

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 183 of 2020**

**STATE**

**V**

**VONIVATE VITUKUTUKU**

**Counsel** : Mr. Joeli Nasa for the State  
Ms. Benazir Muhammed with Ms. Manisha Devi for the Accused

**Dates of Trial** : 15-17 August 2023

**Closing Submissions** : 18 August 2023

**Judgment** : 31 October 2023

*The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "LH".*

### **JUDGMENT**

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused above named is charged with the following offence:

#### **FIRST COUNT**

##### ***Statement of Offence (a)***

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

##### ***Particulars of Offence (b)***

VONIVATE VITUKUTUKU, on the 22<sup>nd</sup> day of October 2020, at Sigatoka, in the Western Division, had carnal knowledge of LH, without her consent.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 3 days. Thereafter, the Learned Counsel for the State and Defence made their closing submissions.

### **The Burden of Proof and the Standard of Proof**

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

*(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*

*(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*

*(3) In this Decree (Act)—*

*"legal burden", in relation to a matter, means the burden of proving the existence of the matter.*

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

### **Legal Provisions and the Elements of the Offences**

- [5] As could be observed the accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.
- [6] Section 207(1) of the Crimes Act reads as follows:

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

- [7] Section 207(2) of the Crimes Act is reproduced below:

*(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; or*

*(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*

*(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*

- [8] Section 207 (2) (a) makes reference to carnal knowledge, which is an archaic legal euphemism (synonym) for sexual intercourse. In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile-vaginal sexual intercourse with that other person or having sexual intercourse whereby the man penetrates his penis into the vagina of the woman.
- [9] In terms of Section 206 (5) the term carnal knowledge is said to include sodomy or anal sexual intercourse as well.
- [10] Therefore, in order to prove the first count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
  - (ii) On the specified day (in this instance on the 22 October 2020);
  - (iii) At Sigatoka, in the Western Division;
  - (iv) Penetrated the vagina of the complainant LH, with his penis;
  - (v) Without the consent of the complainant; and
  - (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [11] To further elaborate upon these elements in respect of the said count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offence.
- [12] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [13] The fourth element involves the penetration of the complainant's vagina, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis, to any extent.

[14] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina with his penis, without her consent.

[15] It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the 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:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[16] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis; the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[17] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 15 years at the time of the alleged incident of Rape, and therefore, she had the mental capacity to give consent. [Her date of birth being 23 June 2005].

[18] It must also be noted that in terms of Section 129 of the Criminal Procedure Act, it is stated that no corroboration of the complainant's evidence is necessary to prove an offence of a sexual nature; Rape is obviously considered as an offence of a sexual nature. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

### **The Agreed Facts**

[19] Section 135 of the Criminal Procedure Act deals with "Admission of facts". The Section is reproduced below:

*135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.*

*(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—*

*(a) by the prosecutor; and*

*(b) by the judge or magistrate.*

*(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.*

[20] Accordingly, the prosecution and the defence have consented to treat the following facts as "Admitted Facts":

1. Vonivate Vitukutuku (hereinafter referred as the accused) is 28 years of age, farmer, residing at Navula Village, Navosa.
2. On the 22<sup>nd</sup> day of October 2020, the complainant, LH, met her aunt namely Miriama Livanalagi (hereinafter referred to as PW2) as she was inside the bus and making her way down to Sigatoka Town. [However, the prosecution called her as the 4<sup>th</sup> witness during the trial].
3. Whilst in Sigatoka Town, the accused came in a taxi with his friend and called out to PW 2 to board the said taxi.

4. The complainant and PW 2 boarded the said taxi and they made their way to Olosara Seaview Drive whereby they all got off and drank some alcohol.

[21] Since the prosecution and the defence have consented to treat the above facts as "Admitted Facts" without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

### **Case for the Prosecution**

[22] The prosecution, in support of their case, called the complainant (LH) and witnesses Miliana Natuiyaga, Mereula Batimala and Miriama Livanalagi.

### **[23] Evidence of the complainant LH**

- (i) *The complainant's evidence was recorded over a period of 2 days. Her evidence was recorded in a 'closed court' and a screen was placed so that the complainant could not see the accused.*
- (ii) *The complainant testified that she is currently 18 years old. She is currently residing at Nalebaleba Village, Sigatoka, with her father, mother, big brother and small sister.*
- (iii) *The complainant testified that her date of birth is 23 June 2005.*
- (iv) *The complainant testified to the events which took place on 22 October 2020. She said she had woken up at 7.00 in the morning that day. Her father had told her to boil the tea. Thereafter, she said that she had to wait for the 12.00 o'clock bus to come down to Sigatoka Town. She was going to Sigatoka Town to buy some clothes and also to buy their dinner.*
- (v) *While she was boarding the bus at Nalebaleba Village, she had met her aunt by the name of Miriama Livanalagi (her dad's sister), who was seated inside the bus. It is an admitted fact that on 22 October 2020, the complainant met her aunt Miriama Livanalagi as she was inside the bus and making her way to Sigatoka Town.*
- (vi) *The bus had stopped at Sigatoka Town and the complainant and her aunt had got off the bus. At this point the witness had informed her aunt that she will go and do her shopping at Bargain Box to buy her clothes. After completing her shopping at Bargain Box, whilst the witness was coming out, her aunt had informed her that she was going to meet her boyfriend at Angel's Shop. The witness testified: "Aunty had asked if I could accompany her. Then I replied, yes to that".*
- (vii) *Thereafter, they had walked from Bargain Box to the Angel's shop. The Angel Shop is said to be an amusement place (a billiard shop). There they had met her aunt's boyfriend named Kitione. The three of them had sat at the Angel's Shop and had their lunch.*

- (viii) *The witness testified that after resting a while they had walked towards the bus stand, where her aunt's boyfriend was to drop them off. On the way, they had met her aunt's sister and her aunt had a conversation with her. Kitione had taken the lead.*
- (ix) *After her aunt's sister had left, the complainant and her aunty had continued walking towards the bus stand. They had been walking towards the canteen just past the Fire Station when a probox taxi had come along. As the taxi approached them, Vonivate (the accused) had called her aunt as they knew each other. Vonivate had told the witness and her aunt to get into the taxi. They had done so. Her aunt had told the accused that they were to get off at the bus stand.*
- (x) *It is an admitted fact that whilst in Sigatoka Town, the accused came in a taxi with his friend and called out to Miriama to board the taxi. It is further admitted that the complainant and Miriama had boarded the same taxi.*
- (xi) *The witness testified as follows: "While the taxi was going, we went towards the Tappoos Road. After that Vonivate told the taxi driver not to stop at the bus stand. Then Vonivate told my aunt that we are going to drop stuff at Olosara then we will come back to the bus stand". The witness said that her aunt had agreed.*
- (xii) *Inside the taxi, one of the accused's friends had been seated in the front passenger seat (besides the driver). The complainant had sat behind the driver, while her aunt was seated next to her. The accused had been sitting next to her aunt.*
- (xiii) *The witness testified that whilst travelling in the taxi, when they had approached the Laselase Bridge (Melrose Bridge), the accused had served her and her aunt a drink – it was a Fiji Bitter. Both she and her aunt had drunk the glass of beer. When asked how many glasses of beer she drank in the taxi, the witness said that 4 bottles of Fiji Bitter were shared amongst the 4 of them – herself, her aunt, the accused and his friend. The bottles of beer were already in the taxi. The accused had been taking the bottles out from a carton/box.*
- (xiv) *On reaching Olosara, they had gone and stopped at Olosara Seaview. The 4 of them had got off the taxi. The accused had got hold of the carton of beer and a gallon of kerosene from the taxi boot. The accused's friend had taken a carton of Joskey from the taxi boot, while her aunt had got hold of another gallon of kerosene. The complainant had taken her clothes which she bought from Bargain Box. They had all then carried the stuff towards the beach.*
- (xv) *At the beach, they had started drinking again. The accused and his friend had sat together. The complainant and her aunt had sat on the other side (opposite side-they were facing each other). The drinks were in the middle.*
- (xvi) *They had drunk and finished 8 bottles of Fiji Bitter. At this stage, her aunt had called Kitione (to come there). Kitione had come there with another male friend. Upon his arrival, they had started to open the carton of Joskeys. The accused had been serving the Joskey to each of them in glasses.*

- (xvii) *The complainant testified: "Whilst we were drinking, the accused came close to me and wanted to hug and kiss me. I stood up and went towards my aunt. I was really drunk. I wanted to lie down for a while. I lied on my aunt's thighs/lap... At the time the accused was not far away. He was just close (the witness demonstrated how close the accused had been at the time). The others had continued drinking".*
- (xviii) *The witness said that thereafter, Kitione had woken her up for them to leave. It was after 5.00 p.m. The drinks had finished by then. She said she was really drunk and Kitione and her aunt were holding her to walk properly by holding her on both sides. The accused and his friend had been walking behind them.*
- (xix) *She said: "...He (the accused) was trying to pull me whilst we were walking. He was pushing my aunt's boyfriend away in order to come close to me and pull me". However, the accused had not succeeded to pull her away since Kitione was holding her tight and not letting the accused to come close to her. Her aunt had been telling the accused not to do such things.*
- (xx) *They had then proceeded towards the main road. Whilst they were about to reach the main road, her aunt had sat down beside the road. Kitione had told the witness to go and lie on her aunt's lap whilst they were waiting for the taxi to arrive. The witness explained that the first taxi that had brought them to Olosara had dropped them at the beach and left.*
- (xxi) *The complainant testified that a taxi had arrived. At this point, the accused had pulled her from her aunt and tried to force her/push her into the taxi. Whilst she was in the taxi, her aunt and Kitione had asked the accused if he can go later in the taxi (on the second trip), so that they will take the lead since they had to catch the express bus that is going towards the village.*
- (xxii) *However, the accused had just pushed her aunt aside, walked towards the taxi and got in. The complainant said that she was already in the taxi at the time. She testified that she wanted to get off the taxi but the accused had pulled her and closed the door of the taxi – the door on her side. She said she was really drunk at the time.*
- (xxiii) *Her aunt had told the accused that since they were all going to the bus stand for the same taxi to come back and pick them from the same spot. However, the accused did not reply and had then told the taxi driver to drive off. At the time, there were 4 persons in the taxi – the complainant, the accused, the accused's friend and the taxi driver.*
- (xxiv) *The driver had started the taxi and left. Whilst they were travelling, the witness had wanted to lie down for a while. So while sitting in the taxi, she had tilted her head back on the seat and had fallen asleep. She said she couldn't feel anything since she was really drunk.*
- (xxv) *She came to her senses only when the accused was pulling her out of the taxi. The witness explained that the accused had held on to both her hands and pulled her out of the taxi. The taxi driver and the accused's friend had just sat in the taxi and done nothing.*



- (xxvi) *The complainant says she did not know the place where the taxi had stopped. It was a kind of a jungle area (a bushy area) where there was a sugar cane field on one side. Between the jungle area and the sugar cane field, there was a gravel road. She had seen a house at the opposite side of the road.*
- (xxvii) *The witness testified that she tried to resist and hold on to the door of the taxi. However, the accused had held on to her and thrown her towards the ground. She explained further: "He held on to my hand that I was holding onto the taxi door. He held on to my t-shirt at the back and pulled me forcefully towards the ground (besides the road). After that he pulled me towards the bush. He held on to both of my hands and pulled (the accused had dragged the complainant towards the bush). When he was pulling me towards the bush, there was a drain. I fell onto the drain and I then tried to stand up.... I am aware of seeing him hold on to a big stick and hit me on my head. The stick was lying beside me".*
- (xxviii) *The complainant further explained that when she was trying to stand up, at that moment the accused had struck her with a stick on the right side of her head. She became unconscious.*
- (xxix) *When she regained consciousness, she realized that she was naked. There was no clothes on her. She was fully naked. She had also felt weak and her private part (her vagina) was paining. Her body was aching and people were crowded there.*
- (xxx) *From the crowd of people, she was aware of two girls who were pouring water on her. They were Mereula and Miliana (Mili). Her aunt was also there and calling out her name. On seeing her aunt, she had informed her that she is scared and if she can help to put on her clothes. Her aunt had put back her clothes.*
- (xxxi) *The witness said at the time of the incident, she had been wearing a blue t-shirt, brown bra, blue panty and brown trousers (shorts). At the time she regained consciousness, she found that all these clothes had been removed. When her aunt had helped her wear her clothes back, she had only worn the blue t-shirt and brown trousers. Her panty and bra were missing.*
- (xxxii) *The witness testified that thereafter the Police Officers had approached her and taken her in the Police vehicle. It had just started to get dark at the time. The Police had taken her to the Sigatoka District Hospital. An Indo-Fijian lady doctor had examined her. Her aunt too had been present at the time.*
- (xxxiii) *She had rested for 1 day in the hospital. The day after, the Police had come and taken her to the Sigatoka Police Station and her statement had been recorded.*
- (xxxiv) *The Learned State Counsel submitted that he will not be asking the complainant to make a dock identification of the accused (since she was unconscious at the time of the alleged incident of Rape).*

- (xxxv) *The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant, totally denying the allegation of Rape.*
- (xxxvi) *The complainant agreed that she had willingly gone in the taxi to the Olosara Seaview. However, she denied that she was aware that the taxi was going to this area and that the plan was to drink at that place.*
- (xxxvii) *It was suggested to the complainant that while they were drinking at the beachside that she had attempted to hug and kiss the accused. It was further suggested that (due to this) her aunt Miriama had asked her to move from the place she was sitting. The complainant denied these suggestions.*
- (xxxviii) *It was suggested to the complainant that the accused did not attempt to kiss, hug or harass her in any manner that day. The witness denied the suggestion and said that he did try to kiss and hug her.*
- (xxxix) *It was suggested to the complainant that at 5.00 p.m. since the drinks had finished, that the accused had wanted to go and buy more drinks and that he had informed that he will go and get a taxi to get more drinks. The witness said that she didn't know that.*
- (xl) *It was further suggested to the complainant that when the taxi had arrived, the accused was the first to get into the taxi and that the complainant had followed the accused to the taxi. The complainant denied this suggestion.*
- (xli) *The complainant agreed that whilst travelling in the taxi, she and the accused were seated in the back seat and that the other male person (the accused's friend) was seated in the front passenger seat next to the taxi driver.*
- (xlii) *It was suggested to the complainant that the accused's friend and the taxi driver did not help her because the accused did not pull her from the taxi or drag her into the bushes. The complainant categorically denied this suggestion.*
- (xliii) *The following further suggestions were put to the witness in cross-examination and she answered as follows:*

Q. *I suggest to you that my client had helped you out of the taxi and helped you to sit down near the road side?*

A. *No.*

Q. *I suggest to you that afterwards my client had gone to relieve himself and you were left alone near the road side?*

A. *No.*

Q. *I further suggest to you that before he came back to you, he also had a cigarette break?*

A. *No.*

Q. *I suggest to you that by the time he came back to you within a few minutes, the Police were there?*

A. No.

Q. I suggest to you that the accused did not hit you with a stick?

A. No.

Q. When all these alleged incidents were happening the person who sat in the front passenger seat was still there?

A. Yes.

Q. You would agree with me that you didn't remember anything after the stick incident?

A. Yes.

Q. I suggest to you that the accused did not assault or do anything wrong to you on that day?

A. No.

**[24] Evidence of Miliana Yaliewa Natuiyaga**

- (i) The witness testified that she is 21 years of age and residing at Nayawa, Sigatoka. Her date of birth is 27 July 2002. She is living with her parents and 4 siblings. She is the third in her family.
- (ii) The witness testified to the events which took place on 22 October 2020. She said at the time she was a Form 6 student at Andhra Sangam College, Sigatoka. She had returned home (to Nayawa) after school. She had knocked off from school at around 3.30 p.m. She had then done some household chores.
- (iii) At about 5.00 p.m. she had gone to play Volleyball. She said there's a Volleyball ground besides the Queen Highway. That place is Oloolo junction. After playing she had told her friends for them to go and smoke beside the road. They had been smoking suki. At the time she was with her friends, Mereula, Laita and Stella.
- (iv) Whilst they were smoking, a vehicle had come and stop. They were sitting on the left side of the road, while the vehicle came and stopped on the right. It was a tar sealed road. The vehicle had stopped about 10 metres away from where they were smoking. It was a probox taxi white in colour. The witness said at the time it was still daylight.
- (v) The witness testified that she saw the accused get out of the taxi and he was pulling the complainant out of the taxi. The driver of the taxi and another man was seated in the front at the time. The witness said that the accused was forcing the complainant to go to the bushes. At the time he was wearing a blue vest and a lee pants blue in colour. She said that the taxi had left towards the town at the time the accused was forcing the complainant into the bushes.

- (vi) *The witness said that the accused was not that tall, not that dark and he was growing a beard. She testified that she had clearly seen the accused and the complainant and that there was nothing blocking her view.*
- (vii) *The witness further testified that whilst the accused was forcing the complainant to go to the bushes, she and her friends had followed them but then the accused had chased her away. She said: "He looked back and said go away".*
- (viii) *The witness had then told her friends that she will follow them along the road and that they should follow the track to the bushes. Whilst following, the witness said that whenever the accused would look back she would duck down. While the accused was forcing the complainant towards the bushes she observed that the complainant would often fall besides the road and that the accused would pull her up.*
- (ix) *The witness had followed them until the accused had taken the complainant to the bushes. When asked as to how the accused had dragged the complainant into bushes, the witness said: "LH was behind him facing backwards. His hands were at the back of her t-shirt dragging her forward. ....LH was lying down on the ground with her face upwards towards the sky with Vonivate holding her t-shirt from the back and dragging her".*
- (x) *The witness testified that the complainant did not seem to want it but he kept on forcing her. He had kept on dragging the complainant and was looking for a good place to lay her down. When he laid her down the complainant was trying to stand up. Vonivate then took a stick and hit her head. The complainant became unconscious. The witness said that at the time she was about 5 metres away from them.*
- (xi) *The witness continued that Vonivate then took off his pants and took off the complainant's clothes – he took off all her clothes. At the time the complainant had been lying on the ground facing upwards and the accused was kneeling towards her. Vonivate had his vests on. He had taken off his underwear. He then took his penis and inserted it into the complainant's vagina. He had been doing this for about 2 minutes. At the time, the complainant was still unconscious. The witness said that she was knocked out.*
- (xii) *The witness said that she had clearly seen this incident from the place she was at and nothing was blocking her view at the time. There was sufficient light for her to see the incident clearly.*
- (xiii) *Thereafter, the witness had told her friends to wait for her that she will go and get an adult. At the time her friends who were there were Mereula, Semisi, Naibala and Stella. Mereula had been standing about 6 metres behind her.*
- (xiv) *She had then walked towards the road. Whilst walking on the road, the same taxi that Vonivate had come in came and stopped again. The complainant's aunt and another man got off the taxi. They had asked her if she had seen a boy and a girl. She had told them yes and taken them to the place where*

*Vonivate and complainant were. The witness said she does not know the name of the complainant's aunt.*

- (xv) The witness said that upon arriving at the place, the complainant's aunt had asked Vonivate why he was doing that act. Vonivate had replied that he did not do anything. At the time the accused had been half naked. The complainant was still lying on the ground fully naked. At that stage Vonivate had worn his pants, stood up and walked towards town.*
- (xvi) The witness testified that she, her friends and the complainant's aunt had then clothed the complainant. At the time the complainant was still unconscious. She had regain consciousness only after they poured water on her.*
- (xvii) Thereafter, people started coming and the Police were called. They had made the complainant stand up and brought her to the road. The Police arrived and took the complainant to the hospital in a Police vehicle. She and her friends had been taken to the Sigatoka Police Station in another Police vehicle and their statements had been recorded.*
- (xviii) The witness identified Vonivate as the accused in the dock.*
- (xix) She said the prior to that day she did not know who Vonivate was. She had come to know his name only at the Police Station. She explained: "Because I had seen his (Vonivate's) face in Nayawa, at that place and when he came to the cell and the Police were talking to him, we were standing outside".*
- (xx) The witness further testified that prior to that day she did not know the complainant as well.*
- (xxi) In cross-examination, it was suggested to the witness that the incident took place after 6.00 p.m. and it was dark. She denied the suggestion.*
- (xxii) It was suggested to the witness that she had listened to the complainant's aunt and (after talking to her) had been influenced to give a false statement to the Police about the accused. The witness denied this suggestion.*
- (xxiii) It was further suggested to the witness that at no time did the accused force, pull or drag the complainant into the bushes. It was suggested that the accused was only helping the complainant to get down from the taxi and sit near the roadside. It was also suggested that the accused did not have sexual intercourse with the complainant whilst she was knocked out. The witness completely denied these suggestions.*
- (xxiv) The Defence highlighted the following omission in the testimony given in Court by the witness vis a vis her statement made to the Police on 22 October 2020:*

*Although in her testimony in Court the witness had stated that the accused had hit the complainant with a stick, she had made no mention of this fact in her statement made to the police.*

*The witness explained that she did mention this fact to the Police, however, it is not recorded. She went on to state that plenty of*

things she had told the Police that day is not recorded in her statement.

**[25] Evidence of Mereula Amuna Lelevawalu Batimala**

- (i) The witness testified that she is 20 years of age and residing at Nayawa Village in Sigatoka. She lives there with her parents and her small sibling. Her date of birth is 8 May 2003.
- (ii) The witness testified to the events which took place on 22 October 2020. At the time she was attending Sigatoka Methodist College and was in Form 6. She said that school finished for the day at 4.00 p.m. After returning home from school she had gone to play volleyball at the Oloolo junction with her friends Stella, Naivola and Mili. This was between 4.00 and 4.30 p.m. She confirmed that Mili was Miliana Natuiyaga (prosecution witness).
- (iii) The witness said that after playing volleyball, Mili had told them to go and smoke some suki and they came near the highway to smoke the suki. Whilst they were smoking suki at the same time they were taking pictures on the phone. At this stage, Mili had told them that one vehicle had just stop-that vehicle was a white probox taxi. It had stopped about 10 metres away from them.
- (iv) The witness testified that they had kept on smoking suki. She and her other friends had been sitting down, while Mili had been standing at the time. Mili had informed that there were two people who seemed like they were dragging each other along the high way. So they stood up to see what was happening.
- (v) The witness said that at this point, she had seen one man dragging a girl. Mili had crossed over closer to them. The witness and her friends had followed the tramline right to the place where the two people went to. While they were hiding and looking at what was happening, the man had seen them and chased them away. She said, she was about 6 metres away from the man and the girl he had been dragging.
- (vi) The witness said that the man was a bit tall, not that dark and he was growing a beard as well. She testified that she had clearly seen the man and the complainant and that there was nothing blocking her view.
- (vii) Thereafter, she and her friends had come back near the highway. After a while, she had told her friends Naivola, Stella and Semisi that they should go and check again. So they had gone back to check.
- (viii) The witness testified that at this point she saw the man had already taken off his trousers. Then she saw the man taking off the girl's clothes-he had taken off all her clothes. The girl was blacked out and didn't know what was happening. Then she saw the man taking out his penis and inserting it into the girl's vagina. He had been doing this for about 3 minutes.
- (ix) The witness said she saw all this happening herself. At the time she had been about 5 to 6 metres away. It was almost 6.00 in the evening and was getting dark. However, there was enough light for her to see what was happening.

- (x) *At this time her friend Mili had been standing just at the back of where the two people were having sexual intercourse. Mili was in front of them and closer to the man and the girl. Mili had signaled to them to go back to the main road (to seek help). So they came to the main highway. They had seen many people were there.*
- (xi) *Thereafter, they had returned to where Mili was. The witness said that Mili was helping the girl. They saw the girl laying her head on top of Mili's lap. The girl was still naked and blacked out. The man had run away from there.*
- (xii) *Mili had told them to go and get some water. So they went to fetch some water from a nearby house. They had splashed the water on the girl and she started to wake up.*
- (xiii) *After a while, the Police vehicle came and along with that the girl's aunty also came. They had told the Police as to what had happened there. The Police took the girl into the Police vehicle and from there took her to the hospital. Thereafter, she had been taken to the Police Station and her statement had been recorded.*
- (xiv) *The witness said that at no point in time did she come to know the name of the accused.*
- (xv) *The witness identified the accused in the dock.*
- (xvi) *In cross-examination, it was suggested to the witness that she did not see this incident herself and that she only relied and believed on what Mili had told her regarding one person dragging another person. The witness denied this suggestion.*
- (xvii) *It was further suggested to the witness that when this alleged incident took place, it was already dark. The witness said, it was getting dark.*
- (xviii) *It was suggested to the witness that she had been influenced by the complainant's aunt Miriama to give a false statement to the Police about the accused. The witness denied this suggestion.*
- (xix) *It was also suggested that the accused did not have sexual intercourse with the complainant that day. The witness said that she did see them having sexual intercourse that day.*

**[26] Evidence of Miriama Livanalagi**

- (i) *The witness testified that she is 26 years of age and residing at Sanasana Settlement in Sigatoka. She lives there with her grand-father and 2 of her cousin sisters. Her date of birth is 23 May 1997. She is in a de-facto relationship.*
- (ii) *The witness testified to the events which took place on 22 October 2020. On that day she said that she was in her village, Nalebaleba Village. After breakfast in the morning, she had a phone conversation with her de-facto partner (Kitione/Kiti). Their conversation that day was for her to take some money to town – there was a family occasion at Kitione's village.*

- (iii) *She had waited for the 12.30 bus (to go to Sigatoka Town). Whilst inside the bus, she had met the complainant LH who was her niece. Upon reaching town, the complainant had said that she was going to buy something at Bargain Box. The witness had accompanied the complainant to Bargain Box.*
- (iv) *After making some purchases at Bargain Box, the witness had informed the complainant that she was going to meet Kitione at one Billiard Shop-Angel. The complainant had asked whether she could accompany her, the witness had agreed.*
- (v) *They had then met Kiti and after that gone for lunch together. After lunch they had a discussion about going back to town. Upon reaching town, Kiti had met a friend of his and they had taken the lead. The witness and the complainant were walking behind. On the way, the witness had also met a cousin of hers and they had a conversation.*
- (vi) *Thereafter, the witness and the complainant had continued following Kiti and his friend (they had been walking behind). Whilst walking in town, they saw one white vehicle which stopped besides them. Inside the vehicle was Vonivate, the accused and one of his friends.*
- (vii) *Vonivate had told them to get into the vehicle. Thus, the witness and the complainant had got into the vehicle. The witness had called Kitione and told him that they will take the lead to town. Inside the vehicle, the witness had been sitting in the middle of the back seat. The accused had been sitting on her right while the complainant was sitting on the left. The accused's friend was in the front passenger seat.*
- (viii) *The witness said that on their way to town, the vehicle had taken a different route-instead of going to the bus stand, they had gone towards Tapoos. The witness had told the accused to stop the vehicle so they could get off. However, the accused had told the driver to keep going. The accused had told her that they will go quickly to deliver one package from Olosara and then return back.*
- (ix) *While travelling the accused had poured out a drink-Fiji Bitter and given it to the complainant and the witness to drink.*
- (x) *Upon reaching Olosara (Sea View), they had got off and gone straight to the beach-the accused, his friend, the complainant and the witness. Upon getting to the beach they had sat down and continued drinking. The witness had called Kitione who had also arrived there with his friend.*
- (xi) *Whilst they were drinking, the accused started to get closer to the complainant and started to hug her. The complainant had stood up and moved away from the accused. The witness had told the accused not to do such things to the complainant.*
- (xii) *The accused had then asked Kitione to call for a car (taxi) for them. The taxi had arrived. The witness said, out of the 6 of them, only 3 people could get into the taxi. Kiti's friend had got into the front passenger seat, while the accused and the complainant had got into the back. The witness, Kiti and the accused's friend had remained behind.*



- (xiii) Thereafter, the taxi had left and returned to pick them up. At the time the taxi returned, only Kiti's friend was in the front passenger seat. The complainant and the accused were not in the taxi. Upon inquiring from Kiti's friend, he had said, that the accused and the complainant had got off at Oloolo.
- (xiv) The witness, Kiti and the accused's friend had got into the taxi and come to Oloolo. Upon reaching Oloolo, many people had been standing there. They had got off there.
- (xv) At this stage Kiti had told the witness to check on the complainant. Then the witness had seen the complainant was lying down on the road. She was totally naked. She did not even know what was happening around her. Upon reaching the place where the complainant was the accused had also been standing there. The witness said that the accused was about to put on his pants. At the time she saw the accused, he was only wearing a vest which was blue and white in colour. He was about to put on his blue coloured lee pants.
- (xvi) The witness said that on seeing the accused she had got angry and asked him what he had done. However, the accused had not responded (he had not said anything).
- (xvii) The complainant had been lying there with her eyes closed. She was unconscious and could not feel anything. The witness had tried to make the complainant sit so as to put on her clothes. The complainant's clothes had been put on. Then they had taken the complainant to a well surfaced place where she could sit properly.
- (xviii) The witness said that at that point some people brought water to sprinkle on the complainant's head. Her boy-friend Kitone had poured the water on the complainant's head. He witness said that on pouring water on her head, the complainant had just opened her eyes and then closed her eyes again.
- (xix) The witness testified that soon after, a police vehicle had come and taken the complainant to the hospital. The witness said that she had not got into the said police vehicle.
- (xx) She and her boy-friend had got into another vehicle and gone to the Police Station. The Police had recorded her statement.
- (xxi) The witness testified that prior to 22 October 2020, she had known the accused for about 10 years. Although he is not from the same village, the accused used to come down to her village with one of her cousins, with whom he had gone to school with.
- (xxii) The witness identified Vonivate as the accused in the dock.
- (xxiii) In cross-examination, it was put to the witness that she was the accused's girl-friend during secondary school and that they were dating. The witness denied the suggestion.
- (xxiv) It was suggested to the witness that while they were all drinking on the beach at Olosara Sea View, the complainant had tried to get close to the accused and started hugging and kissing him. The witness denied this suggestion.

- (xxv) *It was suggested to the witness that she was getting jealous that the complainant was getting closer to the accused and therefore asked the complainant to move away from where she was seated. The witness denied these suggestions.*
- (xxvi) *It was further suggested to the witness that she falsely complained about the accused because she was jealous that the complainant was getting close to the accused. It was also suggested that her report to the Police and her evidence in Court was a form of revenge to get back at the accused. The witness denied these suggestions.*
- (xxvii) *It was further suggested to the witness that she had influenced the other two prosecution witnesses-Miliana and Mereula-to complain and testify against the accused. The witness denied this suggestion and said that she did not know the said two prosecution witnesses prior to this incident.*

[27] At the end of the prosecution case this Court decided to call for the defence of the accused. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[28] The accused exercised his right to remain silent.

### **Analysis**

[29] As stated before, the prosecution, in support of their case, called the complainant (LH) and witnesses Miliana Natuiyaga, Mereula Batimala and Miriama Livanalagi. The accused exercised his right to remain silent.

[30] The burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove all the elements of the charge beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove in paragraph 10 of this judgment in respect of the count of Rape.

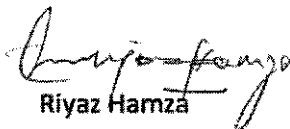
- [31] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.
- [32] Based on the said admitted facts it is admitted that on 22 October 2020, the complainant, LH, met her aunt namely Miriama Livanalagi as she was inside the bus and making her way down to Sigatoka Town. It is also agreed that whilst in Sigatoka Town, the accused came in a taxi with his friend and called out to Miriama Livanalagi to board the said taxi. It is further agreed that complainant and Miriama Livanalagi boarded the said taxi and they made their way to Olosara Seaview Drive whereby they all got off and drank some alcohol. Therefore, those facts are considered as proved beyond reasonable doubt.
- [33] The identity of the accused is not in dispute since witness Miriama Livanalagi knew him well prior to the incident.
- [34] The complainant's date of birth is 23 June 2005. Thus, at the time of the alleged offending she was merely 15 years of old. At the time she testified in Court she had turned 18.
- [35] I have summarized the evidence of all witnesses led during the trial.
- [36] The complainant clearly testified that she was highly intoxicated at the time of this incident. She had been drinking (Fiji Bitter) while travelling in the first taxi on the way to Olosara Seaview. At the Olosara Seaview, she had been drinking further (Fiji Bitter and Joskeys). She had been so intoxicated that whilst travelling in the second taxi, along with the accused, she had wanted to lie down for a while. So while sitting in the taxi, she had tilted her head back on the seat and had fallen asleep. She said she couldn't feel anything since she was really drunk.
- [37] What the complainant remembers is that she came to her senses only when the accused was pulling her out of the taxi. She explained that the accused had held on to both her hands and pulled her out of the taxi.
- [38] As to the location, the complainant says she did not know the place where the taxi had stopped. She testified that it was a kind of a jungle area (a bushy area) where there was a

sugar cane field on one side. Between the jungle area and the sugar cane field, there was a gravel road. She had seen a house at the opposite side of the road.

- [39] The complainant testified that she tried to resist and hold on to the door of the taxi. However, the accused had held on to her and thrown her towards the ground. She testified further: "He held on to my hand that I was holding onto the taxi door. He held on to my t-shirt at the back and pulled me forcefully towards the ground (besides the road). After that he pulled me towards the bush. He held on to both of my hands and pulled (the accused had dragged the complainant towards the bush). When he was pulling me towards the bush, there was a drain. I fell onto the drain and I then tried to stand up.... I am aware of seeing him hold on to a big stick and hit me on my head. The stick was lying beside me".
- [40] The complainant further explained that when she was trying to stand up, at that moment the accused had struck her with the stick on the right side of her head. She became unconscious. When she regained consciousness, she realized that she was naked. There was no clothes on her. She was fully naked. She had also felt weak and her private part (her vagina) was paining. Her body was aching and people were crowded there.
- [41] From the crowd of people, she was aware of two girls [Mereula and Miliana (Mili)] who were pouring water on her. Her aunt was also there and calling out her name. On seeing her aunt, she had informed her that she is scared and if she can help to put on her clothes. Her aunt had put back her clothes.
- [42] Prosecution witnesses Mereula and Miliana are eye-witnesses to the incident of sexual intercourse. They had clearly seen how the accused had taken off the complainant's clothes and had inserted his penis into her vagina. Both witnesses testify to the fact that at the time, the complainant was still unconscious. The witnesses said that the complainant was knocked out or blacked out. She did not know what was happening to her.
- [43] The complainant's aunt Miriama Livanalagi testified that when she came to the place where the complainant was, the complainant was lying down on the road totally naked. She did not even know what was happening around her. Upon reaching the place where the complainant was the accused had also been standing there. The witness said that at the time she saw the accused, he was only wearing a vest and was about to put on his pants.

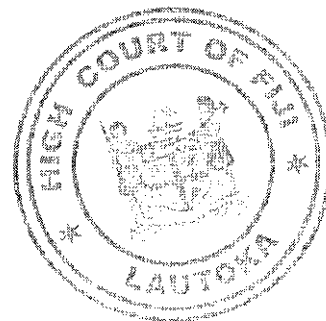
- [44] From the testimony in this case it is manifest that the complainant was not in a position to give her consent for the accused to have sexual intercourse with her at the given time since she was intoxicated and also due to the fact that she was unconscious. It is also obvious that the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [45] The accused totally denies the allegation of Rape made against him by the prosecution. The defence position is that this was a false complaint made against him by the complainant. As per the defence, the reason for doing so was due to the fact that witness Miriama Livanalagi was getting jealous since the complainant was getting close to the accused. It is also the defence position that the said Miriama Livanalagi had influenced the other two prosecution witnesses-Miliana and Mereula-to falsely complain and testify against the accused.
- [46] However, considering the totality of the evidence in this case, it is my opinion, that the defence version cannot be accepted as truthful and reliable and I reject the defence version.
- [47] Having analysed all the evidence in its totality, it is my considered opinion that the prosecution's evidence, can be accepted as truthful, credible and reliable. The complainant and other prosecution witnesses withstood the rigorous cross examination by the Defence and remained consistent throughout their evidence, in relation to the material particulars of this case.
- [48] It must also be mentioned once again that in terms of the provisions of Section 129 of the Criminal Procedure Act, where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted.
- [49] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charge of Rape with which the accused has been charged.
- [50] In the circumstances, I find the accused guilty of the count of Rape with which he is charged.

[51] Accordingly, I convict the accused of the count of Rape with which he is charged.

  
Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT LAUTOKA

Dated this 31<sup>st</sup> Day of October 2023

**Solicitors for the State:** Office of the Director of Public Prosecutions, Lautoka.

**Solicitors for the Accused:** Office of the Legal Aid Commission, Lautoka.