SULIASI BALEITAVEA

Counsel : *Ms. S. Naibe with Ms. R. Uce for the State*
1st Accused appears in Person
Mr. W. Rosa for the 2nd to 6th Accused

Hearing on : *04th of June 2020 – 09th of June 2020*
Summing up on : *12th of June 2020*

SUMMING UP

Ladies and gentleman assessors;

1. It is now my duty to sum up the case to you. Your opinion is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case.

You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused are guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the assessors of facts.

2. As the representatives of the society, your duty here is sacred. Your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused have committed the alleged offence, then it is your duty to find them guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused have committed the alleged offence, you should not find them guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to you in my opening address, your opinion should be based only on them. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel during the examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the available evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe none, a part or all of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him/her or reveal a safely

guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.

8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provide for the inconsistency and consider him/her to be reliable as a witness.

11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only a few guidelines. It is up to you, how you assess the evidence and what weight you give to a witnesses' testimony.
12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there more than one reasonable inference to draw, against the accused, as well in their favor, based on the same set of proved facts, then you should draw the inference, which is most favorable to the accused.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond a reasonable doubt, in order for you to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.

15. You are not required to decide on every point the Counsels in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charges are proved against the accused.
16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not a must.
17. Let us look at the Information. The Director of Public Prosecutions has charged the accused of 6 counts of rape.

COUNT 1

Statement of Offence

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

Particulars of Offence

Epeli Narara, on the 21st day of April 2014, at Naboutolu Village, Rakiraki, in the Western Division, had carnal knowledge of Laisa Naileqe, without the said Laisa Naileqe's consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

Livai Saukuru, on the 21st day of April 2014, at Naboutolu Village, Rakiraki, in the Western Division, had carnal knowledge of Laisa Naileqe, without the said Laisa Naileqe's consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

Maika Tuidravu, on the 21st day of April 2014, at Naboutolu Village, Rakiraki, in the Western Division, had carnal knowledge of Laisa Naileqe, without the said Laisa Naileqe's consent.

COUNT 4

Statement of Offence

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

Particulars of Offence

Pauliasi Degei, on the 21st day of April 2014, at Naboutolu Village, Rakiraki, in the Western Division, had carnal knowledge of Laisa Naileqe, without the said Laisa Naileqe's consent.

COUNT 5

Statement of Offence

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

Particulars of Offence

Sairusi Tamanasolevu, on the 21st day of April 2014, at Naboutolu Village, Rakiraki, in the Western Division, had carnal knowledge of Laisa Naileqe, without the said Laisa Naileqe's consent.

COUNT 6

Statement of Offence

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

Particulars of Offence

Suliasi Baleitavea, on the 21st day of April 2014, at Naboutolu Village, Rakiraki, in the Western Division, had carnal knowledge of Laisa Naileqe, without the said Laisa Naileqe's consent.

18. Now I will deal with the essential elements of the offence of Rape.

Section 207(1) of the Crimes Act reads as;

207. —(1) Any person who rapes another person commits an indictable offence.

Section 207 (2) (a) of the Crimes Act reads as;

(2) A person rapes another person if —

(a) The person has carnal knowledge with or of the other person without the other person's consent;

19. Accordingly, in this case, to prove the offence of Rape as for the alleged count the prosecution must prove the following elements beyond a reasonable doubt.

(i) The accused;

(ii) Penetrated the vagina of Laisa Naileqe with his penis

(iii) Without the consent of Laisa Naileqe; and

(iv) Either the accused;

knew or believed that Laisa Naileqe was not consenting; or
was reckless as to whether or not she was consenting.

20. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence. This element is contested only by the 1st accused in this case.

21. In the second element 'carnal knowledge' means having sexual intercourse or in this case, the penetration of Laisa Naileqe's vagina; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the

accused penetrated the vagina of Laisa Naileqe with his penis, to any extent. This element too is contested only by the 1st accused in this case.

22. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent. This is the vital element contested by all the accused in this case.
23. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact, that there was no physical resistance alone, shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
 - i) by force; or
 - ii) by threat or intimidation; or
 - iii) by fear of bodily harm; or
 - iv) by exercise of authority.
24. In addition to proving that the complainant did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
25. It is not difficult to understand what is meant by the words "the accused knew or believed". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you

have to see whether the accused did not care whether the complainant was consenting or not.

26. Please remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
27. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the count of Rape.

Summary of Evidence

28. The PW1, Laisa Naileqe is the main witness for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. Her evidence is that;
 - i) Presently, she is 22 years old, married and resides at Nakorowaqa, Rakiraki with her husband and in-laws.
 - ii) She was born on 16th of January 1998, and in 2014, she was 16 years old and was in form 3 at Nakauvadra High School.
 - iii) Then she was residing with her mother and the siblings at Nokonoko Settlement. She has 3 sisters and a brother.
 - iv) On the 21st of April 2014, at around 6.00pm, she was asked by her mother to take some pandamus leaves to her aunty at the Naboutolu Village.
 - v) Naboutolu Village is about 15 minutes' walk from her home and the bus would take about 5 minutes to get there. She has boarded the bus and went to Naboutolu Village with the pandamus leaves. She has got off the

bus at the main road and walked to the village. She has given the pandanus leaves to her aunty Ula and come to her grandmother's house. There she has had tea. It was about 7.00pm and then she has gone to her grandfather, Timoci's house. Having been there for about 5 minutes, she has left to come home. On her way back home at the village ground, Ranadi and Bale have called her. They told her to wait there until they go back and come. Ranadi and Bale are her grandmother's children.

- vi) She has waiting there alone at the ground for about 5 minutes and then turned to go back home. Then she has met Maika. Maika has taken her by the T-shirt and pulled her. She has tried to free her-self and told him to release her and let her go. They have come beside the church, where Maika's friends were. Then from there, Maika has pulled her by her t-shirt across the creek and to the shed beside the sugar cane field.
- vii) As for the witness the distance from the church to the shed was about 6-8 meters. When they came to the shed Maika put her on the ground and she wanted to escape but Maika's friends got hold of her from her feet and the hands. Then Maika has removed her clothes and she has had sexual intercourse with them. Epeli has had sexual intercourse with her first. He has come on top of her and inserted his penis into her vagina and had sex for about 15 minutes. She has tried to free herself but couldn't as Degei was holding her legs, Sairusi was holding her hands and though tried she could not shout as Livai was covering her mouth. Having sex with Epeli has been painful and the pain has come from her vagina.
- viii) Having had sexual intercourse with her, Epeli has stood up and then Sairusi has come on top of her. Sairusi has inserted his penis into her vagina and had sex for about 15 minutes. Bale has held her hands, Degei holding her legs and Livai was covering her mouth when Sairusi was having sexual intercourse with her. She has felt pain in her vagina when having sex with Sairusi. When Sairusi stood up Degei has come on top of her and inserted his penis into her vagina. He also has had sex for with her for about 15

minutes and Sairusi has held her by the legs Bale has held her by the hands and Livai was covering her mouth at that time. She has felt pain in her vagina. Then Degei has stood up and come to cover her mouth and Livai has come on top of her. At that time Bale was holding her hands and Sairusi has held her by the legs. Livai too has inserted his penis into her vagina and had sexual intercourse with her for about 15 minutes. She has felt pain in the vagina when having sex with Livai.

- ix) When Livai stood up, Maika has come on top of her. He has inserted his penis into her vagina and had sex with her for about 15 minutes. At that time Epeli was covering her mouth. She has felt pain in her vagina when having sex with Maika. When Maika got up, Bale has come on top of her. He too has inserted his penis into her vagina and had sex with her for about 15 minutes. At that time Sairusi has held her by the legs, Maika was holding her from her hands and Epeli was blocking her mouth. Having sex with Bale too has been painful and she has felt the pain in her vagina. When bale got up from her, they have heard her grandfather coming there and the boys have run away leaving her there. She has felt weak. He came and picked her up and told her to go home. When her grandfather came, she was still lying down and had her underwear in her hands.
- x) Then she has walked home to Nokonoko Settlement with her grandfather, through the shortcut. When they were walking home, she states that boys came after and sought forgiveness from them. When asked of the names she names the all six accused. But later states that the 5th accused Sairusi, did not come to seek forgiveness from them. Having gone home, her grandfather informed her mother of what happened and she too informed her mother that the boys had sexual intercourse with her in the village.
- xi) Her mother then told her to have a shower and go to bed and she has done accordingly. When she got up in the following morning she came to know that the boys and some of the ladies from the village has come presenting *yaqona* and sought forgiveness. Her parents refused to accept

yaqona and she went with her mother to the police station and lodged a report. Having reported the matter, she was medically examined at the hospital.

- xii) The witness states further that it was around 8.00pm when the incident took place and it has been dark then. There were no lights in the shed. She did not see the boys' faces but recognized them from their voices.
- xiii) All the accused are related to her and well known to her. She identifies the 1st accused as Epeli, 2nd accused as Livai, 3rd accused as Maika, 4th accused as Degei, 5th accused as Sairusi and the 6th accused as Bale.
- xiv) After the incident she was at home for a week and went to school for a day thereafter. When she went to school that day, the children were talking of this incident and she did not go school thereafter as she was embarrassed. Later she did not go back to school as she started to work.

29. In answering the cross examination by the 1st accused, the witness states;

- i) She got in to the bus around 6.00pm and got down around 7.00pm at Naboutolu Village junction. The witness fails to explain the time take for her to travel the short distance. Further, when contradicted with her statement to the police she fails to answer. Furthermore she contradicts herself in evidence as to the fact whether she had the bus fare with her.
- ii) She states that she saw Epeli for the first time that day at the shed when Maika took her there. She further confirms that she did not see Epeli at the Lali house. Later she contradicts that she saw Epeli at the Lali house. Furthermore she states that she is not aware of the Epeli's job. Later admits that Epeli works for the agriculture.
- iii) The witness states that after speaking to Ranadi before the alleged incident she saw Ranadi only after the incident when she came with her grandfather. That is an inconsistency with her statement to the police.
- iv) The witness repeatedly confirms that Maika came alone to take her to the shed. When shown her statement to the police, she admits that she told

police that Maika came with Pauliasi. She concedes that what she told to the police soon after the incident while her memory was fresh, was incorrect. Further, she admits that though she has stated to the police, she could not recollect Pauliasi coming with Maika or pulling from her hand to take her to the shed.

- v) She states that there wasn't a light in the shed and the moon was not shining. When asked how does she know that Epeli was there, she states that Epeli always call her *Namarama* as he is her uncle. But goes on to state that Epeli did not call her *Namarama* that night and recognized him from his voice as he spoke with other boys. The witness gives an answer inconsistent with her statement to the police in relation to seeing Epeli before the incident.
- vi) She concedes that she recognized Epeli only from his voice, him speaking to other boys. Nevertheless, she fails to recollect what he was talking with the others.

30. In answering the cross-examination on behalf of the 2nd to 6th accused, the witness states that;

- i) Pauliasi came and pulled her when she was taken from the church to the shed. She contradicts her own evidence in this regard.
- ii) She admits that she has had no injuries on her body after the alleged incident. She fails to answer that how she didn't get any injuries on her if she was dragged across the stream all the way to the shed.
- iii) When asked whether she had been there before, in the afternoon, on the same day, at the Naboutolu Village, she does not deny it but states that she could not recollect it. Is it normal for a person who is alleged to have undergone so much trauma to forget whether she had been there in the same evening, before returning with the pandanus leaves? You should evaluate her evidence appropriately and give it the due credit.

- iv) Furthermore, she states that she went to school and having returned afterschool remained at home. It should be noted that 21st of April 2014 was the Easter Monday and it is a public holiday. Though she came to Naboutolu Village at around 7.00pm she has not considered going back until it was past 8.00pm. Having handed over the pandamus leaves to her aunty vilisi, she has gone to her grandmother's place. Having had tea there she has gone to her grandfather's place. Thereafter she has gone back to aunty Vilisi's house to just to have a chat. It is apparent that she deliberately waited there due to an undisclosed reason and that she is indeed a frequent visitor to Naboutolu Village, which she tries to cover up.
- v) The witness states that she cannot recollect whether the alleged incident happened on the way to aunty Vilisi's house or on the way home from the aunty Vilisi's house. Later she states that she returned to Vilisi's house and from there left to go home, at which point the alleged incident took place.
- vi) When she met Ranadi and Bale at the ground, she has not heard Bale saying anything to Ranadi. When her statement to the police is shown she contradicts herself and admits that Bale said certain things to Ranadi.
- vii) she states that she could not recollect seeing any of the boys before, smoking at the Lali house. However, when her statement is shown she admits that she saw them smoking at the Lali House and goes further to state that she saw them clearly because there was light.
- viii) Thogh she says that Maika came to her when she was alone in the ground, she cannot recollect the way he came in. She refuses to answer why she didn't go home then. Further the witness states that she did not meet either Ranadi or Bale for the rest of the night.
- ix) She states that there are no residential houses close to the church. Beyond the church is the main road and beyond that are the houses. She refuses to answer to the question whether she screamed or shouted when Maika dragged her. Though she denies going with the boys consensually, she refuses to give any reason for not screaming or shouting at the time.

- x) After the alleged incident though she was in pain she managed to walk up the hill and then down again and thereafter for another 20 minutes to reach home. Further, even though the medical report does not show any injury she states that she was in great pain.
 - xi) When asked again of the time Epeli has had sex with her she gives contradictory answers that Sairusi was holding her legs and Degei was holding her hands, at that time. Further, she contradicts her earlier position by admitting of seeing Ranadi by the shed before the alleged incident. The witness admits that she has not mentioned to the police of anyone holding her by her feet or anyone covering her mouth at the time of the alleged incident. She finally states that she is not certain of the accuracy of the events given by her in the evidence.
31. In answering the re-examination by the prosecuting counsel, the witness states that;
- i) She recognized Epeli to have had sex with her from his voice. Furthermore, after the incident Epeli came to her place seeking forgiveness.
 - ii) Answering a question by the court, witness states that she gave the names of the accused to the police because they came to her house seeking forgiveness.
 - iii) The witness refrains from answering or explaining of the reason as to not shouting at the time Maika dragged her.
32. The PW2 was Inspector Makitala Masira. Her evidence was that;
- i) She has a service of 14 years and presently based at the Western Division Police Headquarters in Lautoka.
 - ii) In the year 2014, she was working at Rakiraki police Station, attached to the CID Branch.
 - iii) She recollects receiving a report on the 22nd of April 2014 of an incident of a young girl named Laisa being raped by 6 boys in Naboutolu Village.

- iv) She has recorded the complaint herself. The complainant has been there with the mother. She has conversed with the complainant in I-Taukei language and having translated by herself, recorded it in the English Language.
- v) It has been difficult to get the information from her as the complainant was tired and looked shocked. It has taken more than an hour to record her statement. Having recorded the statement, she has taken the complainant to the crime scene. There she has prepared a rough sketch, which was marked and produced as PE1.
- vi) The witness states the main road is towards the bottom of the sketch beyond what is shown and the feeder road shown there to the south-west leads to it. There were houses around the feeder road. She is not aware of location of the house of the complainant's aunty, Rusila.
- vii) As for the information she was dragged past the Church, across the creek to the shed by the sugar cane field. She has not observed any signs of one being dragged on the ground. Further, she cannot recall seeing any injuries on the complainant. The distance to the closest house from where the complainant was standing in the ground is less than 7 meters. From the place she was said to be standing the church is about 7 meters away and the creek is further 10 meters away. From the creek to the shed the distance was about 10-15 meters. This is much inconsistent with the distances given by the PW1.
- viii) From Naboutolu Village, there is a short cut used by the farmers to go towards the Nokonoko settlement. She has not gone through it and is unaware of the time that will take to reach Nokonoko settlement through that.
- ix) In answering the cross-examination, on behalf of the 2nd to 6th accused, the witness states that she visited the scene of the alleged crime on the 22nd of April 2014 at around 2.00pm. The alleged incident has happened on the previous night. When she visited the scene the complainant

showed her the places. She did not observe any sign of a struggle or of a dragging on the floor. Though there was a mark on the floor of the shed it could have occurred even by the consensual sexual intercourse.

- x) The witness further states that the complainant spoke in I-Taukei and she translated it into English and took down. However, she admits that she is not officially qualified to translate. The witness admits that the complainant did not mention that anybody was holding her from her legs. Further, there is nothing mentioned of anyone covering her mouth. Furthermore, the witness confirms that the medical report issued for the complainant does not indicate that she has had any injuries on her.

33. With leading the evidence of PW1 and PW2 and marking and producing the document PE 1, the prosecution closed their case. Court being satisfied that on the face of it, the prosecution has adduced sufficient evidence covering the elements of the alleged offence, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving their due rights to the accused.

34. The 1st accused having understood his rights elected to not to give evidence but to call a witness on his behalf. His witnesses' name is Mosese and the evidence was that;

He resides at the Draunivau Village in Ra. His grandmother's house is at Naboutolu Village and one night, when he was there in the grandmother's house he watched TV with Livai Saukuru. Having watched TV they were sitting outside when Ranadi and Laisa came. They came and called Bale who was inside the house. Then Bale went with them. Thereafter he and Livai were standing outside when they met Epli. Three of them smoked cigarette together. Thereafter he saw Ranadi, Laisa and Tamalesi with some others going towards the church. At that time Livai and Epli went after them.

35. The learned counsel appearing for the 2nd to the 6th accused decided to call the 2nd accused, Livai to give evidence. His evidence was that;

- i) On the 21st of April 2014, he was at his home in the Naboutolu Village at around 8.00pm.
- ii) He was watching movies at his grandmother's house and has come outside to smoke. He has seen some gang going down the creek and has gone after them to see them.
- iii) When he went to the shed at the edge of the cane plantation, he has seen Laisa, Ranadi, Temelesi, Jonecani Loloma, Maika, Pauliasi, Sairusi and Suliasi Bale there. Pauliasi Degei and Laisa were having sexual intercourse then. At the time no one was holding Laisa and when Pauliasi stood up, he has had sexual intercourse with Laisa. While having sexual intercourse with him, Laisa has been talking with Ranadi and Temalesi. The rest of the boys were standing around.
- iv) Laisa did not object or refuse but allowed him to have sexual intercourse with her.
- v) In answering the cross examination by the 1st accused, the witness states that he went to the shed with Epeli, the 1st accused. Epeli did not have sex with Laisa then.

36. In answering the cross-examination by the prosecution, the witness states;

- i) That he had sexual intercourse with Laisa that night.
- ii) He was watching movies with some other boys including Suliasi Bale. He came outside and smoked with Mosese and Epeli.
- iii) The witness states that Epeli did not have sex with Laisa that night. However it is inconsistent with his statement to the police where he admits seeing Epeli having sex with Laisa.
- iv) Further he admits that he did not inform the police that Ranadi, Temalesi and Jonacani were there at the shed where the incident took place.

- v) The witness admits of not having spoken to Laisa prior to having sex with her. However, he states that Laisa knew he is there as when he came, the others called out his name. Laisa did not resist or refused to have sex with him.
- vi) The witness states that he went with others to seek forgiveness, not because he had sexual intercourse with her without her consent but because he has had sexual intercourse with her that night and the rumors were spreading in the village.

37. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.

38. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offences have been proven beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

39. The Accused has indicated his stance and it was that;

- a) The first accused did not have sexual intercourse with Laisa and
- b) The 2nd to 6th accused did have sexual intercourse with Laisa that night with her consent.

In other words all of them deny committing rape. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen

the prosecution case. The accused need not prove that they are innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.

40. With the submission of the accused's stance, one of the three situations given below would arise;
- (i) You may accept their stance and, if so, your opinion must be that the accused are 'not guilty'.
 - (ii) Without necessarily accepting his stance you may think, 'well what they say could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject their stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged count.
41. Any re-directions? - none -
42. Lady and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. You have the copies of the document tendered as exhibit "PE 1". When each of you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

43. Your opinion should be;

whether the each accused is guilty or not guilty of the alleged offence of Rape.



Chamath S. Morais

JUDGE

Solicitors for the State

:

Office of the Director of Public Prosecutions, Lautoka

Solicitors for the Accused

:

Legal Aid Commission, Lautoka.