

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 72 of 2022

THE STATE

-v-

SEMI TUATEGU

1ST ACCUSED

JOAPE DRAUNA

2ND ACCUSED

APIMELEKI TUINAVITILEVU

3RD ACCUSED

LAISENIA VEISEYAKI

4TH ACCUSED

NIUMAIA RASERU

5TH ACCUSED

Counsel:

- Mr. E. Kotoilakeba for the State**
- Ms. M. Besetimoala for the 1st Accused**
- Ms. K. Marama for the 2nd Accused**
- Mr. I. Rusaqoli for the 3rd Accused**
- Ms. S. Devi for the 4th Accused**
- Ms. V. Kirti for the 5th Accused**

Date of Trial: 22, 23 and 25 September 2025

Date of Judgment: 12 December 2025

JUDGMENT

(The complainant has been granted name suppression. I shall refer to her as “the complainant” in this Judgment.)

Introduction

1. These proceedings arise from events on 29 June 2018. Mr. Semi Tuategu and the complainant had consensual sexual intercourse in a field near to Korokadi Primary School, Bua in the Northern Division. It is not in dispute that four young men then had sex with the complainant at the same place, one after the other. The prosecution alleges that this sexual activity was not consented to by the complainant, and that each of those four young men was aware that the complainant did not consent. It is further alleged that Mr. Tuategu also knew that the complainant did not consent to have sex with those young men and he, nevertheless, assisted and encouraged them to have sex with the complainant without her consent.
2. Arising from these events, a five-count Information dated 17 August 2022 was filed by the Director of Public Prosecutions. Mr. Semi Tuategu (“the 1st accused”) was charged with a single count of rape, the particulars being that he aided and abetted Mr. Joape Drauna (“the 2nd accused”), Mr. Apimeleki Tuinavilevu (“the 3rd accused”), Mr. Laisenia Veidreyaki (“the 4th accused”), and Mr. Niumaia Raseru (“the 5th accused”) to have carnal knowledge of the complainant without her consent (count 1).
3. The 2nd accused was charged with a single count of rape, the particulars being that, on 29 June 2018, he had carnal knowledge of the complainant without her consent (count 2).
4. The 3rd accused was charged with a single count of rape, the particulars being that, on the same occasion as in count 2, he had carnal knowledge of the complainant without her consent (count 3).

5. The 4th accused was charged with a single count of rape, the particulars being that, on the same occasion as in count 3, he had carnal knowledge of the complainant without her consent (count 4).
6. The 5th accused was charged with a single count of rape, the particulars being that, on the same occasion as in count 4, he had carnal knowledge of the complainant without her consent (count 5).
7. All the accused pleaded not guilty and the matter proceeded to trial.

The prosecution case

8. The somewhat unusual starting point of the prosecution case is the agreed fact that the 1st accused and the complainant had consensual sexual intercourse at Korokadi on 29 June 2018.
9. Further agreed facts helpfully narrowed the issues for my determination. Each of the 2nd to the 5th accused accept that they had sexual intercourse with the complainant at Korokadi on 29 June 2018. Each of the accused was a youth at the material time. The 1st accused had just turned 18 years of age, the 2nd accused was 18 years old, the 3rd accused was 16 years old, the 4th accused was 17 years old, and the 5th accused was also 17 years of age. At the material time, therefore, three of the five accused were what would now be termed children in conflict with the law.
10. In a nutshell, the prosecution case against the 2nd to 5th accused is that the complainant did not consent to sexual intercourse with them, and each of them knew that she was not consenting. The case against the 1st accused is a little more complex. As I understand the prosecution case, the 1st accused knew that the complainant did not consent to have sex with the 2nd to 5th accused, and he nevertheless assisted and encouraged the 2nd to 5th accused to have non-consensual sex with her. I shall return to the factual and legal complexities later in this Judgment.

Prosecution evidence

11. The complainant, aged 26 years at trial, and 19 years at the time of the alleged offending, testified that, in 2018, she was staying with her mum's friend, Ms. Sera Luta, in Bua Lomanikoro. She was studying cookery at Nawaca Technical College.
12. On 29 June 2018, she attended a volleyball and soccer tournament at Korokadi Primary School. As she was watching the games, the 1st accused came and sat beside her and asked her whether they could go and have sex. She laughed and then followed him for about 20 metres to a pine tree field. They sat down, started kissing and then had sex. She noticed three boys were watching them and, when she asked the 1st accused about them, he replied that they were just looking. After the 1st accused pulled up his pants, there was another guy standing behind her. The 1st accused told her that, *"if I won't fuck that person he will go and tell around that I fucked him."* She was scared as she had only given consent to the 1st accused and not to others. The 1st accused said for her to have sex with the other boy. She lay on the grass and had sex with the second boy for about 6 minutes. She did not know this boy. After sex, she stood up and was about to pull up her pants. She got a shock when another boy appeared and said to her that if she did not have sex with him, he would go and tell everyone. He told her to lie down. As she was scared, she lay down and this third boy had sex with her. He gave it all his might for about 5 minutes. She wanted to shout, but was afraid that he would do something to her. She did not consent to have sex with that boy. She was feeling weak and her head was spinning. As she was lying down, a fourth boy came and had sex with her. He did not say anything to her. She did not consent to have sex with him. When he left, all of a sudden, a fat boy came to her. He lay on top of her and had sex with her. He did not say anything to her and she did not consent to have sex with him. After the fifth boy finished, she felt someone poured water on her face as she lay with her eyes closed. She then heard someone calling her to catch the bus home.
13. On the following Monday, Sera asked her about the rumours and she told Sera that she was feeling weak and had pain in her vagina. She did not tell Sera about the incident because she was scared to tell her. Sera's elder sister, Merelita,

suggested that they go to the clinic for her to be checked. She was scared and ashamed to tell Merelita about what had happened. The nurse made a report to the police.

14. When Ms. Besetimoala suggested to the complainant that the 1st accused had asked her to have sex with the second boy and she had agreed, the complainant denied that. When it was put to her that the 1st accused had never threatened to tell everyone if she refused to have sex with the second boy, the complainant was adamant that he had said that to her.
15. Mr. Rusaqoli suggested that his client (the 3rd accused) was the second person to have sex with the complainant, and when he asked her for sex, she replied for him to hurry up. The complainant denied that. She agreed that she had lay on the grass and removed her pants before having sex with the 3rd accused. She agreed that she did not push him away and explained that she was scared. She agreed that she did not tell the 3rd accused that she did not want to have sex with him and also did not tell the 1st accused that she did not wish to have sex with the 3rd accused. She maintained that she did not consent to sex with the 3rd accused. She did not tell anyone about the incident until the following Monday because she was ashamed and scared.
16. When Ms. Marama, for the 2nd accused, suggested that the complainant had waited for 5 to 10 minutes before her client approached her for sex, she denied that. She also denied that she was sitting in a “hook” position exposing her naked private parts to the 2nd accused. She said that she took off her panty when the 2nd accused approached her for sex.
17. When Ms. Devi, for the 4th accused, suggested to the complainant that she was aware that she was going to have sex with multiple boys when she followed the 1st accused to the pine trees, she denied that. The complainant agreed that she laid down when the 4th accused approached and asked her to lie down for them to have sex. She opened her legs a “little bit”. She disagreed that she agreed to sex with the 4th accused and told him to be fast. She wanted to push him away but was weak. She agreed that she did not tell the 4th accused that she did not want to have sex with him. She did not tell Sera anything about the incident on Friday,

Saturday or Sunday because she was ashamed and scared. When she went to college on Monday, there was a rumour going around that she had sex with multiple boys on sports day.

18. In cross-examination for the 5th accused, the complainant said that the 5th accused did not ask her for sex, and she did not allow him to have sex with her. He did not hit or threaten her. When it was put to her that she had consented to have sex with the 5th accused, the complainant replied: *“I was weak. I couldn’t even tell him anything.”*
19. In re-examination, the complainant confirmed that the 1st accused had never informed her that she would be having sex with four other boys after him. She did not give her consent to have sex with the second boy. The third boy did not ask her for sex and she did not consent to sex with him. She did not give the 4th accused any signal that she consented to have sex with him, and did not have any conversation with the 5th accused before he had sex with her.
20. When the Court sought to clarify whether she said anything to the 1st accused after he told her that he would tell stories about her if she did not have sex with the second boy, the complainant replied that she had not. Also, the 1st accused never said anything to her about her having sex with the 3rd, 4th and 5th boys.
21. Dr Talei Vasuitaukei was stationed at Nabouwalu Hospital in 2018. She examined the complainant on 3 July 2018. The history given was that she had been raped by some iTaukei youths at Korokadi settlement during the National Sports and Wellness Day on 29 June 2018. There was a small tear at the base of her vaginal wall. In answer to a question from the Court, Dr Vasuitaukei confirmed that the medical findings were as consistent with the complainant having had consensual sex with 5 boys as they were with her having had non-consensual sex with 5 boys.

Half-time submissions

22. At the close of the prosecution case, Ms. Besetimoala submitted that the 1st accused had no case to answer. Counsel for the 2nd – 5th accused quite properly accepted that the complainant’s testimony was sufficient for them to be put to their defences.

23. The gist of Ms. Besetimoala's argument was that there was no direct evidence that her client had assisted or encouraged the other accused persons to have sex with the complainant without her consent.
24. Mr. Kotoilakeba argued that the complainant's evidence supported that the 1st accused had effectively extorted her into having sex with the second boy (3rd accused). Her consent was not freely given, as the 1st accused must very well have appreciated. Whilst he accepted that there was no direct evidence that the 1st accused extorted the complainant into non-consensual sex with the 2nd, 4th and 5th accused, all the surrounding circumstances pointed to him having encouraged the other boys to have sex with the complainant when he must have appreciated that she had not freely consented to sex with those boys. He had assisted the other accused to have sex with the complainant without her consent by threatening to besmirch her reputation.
25. I found that there was sufficient evidence to put each of the accused persons to their respective defences.
26. Having been explained their options, each of the accused elected not to give or call evidence in his own case.
27. The trial was adjourned for closing submissions, and I requested the assistance of counsel on the legal complexities related to accessorial liability for rape, and the fault element of rape in the event that I was satisfied that the prosecution had proven the physical element of the offences, namely that the complainant did not consent to have sex with the 2nd – 5th accused. I specifically requested assistance on the thorny issue of whether the 1st accused may be convicted as a secondary party in the event that I found the 2nd – 5th accused not guilty of rape.

Closing submissions

28. Mr. Kotoilakeba very sensibly structured his closing speech to firstly address the prosecution case against the 2nd – 5th accused, before going on to address the more complex question of the 1st accused's accessorial liability for their alleged offending.

29. As I understood his argument, the Court can be sure that the complainant did not consent to sex with the 2nd – 5th accused because she gave credible and reliable evidence that she had not consented to sex with the 2nd – 5th accused. Mr. Kotoilakeba invited the Court to find that each of the 2nd – 5th accused either knew that the complainant did not freely and voluntarily give consent for them to have sex with her or were reckless as to whether she consented.
30. On the more difficult issue of the 1st accused's accessory liability for the rapes committed by the 2nd – 5th accused, Mr. Kotoilakeba submitted that the prosecution must prove that he had full knowledge of the facts which constitute the offences, and that he gave some form of voluntary assistance in the commission of those offences. He highlighted that, in the presence of the 3rd accused, he had threatened to besmirch the complainant's reputation if she refused to have sex with the 3rd accused. He knew very well that the complainant did not voluntarily and freely consent to have sex with the 3rd accused and assisted the 3rd accused to have non-consensual sex with the complainant by overbearing her free will. That threat also opened a "gateway" for the 2nd, 4th and 5th accused to rape the complainant.
31. Defence counsel made helpful written and oral submissions for which the Court is grateful.
32. In order to lay the foundation for her submission that her client is not guilty of aiding and abetting the other accused to rape the complainant, Ms. Besetimoala argued that the prosecution has failed to prove that the complainant did not freely consent to sex with those accused. Her secondary argument is that, even if it is established that the complainant did not consent to sex, the prosecution has failed to prove the necessary fault element for any of the 2nd – 5th accused to be convicted of rape. In other words, the prosecution has failed to prove that each of the 2nd – 5th accused either knew that the complainant was not consenting to sex or were reckless as to whether or not she consented. In this context, Ms. Besetimoala referred me to the statutory definition of recklessness. Since the issue of whether sexual intercourse is consensual is a circumstance, a person is reckless as to that circumstance if: (a) he or she is aware of a substantial risk that the circumstance

exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. Ms. Besetimoala submits that the prosecution has failed to adduce evidence to prove that the 2nd – 5th accused were aware of a substantial risk that their sexual intercourse with the complainant was non-consensual. The manner in which the complainant conducted herself led each of the accused to reasonably believe that she was consenting to have sex with each of them.

33. Ms. Besetimoala argues that her client could not have foreseen a risk that the complainant was not consenting to sex with the 3rd accused because she never told the 1st accused that she was not consenting, and she removed her own panty before having sex with the 3rd accused.
34. I allowed Ms. Besetimoala further time to file supplementary submissions on the difficult issue whether her client may be convicted of rape, as a secondary party, in the event the 2nd – 5th accused are acquitted of rape. In her helpful supplementary submissions, Ms. Besetimoala acknowledges what would appear to be a conflict between section 45(2) and section 45(5) of the Crimes Act 2009. Whereas section 45(2) provides that, in order for a person to be guilty of aiding and abetting another person to commit an offence, that offence must have been committed by the other person, section 45(5) of the Act provides that a person may be found guilty of aiding and abetting the commission of an offence even if the principal offender has not been found guilty. Ms. Besetimoala submits that, when considering section 45 of the Act in totality, it is clear that in order for a person to be found guilty of aiding and abetting a person to commit an offence a principal offender must have been convicted of that offence.
35. For the second accused, Ms. Marama pointed to the complainant's evidence that she had removed her own panty before having sex with her client. Also, the complainant had remained in the same place when having sex with each of the boys one after the other. The accused had not surrounded her or done anything to prevent her leaving that place.

36. For the 3rd accused, Mr. Rusaqoli made the point that the complainant had not told the 1st accused that she did not wish to have sex with his client and had removed her own panty before having sex with the 3rd accused. The 1st accused was not present whilst the complainant had sex with his client for about six minutes. Mr. Rusaqole argues that the complainant gave tacit consent for sex with his client, who honestly and reasonably believed that she was consenting. His client was not reckless as to whether the complainant consented.
37. Ms. Devi highlights that the complainant testified that she was standing up and about to wear her pants when the 4th accused approached and told her to lie down for them to have sex. She lay down and opened her legs. Ms. Devi argues that she would not have done that if she was not consenting to sex. There were no coercive circumstances. The complainant could have simply walked away. The 4th accused reasonably believed that the complainant was consenting.
38. Finally, on behalf of the 5th accused, Ms. Kirti highlighted that the complainant was not wearing her panty when approached by the 5th accused for sex. She willingly lay down and opened her legs. She was not threatened by the 5th accused. Her behaviour after the encounter was consistent with consensual sex.

Law

39. Section 207(1) of the Crimes Act 2009 (“the Act”) provides that any person who rapes another person commits an indictable offence. Relevantly for present purposes, Section 207(2) states that:

“(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 ...”

40. Section 14 of the Act provides:

“214. In order for a person to be found guilty of committing an offence the following must be proved-

(a) The existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) In respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.”

41. Since section 207 of the Act does not specify the fault elements of rape, section 23 of the Act comes in to play:

“23. –(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify the fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.”

42. The statutory definition of recklessness is provided in section 21 of the Act:

“21.-(1) A person is reckless with respect to a circumstance if-

(a) He or she is aware of a substantial risk that the circumstance exists or will exist;and

(b) Having regard to the circumstances known to him or her , it is unjustifiable to take the risk.

(2)

(3) The question whether taking a risk is unjustifiable is one of fact.”

43. Plainly, the physical element of the offence of rape consists of a circumstance, namely that the carnal knowledge is non-consensual.

44. Section 206 of the Act provides relevant definitions:

“206. In this Part –

(1) The term “consent” means consent freely and voluntarily given by a person with the necessary mental capacity to give consent,

and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained -

(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”

45. Finally, since the prosecution case against the 1st accused is founded in his complicity in offending by the other accused persons, it is necessary to set out the material parts of section 45 of the Act as follows:

“45.-(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2)For the person to be guilty-

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) Subject to sub-section (6), for the person to be guilty, the person must have intended that –

(a) his or her conduct would aid abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the

commission of the offence (including its fault elements) that he other person in fact committed. ...

(4) ...

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.”

Analysis and resolution

46. As mentioned above, this case is a little unusual in that the 1st accused is charged with rape against the backdrop of an agreed fact that he had consensual carnal knowledge of the complainant. The doctrine of secondary liability makes it perfectly possible for a person to be convicted of rape notwithstanding that he or she is not the principal offender.
47. The first issue that I must resolve is whether the 2nd to 5th accused, or any of them, committed the offence of rape. Since it is agreed that each of them had carnal knowledge of the complainant, the narrow issue is whether the complainant freely and voluntarily consented to have sex with each of the 2nd – 5th accused.
48. I am sure that the complainant did not freely consent to have sex with those accused one after the other. It is important for trial courts to guard against antediluvian thinking. Just because the complainant freely consented to have outdoor sex with the 1st accused, it does not follow that she agreed to sex with the other four accused. I accept the complainant’s evidence that the 1st accused said to her: *“if I won’t fuck that person he will go and tell around that I fucked him.”* I also accept that she was in fear of bodily harm in the unexpected circumstances she found herself in, albeit she very fairly accepted that none of the 2nd – 5th accused had used or threatened violence against her.
49. I remind myself that there may be many reasons why a complainant of a sexual offence might not immediately make a complaint, whether to family, friends or others. There can also be understandable reasons why someone does not involve the Police straight away. Research shows that complainants of sexual offences react in different ways. Some complain close in time to the alleged offending.

Others do not. This can be because of shame, shock, confusion or fear of getting into trouble, not being believed, causing problems for other people, or because of a fear about the process that may follow. Importantly, there is no such thing as a "typical" response. Different people react to situations in different ways. A complaint made some time after the alleged offending does not of itself mean the complaint was untrue, just as an early complaint does not of itself mean it was true. In this case, the complainant testified that she delayed reporting out of fear and shame. I find that perfectly understandable, particularly in the circumstances of this case where reporting the rapes would have required the complainant to acknowledge that she willingly had sex with the 1st accused in a pine field.

50. I am sure that the complainant was raped by each of the 2nd – 5th accused.
51. The second, and more important, issue for present purposes is whether any of the accused may be found guilty of those rapes.
52. The prosecution must prove that each of the accused is guilty. The accused do not have to prove anything to me. The defence does not have to prove that the accused is innocent. The prosecution will only succeed in proving that the accused is guilty if I have been made sure of his guilt. If, after considering all of the evidence, I am not sure that the accused is guilty, my verdict must be not guilty.
53. The physical elements of rape have been proved to the criminal standard. Before I can convict the 2nd – 5th accused, however, I must be sure that they either knew that the complainant was not consenting to sex with each of them or were reckless as to whether she was consenting.
54. The evidence led by the prosecution does not make me sure that the 2nd – 5th accused knew that the complainant was not freely and voluntarily engaging in sexual intercourse with each of them. Whilst I accept that the 3rd accused (the second youth to have sex with the complainant) was in the vicinity when the 1st accused said that he would publicly humiliate the complainant unless she had sex with the 3rd accused, I cannot be sure that the 3rd accused was aware of that threat having been made. The complainant accepts that she removed her own panty and lay down before having sex with the 3rd accused. The evidence points to the

2nd, 4th and 5th observing the complainant having sex with the 1st and 3rd accused in a pine field. They would, no doubt, have observed that the complainant remained *in situ* after each sexual encounter. Whilst fully acknowledging that the complainant's submission without physical resistance shall not alone constitute consent, that is a point that goes to whether she did, in fact, consent (I have found that she did not) rather than to the central issue of whether each of the accused knew that she was not consenting. The fact that the complainant did not say anything to any of the accused to indicate that she did not consent, in the context of all the surrounding circumstances, leads me to the firm conclusion that none of them *knew* that the complainant was not consenting to sexual intercourse.

55. A more difficult question is whether each of the accused were reckless as to whether the complainant consented to have sex with the 2nd – 5th accused. I am required to consider whether, subjectively, each of the accused was aware of a substantial risk that the complainant was not consenting to sex with each of them. Whilst it would certainly have been advisable, and more gallant, for each of the accused youths to have asked the complainant whether she was agreeable to sex, as the law stands there is no requirement for people to obtain positive consent prior to engaging in sexual intercourse. Whilst a failure to ask feeds into the issue of whether there is a risk that the other person may not be freely consenting to sex, that alone does not support a sure finding of recklessness. It is also an important consideration that three of the accused were children, and the other two were just 18 years of age. Taking their lack of maturity, and all the surrounding circumstances into consideration, I cannot be sure that any of the 2nd – 5th accused were reckless as to whether the complainant did not consent to engage in sexual intercourse with each of them. It follows that I must find each of them not guilty and acquit them accordingly.

56. The 1st accused is in a somewhat different situation. I accept the complainant's evidence that he said: "*if I won't fuck that person he will go and tell around that I fucked him.*" Does it necessarily follow that he was reckless as to whether the complainant consented to sex with the other four boys? The evidence is that the complainant did not say anything in response to the 1st accused. When the 3rd

accused approached her for sex, she removed her panty and had sex with him. The 1st accused did not stick around for that. I would expect a fully mature adult to appreciate the risk that a threat to humiliate the complainant would negate her free and voluntarily consent, but in all the circumstances of this case I am very far from being sure that the 1st accused would have appreciated that risk. In my view, he was not reckless.

57. Since the 1st accused's accessory liability requires proof that he was at least reckless about the commission of the rapes committed by the 2nd – 5th accused (including the fault elements), it follows that I must find the 1st accused not guilty and acquit him accordingly.

58. 30 days to appeal to the Court of Appeal.




Hon Mr Justice Burney

At Labasa

12 December 2025

Solicitors

Office of the Director of Public Prosecutions for the State

Office of the Legal Aid Commission for the Accused