

THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 19 of 2023

BETWEEN : **THE STATE**

AND : **RATU VILIAME TAROGI**

Counsel : Mr Singh for the State
Mr I Emasi for the Accused

Hearing : 6, 7, 8, & 9 August 2024

Closing addresses : 6 September 2024

Judgment : 23 September 2024

JUDGMENT

- [1] The Complainant has been granted name suppression. Therefore, any public record of these proceedings must not contain any information that may lead to the identity of the Complainant. She is referred to as 'RM' in this Judgment. I have deliberately avoided identifying details that may lead to identifying the Complainant.
- [2] The Accused, Mr Ratu Viliame Tarogi, is charged with the following:

Count 1

Statement of Offence

Rape: Contrary to Section 207(1) & (2)(a) of the Crimes Act 2009

RATU VILIAME TAROGI on the 4th day of December 2022, at Kaukimoce Road, Nantadi in the Central Division, had carnal knowledge of RM without her consent.

- [3] The Accused denies having committed the offence.
- [4] The Accused is alleged to have raped the Complainant on 4 December 2022 without the Complainant's consent.

Rape

- [5] The offence of rape has three elements: the penetration of a Complainant's vagina, anus or mouth by the accused with their penis, finger or an object, the complainant not consenting to sexual penetration, and the knowledge of the accused that the complainant was not consenting.
- [6] Pursuant to s 207(2)(a) of the Crimes Act, the offence of rape occurs where a person has carnal knowledge of another person without that person's consent. The slightest penetration is sufficient to establish the element of penetration.
- [7] According to s 206 of the Crimes Act, the term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation, will not be considered as consent freely and voluntarily given. Consent or the absence of consent can be communicated by the words or acts of the complainant. The knowledge of the accused that the complainant did not consent is a matter for inference from all the proven facts.
- [8] To establish the offence of rape, the Prosecution must prove the following elements beyond a reasonable doubt:
1. On 4 December 2022, at Suva, in the Central Division, the Accused penetrated the vulva or vagina of the Complainant with his penis.
 2. The Complainant did not freely and voluntarily consent to the penetration.
 3. The Accused knew that the Complainant was not consenting.

Burden of proof and assessment of the evidence

- [9] The Accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the Prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The Accused has a right to remain silent and no adverse inference can be drawn if he remains silent.

- [10] The burden is on the Prosecution to prove the charges beyond reasonable doubt. Each element of the charge must be proved but not every fact of the story. If there is a reasonable doubt, so that the Court is not sure of the Accused's guilt, or if there is any hesitation in my mind on any of the elements, the Accused must be found not guilty of the charges and, accordingly, acquitted.
- [11] The Accused chose to give evidence, but he does not carry any burden to prove or disprove anything. The burden remains on the Prosecution to prove his guilt beyond a reasonable doubt.

Approach to the assessment of the evidence

- [12] I approach the evidence dispassionately, without sympathy or value-laden rules regarding how men and women should conduct themselves. It is entirely a matter for me to decide which witnesses are credible and reliable and which part of their evidence I accept as true.
- [13] If the account given by the Accused is or may be true, then he must be found not guilty. But even if the account given by him is entirely rejected, that would not relieve the Prosecution of its burden of making sure by evidence of the Accused's guilt.
- [14] The identity of the Accused is not an issue in this case and nor is the fact that the Accused penetrated the vagina of the Complainant. The sole issue is one of consent, whether RM consented to the penetration and if not whether the Accused knew the Complainant was not consenting.

Admitted Facts

- [15] The Admitted Facts are:

1. *The complainant's name is [RM].*
2. *The accused's name is Ratu Viliame Tarogi (hereinafter referred to as "Viliame").*
3. *Viliame is also known as Bill.*
4. *Both RM and Viliame reside at Namadi.*

5. *RM and Viliame are known to each other.*
6. *On 4th December 2022, RM and Viliame were drinking together at Reapi's house.*
7. *Reapi is RM's friend.*
8. *People present during the drinking session was Reapi, RM and another Itaukei boy.*
9. *Reapi and RM were drinking grog.*
10. *Viliame and his friend namely Eroni then joined Reapi, RM and the Itaukei boy at around midnight to drink.*
11. *Viliame and Eroni started drinking with the Itaukei boy.*
12. *After drinking grog, Reapi and RM then joined Viliame, Eroni and the other Itaukei boy.*
13. *After the drinking session, RM went to sleep beside her son in the sitting room.*
14. *On 4th December 2022 between 5am – 6am, Viliame had sexual intercourse with RM in the sitting room by penetrating his penis inside her vagina.*
15. *On 20th December 2022, Viliame was arrested for allegedly raping RM.*
16. *On 20th December 2022, Viliame was caution interviewed whereby he admitted to having sexual intercourse with RM. Therefore, the trial issue is consent.*
17. *It is agreed that the admissibility of the following documents is not in dispute and the same will be tendered by consent.*
 - a) *Photographic Booklet.*

Prosecution Evidence

[16] The Prosecution called three witnesses.

[17] The first witness was the Complainant, RM (PWI). Her evidence in examination in chief was as follows:

- i. She is 30 years old. She is married and she and her husband have a six-year-old son.
- ii. On the evening of 3 December 2022, the Complainant went with her then 4 year old son to her friend's house who lives nearby. Her friend is Reapi Tamurere (PW2). She went to Reapi's house in order to drink yaqona. They drank yaqona on the porch from about 7.30pm and were joined by two others. They drank through about three or four \$5 bags.
- iii. About midnight the two others left, leaving Reapi and the complainant drinking yaqona alone. About this time an Itaukei man whom Reapi knew (Reapi's uncle) joined them on the porch. He brought and drank his own alcohol, being several bottles of vodka. Shortly thereafter the Accused and two other Itaukei boys joined the group drinking on the porch. The newcomers drank the vodka. The Complainant was offered a drink and she then began drinking alcohol. The Complainant states that she drank about six shots of vodka. The group were drinking shots in a medium-sized glass (in re-examination she used her fingers to demonstrate the height of the glass, being about 4-5 inches), filled about half-full.
- iv. She stated that she talked with the Itaukei boys, including the Accused. She stated that she had known the Accused for several years. She knew his older sister and had known them since they moved locally, she described him as like a brother to her, *'because through his big sister'*. The conversation that night was friendly; they introduced themselves in a friendly way. They also listened to music and sang. She also described, from the use of photographs of Reapi's house, the different locations where the group were sitting on the porch. She stated that she spoke to the Accused as well, *'it's like a friendly kind of talk'*. He was sitting beside her.
- v. She described herself as being very *'doped'* due to the amount of yaqona that she had drunk. She stated that she had mixed it strong and on a range of one to ten, ten being the most doped, she described herself as being the most doped. She was also asked to describe her level of intoxication from the alcohol between one to ten, ten being the most intoxicated, to which she again described herself as being most intoxicated. In describing her level of intoxication, she stated:

...the most one because that I was really drunk. If that house was on fire, I think I would have died on the spot. That's like how drunk I am.

- vi. She stated that after drinking about 6 shots of vodka she felt dizzy and was really drunk and therefore took her phone with her and went inside the house in order to sleep next to her son.

At that moment, I'm not sure because while I was drinking and I felt dizzy. I felt dizzy and I knew that I felt really drunk. All I know, I just took my phone with me and went inside the house and slept with my son.

And:

I told Reapi and her husband. They were in the living room eating. And then I went past them and I just told Reapi I had enough. And then I went to sleep and she came and she woke me up. She said, you have to eat. And I said, I have no energy for me to eat or no space in my tummy that I can eat. And I just went off to sleep.

- vii. She identified the location in the photographs of the living room where she slept next to her son. She was not able to recall the time she went to sleep.
- viii. She stated that she did not wake up until about 12 the next day and that she remembered nothing during the time that she was asleep. It was Reapi that woke her up. She then went to the bathroom. She stated that before she went to sleep, she had been wearing a black dress with black tights and a bra underneath. She stated that when she went to the bathroom to urinate, she realized that her black tights were not on. She felt embarrassed and did not say anything to Reapi but when she was walking back home with Reapi, Reapi brought up her missing tights and told her that something had happened to her when she was asleep and that she should speak to Reapi's aunt, Miriamu Gogo (PW3), about the matter. The Complainant stated that she felt speechless when she was told this.

- ix. The Complainant went home, had a shower and subsequently went with her husband to Miriama's house. She stated that before she went to Miriama's house a person that she knew as 'Sau' (DW2) approached her and told her *'not to report the matter and for us to know it amongst ourselves'* - she stated that Sau is a friend of the Accused.
- x. She went with her husband to Miriama's house. Miriama told her that she had seen the Accused on top of her, that she had shouted at him and he and another boy then ran away. When RM was told this, she said that she felt embarrassed and could not believe what the Accused had done to her because:
- ...I knew him well and he also know me well through his older sister because we always go together, we always attend the same youth together. And that was the reason I was so emotional when Miri had relayed the message of what he had done to me.¹*
- xi. After being informed what had happened, she and her husband reported the matter to the police. She stated that the police organised for her to be examined by a doctor.

[18] The complainant provided the following evidence in cross-examination:

- i. She confirmed that they were all sharing a bottle of vodka but was unsure whether there was more than two bottles drunk.
- ii. She denied that she had a flirtatious conversation with the Accused while sitting on the porch drinking. She did not accept that Sau joined them on the porch and drank alcohol. Further:

Mr Emasi: I suggest to you that in your conversation with my client [the Accused], you had told him to wait for her [Reapi] to fall asleep as she had just left?

RM: No sir.

¹ RM was very emotional giving this testimony, with tears in her eyes and unable to speak for a while.

Mr Emast: I suggest to you that while having the conversation, you told her that I'm going to bed and to wait for a while and follow you in later?

RM: No sir,

- iii. In respect to the period after she fell asleep, when questioned as to whether she was able to recollect conversations or things happening before waking up at noon, she accepted that she blacked out and could not recall anything. However, she did not accept that she had a conversation with Sau outside Reapi's house that morning after Miriama (PW3) had been yelling.
- iv. She stated that she went to the police the next day and accepted that her written statement was recorded on 6 December 2022.
- v. She was asked whether her relationship with her husband was strained after finding out about the alleged rape. She stated:

No, my husband helped me. Helped me to go to the police station. I was thinking for me to go to her parents and let his parents know what he did to me. But my husband referred me to the police.

- vi. RM accepted that it was her husband's idea to report the matter to the police.
- vii. It was put to the complainant that as they all lived in a small community and went to the same church, that talk (gossip) would spread quickly about the news of an extramarital affair between her and the Accused and that this would have a negative impact on her. The complainant accepted this.

[19] In re-examination, the Complainant stated that Miriama was not at the house before she went to sleep and was not there when she was drinking on the porch. Nor was Sau present when the drinking was occurring and before she went to sleep. She never heard Miriama yelling that morning. In explanation as to why she wanted to report the matter to the Accused's parents and not the police, she stated:

I wanted to tell his parents because we knew each other, we go to the same church and my husband said to report it to the police because this is not the first time that this type of incident has happened, it has been happening in Namadi but they are just scared to report it. That was the reason why my husband insisted to report it to the police.

[20] Reapi Tamurere (PW2) is 30 years old and lives in Namadi. She has four children. She described the Complainant as a friend but not a close friend. Her examination in chief was as follows:

- i. She had been drinking yaqona with her cousin from 6pm on 3 December 2022. The Complainant arrived after 7pm and the three of them drank yaqona until about 10pm when her cousin left. She and the Complainant continued drinking through to about 2am. They drank about eight bags of yaqona.
- ii. Her uncle Jalesi arrived at about 1am and he drank vodka on the porch. He had one small bottle and four large bottles of vodka.
- iii. Shortly thereafter the Accused and two other boys, Eroni and Noa, arrived. They heard the music and saw her uncle on the porch. Reapi explained that she did not give permission for them to come and drink but she could not stop her uncle as he was her relative and *'at the same time I was scared...because they were drunk'*. They sat on the veranda and drank the vodka. The Complainant also drank vodka, sharing about one and a half bottles of vodka between 2 and 3.30am. Reapi stated that RM *'was really drunk and I had to hold her hand and take her inside the house'*. The Complainant told Reapi that she wanted to sleep *'so I took her to the house and lay her down beside her son'* in the living room.
- iv. The others continued to drink. Her uncle at some point passed out as did Eroni while Noa went home. The Accused remained sitting on the porch drinking. Reapi stated that she sat and waited for him to finish the bottle of Vodka and eventually she asked him to go somewhere else to drink but he stated that he wished to stay and finish the vodka. Reapi then went inside, closed the door, and had dinner with her husband. She stated that while she was eating she invited the complainant to eat with them but she was too tired. She also stated that her Aunt Miriama (PW3) arrived at the house while she and her husband were eating. She slept in the living room. She and her husband went into their bedroom to sleep at about 3.30am. Her bedroom is off the living room.
- v. At about 7 to 7.30am she woke up when she heard Miriama screaming and banging on her bedroom door. She opened the door and saw Miriama crying. She also saw the Accused run from the living room through the bathroom out of the house.

- vi. She asked Miriama what had happened. Miriama stated that she saw the Accused on top of the Complainant. Reapi went after the Accused and saw him outside. She asked the Accused what happened to which he replied he was afraid of Miriama.
- vii. When she walked back inside the house she saw the Complainant sitting up where she had been lying just staring at her. The Complainant said that she wanted to go to the bathroom, she then went to the bathroom, and then came back and went back to sleep. Reapi woke the Complainant at about lunchtime. She had to shake her in order to wake her and then walked her home during which she told her that something had happened to her.

[21] In cross-examination Reapi stated:

- i. Her uncle joined them at about 1am. The Accused arrived some time later with Noa and Eroni but she was unsure what time and that they were all drunk. They were sitting on the porch. She was sitting next to the Complainant and the Accused was sitting on the other side of the Complainant.
- ii. She accepted that there was gossip in their small community and that they all go to the same church along with the Accused and the complainant and that if there was talk about an extramarital affair this would not be looked upon favourably in their community.
- iii. She stated that she did not want the Complainant to drink alcohol that night because the Complainant was already very drunk from drinking the yaqona. She also stated that it was normal for them to drink that much yaqona.
- iv. She did not recall any flirtatious conversation between the Accused and the Complainant.
- v. Reapi was asked about the events immediately after Miriama banged on her door and the Accused ran outside. She mentioned that when she went outside to speak to the Accused she did not see Sau but she did see Jalesi and Noa. She also did not see Sau and the Complainant talking to each other at this time outside the house. She stated that Sau and the Complainant were at her house later that afternoon.

- vi. She agreed that she did not tell the Complainant what had happened when she was walking the Complainant home and that she had told her to ask Miriama.

[22] In re-examination, Reapi stated that she knew the Complainant was drunk from drinking grog because the Complainant had told her at the time. She confirmed that Sau was not at the house in the morning but she saw him at about 3pm that afternoon.

[23] Miriama Gogo (PW3) is 55 years old. She is married and has six children. She lives near to Reapi's house, only a few doors away. She is very close to Reapi, who is her sister's daughter. Her evidence in examination in chief was as follows:

- i. On the evening of 3 December 2022, she went to a social function at the bowling club near the Grand Pacific Hotel. She was there from about 10pm to 1am. The group that she was with were drinking yaqona, but she says that she normally does not drink very much and did not drink a lot on this particular evening.
- ii. After leaving the bowling club, she and her friends got something to eat, and then she caught a taxi to Reapi's house. She arrived somewhere between 1.30am to 2am. She asked Reapi whether she could stay the night. Her niece was preparing dinner for her husband. She noticed that there were people on the porch, but she did not take any notice of them. She then went to sleep on the floor in the living room. She identified in the photographs where she slept.
- iii. She woke up the next morning sometime about 6 or 7am. She was facing the window. The sun was shining, she felt hot and she stood up in order to go home. As she got up, she saw a man lying on top of a woman having sex. She immediately thought that the woman was her daughter and she was very scared. She saw another man, Eroni, standing watching the two having sex. The man, Vili, who was having sex had his pants below his backside and he was making thrusting movements into the woman. Miriama did not realize at this stage that the woman was RM. Miriama described this as a '*shocking experience*'. She chased Eroni out the house and then ran to Reapi's door to get help from Reapi and her husband. She saw that Vili was still having sex with the woman. The woman's head was rolling from side to side and she looked unconscious. Miriama stated that she looked '*dead*'. She was '*not responding to anything*' that Vili was doing to her.

- iv. When she ran to Reapi's door she banged on the door, shouting that Vili was doing something to a girl. Reapi then opened the door and as Miriama turned around she saw the Accused run out of the house.
- v. She then went back to the woman and saw that it was RM lying on the floor. She stated:

I shook her to wake up but she didn't respond. I pulled her clothes down and I asked Reapi to look after her and I went home.

- vi. RM's dress had been pulled up to her stomach and her private parts was exposed. She pulled her black dress down. She saw that RM's black pants were thrown to the side. She stated that she had known the Accused his whole life, since he was born, and she knew immediately when she saw the man having sex that it was the Accused. She identified the Accused in the dock.
- vii. RM came to her house later with a man called Sau (DW2). RM came inside whilst Sau stayed outside. Sau called from the window to RM telling her '*to go with the flow*'. Miriama chased Sau away and then spoke to RM. RM asked her what had happened and Miriama explained what she had seen that morning.

[24] In cross-examination, Miriama stated:

- i. She didn't pay much attention to who was at the house when she went to sleep at Reapi's house that morning. She stated that her youngest daughter is 20 years old and that she and her daughter normally slept over at Reapi's house.
- ii. She woke up that next morning because it was hot. When she saw Eroni and the Accused she was scared and feared that the Accused was having sex with her daughter. It was put to her that her fear that the Accused was raping the girl was born out of the fact that Miriama thought he was having sex with Miriama's daughter. Miriama denied this, stating '*No, the thing that made me run to Reapi's door is that a girl was beneath. It's not about my daughter but my thought was for my daughter but I run because there's a girl beneath Vili*'.
- iii. She stated that she did not see RM in the living room before she went to sleep that night. She stated that she was not paying much attention to her surroundings.

iv. Miriama was asked for more details as to what she saw. She stated:

Mr Emasi: Now Ms Miriama while you saw Viliame and RM having sex did you hear anybody talking, while they were having sex...

Ms Miriama: Because Vili was doing it alone

...

Mr Emasi: When you saw my client Viliame having sex with RM you'd agree with me that RM's legs were raised up, they were spread that would be correct?

Ms Miriama: No

...

Mr Emasi: RM's legs were spread open when my client Viliame was lying on top of her?

Ms Miriama: Yes

...

Mr Emasi: When you saw Viliame having sex with RM that morning RM was not pushing at Mr Viliame, correct?

Ms Miriama: She wasn't, she was unconscious.

v. It was put to Miriama that Sau never said the words that she attributed to him at her house. She stated that he did.

vi. It was also put to Miriama that gossip about RM and Vili having an extramarital affair would be harmful to their reputation. Miriama stated that she did not involve herself in gossip.

vii. It was pointed out to Miriama that in her written statement to the police on 12 December 2022 she had not stated anything about Sau coming to her house on 4 December 2022. She accepted this.

[25] In re-examination, Miriama stated that RM had come to her house asking for an explanation. Sau did not come into the house. He stayed outside and spoke through the window.

[26] I asked Miriama whether at any time, from the moment she saw the Accused having sex with RM to the time Miriama left to return home on 4 December, did she see RM awake or conscious. Miriama stated that she did not and that RM was lying in the same

position that entire time. She stated, *'She was like sleeping'*. The Defence then asked whether RM was pretending to be asleep or unconscious. Miriama stated that *'I can confirm that she was unconscious, she was totally dead'*, *'She was not pretending'*. Asked how she knew, she stated, *'Because after Vili ran away I approached [RM] and I was the one who saw her lying down and I shook her body and I tried to wake her up but she couldn't wake up'*.

[27] The Prosecution then closed its case.

Defence Evidence

[28] I informed the Accused that having considered the evidence, I was satisfied that there was evidence for each of the elements of the offence of rape and as such, there was a case for the Accused to answer. I put the three options to the Accused and assured him that if he chose not to provide sworn evidence no adverse inferences would be drawn from this. The Accused decided to provide sworn evidence as well as call a witness in his defence.

[29] The Accused (DW1) gave evidence. His examination in chief was as follows:

- i. He is 24 years old and lives in the Namadi Koro Settlement. He has lived there since he was born and is currently employed. He lives with his parents and siblings.
- ii. On the evening of 3 December 2022, he was at home drinking beer with his friend, Eroni. They started drinking between 7 and 8pm and finished six long neck bottles. At about 10pm they left the house in order to travel to town, but on the way walked past Reapi's house and were asked to join them drinking on the porch. Reapi is his cousin. Their uncle, Jalesi, was also there. Jalesi was there with Noa and the four of them drank Jack Daniels. Reapi was drinking yaqona with RM.
- iii. When they finished the small bottle of Jack Daniels, they began drinking a large bottle of vodka. After a while RM joined them, drinking vodka, whilst Reapi continued to drink yaqona. They finished that bottle and started on a second large bottle of vodka. They began drinking that second bottle of vodka at about 1am. The Accused was shown the photograph booklet and indicated, on

photograph 5, where he was sitting that night on the porch. He was sitting with his back to the concrete wall with RM to his left and Reapi on the other side of RM.

- iv. About the time they started the second bottle of vodka, about 1am, Reapi told RM that she was going to sleep. Reapi then went inside, cooked, ate with her husband they then went to sleep in their bedroom next to the living room.
- v. At about 3.15 to 3.30am they finished the second bottle and then opened a third big bottle of vodka. By this time Jalesi and Noa were asleep. Eroni, RM and the Accused started the third bottle of vodka. He stated that Eroni was largely sleeping, while the Accused was talking to RM. They were 'fixing' each other in order to have sex. They started this conversation when everyone was asleep. He stated that RM initiated the conversation and was physically leaning on him.
- vi. When they were on their third bottle of vodka, Sau (DW2) joined them. Sau lived beside Reapi's house. This was about 4am. They eventually finished the third bottle of vodka which both Sau and Eroni were helping to drink. He stated that Eroni was falling in and out of sleep but would still drink.
- vii. The Accused stated that Miriama (PW3), Reapi's Aunt, arrived at Reapi's house when they were drinking and that Miriama *'was also drunk'*.
- viii. They finished the third bottle of vodka. After about 6am, the Accused and RM went inside together in order to have sex. He saw that Miriama was sleeping by the bed (near number '2' on photograph 6) and that RM's son was sleeping by Reapi's bedroom door. He pointed out where they lay down to have sex on the mat next to RM's son. They began kissing each other. The Accused took off his trousers and RM took off her underwear and placed it beside her. They then had sex. Their feet were facing toward Miriama. It was daylight by this time. Eroni and Sau were drinking on the porch. They had sex for about 4 to 5 minutes. While they were still having sex Eroni went by them to the toilet and then Miriama began shouting. Miriama then started knocking on Reapi's door and calling to her. When Miriama started shouting, he and RM were ashamed and he went to the toilet to put on his clothes whilst RM covered herself with the blankets. He then went outside. He saw RM come outside and talk to Sau. He then grabbed the unfinished alcohol and along with Eroni and Noa went to his house to drink it.

ix. He stated that did not know that RM was married at the time. He knew about her son. He did not become aware of the allegation of rape until the police arrested him. He stated that Miriama was lying about the rape. Only he and RM knew the truth. That Miriama was not there and that she *'came drunk, went past us and went back to sleep'* (in reference to when Miriama arrived at the house when they were drinking on the porch). That Reapi was not on the porch when he talked to RM about having sex. In answer to the question as to why RM would make up the allegations against him, he said that he was shocked and he thinks RM said it was rape because *'we were caught, her family heard about...us'*. That RM agreed to have sex, was awake during the time they were having sex and that *'when Miri was shouting at us, she [RM] was awake and she was ashamed, that's why she put the faked sleeping and lying down and covered herself with the blanket and I ran outside'*.

[30] In cross-examination, the Accused stated that he did not know that RM was married. He stated that RM started drinking alcohol with them about 11.30pm and the next morning was drunk but not that drunk. He stated that RM did not sleep at all up until when they went to have sex. He denied that RM went to sleep before Reapi started cooking and denied that Reapi asked him to go and drink elsewhere when the others on the porch had fallen asleep. The Accused stated that when he and RM were having sex Eroni did not know they were having sex when he went to the bathroom and it was not until Miriama started screaming that Eroni realised. The rape allegations were put to the Accused which he denied – he denied that RM was unconscious.

[31] In answer to my questions, the Accused stated that his relationship with Reapi was good. He stated that he was not related to Miriama as his relationship to Reapi is through Reapi's father. He has known Miriama a long time and has a good relationship with her. He stated that RM stayed on the porch drinking the entire time and did not go and sleep at any time. They both went inside together when they went to have sex. He stated that the sun was rising and coming through the windows when they were having sex but it was still dark inside. He initially stated that he was not scared he would wake Miriama or RM's son when they were having sex but subsequently stated that he was scared that someone might see them.

[32] DW2, Salesi Saunibua Momo, is 24 years old and also lives in Namadi Heights. He is known by the name Sau. His examination in chief was as follows:

- i. On the evening of Saturday, 3 December 2022, he went looking for crabs at the Nasese wall with others from 7pm to 3am. He got home at 4.15am on Sunday morning. He had a cup of tea, heard music next door and went to join them.
- ii. He saw that there was a group drinking. There was the Accused, RM, Jalesi, Noa and Eroni. Sau joined them. Jalesi and Noa were sleeping, Eroni was leaning on a post. Only he and Eroni drank the vodka. The Accused and RM did not drink. They were talking, *'[RM] was saying for the husband and the family not to know what is going on'*. When asked what she meant, Sau stated *'Maybe they were talking and for the families not to know'*.
- iii. Sau stated that RM then went inside into the living room *'and after a while'* the Accused followed. Sau stated, *'I just said yes for them to go'*. Sau continued drinking. At some point Eroni went inside to go to the toilet and then came back and sat with Sau on the porch. After this, he heard shouting from inside the house. The shouting occurred about 6.15am, *'It was daybreak'*. Sau went inside to see who was shouting. Miriama was shouting, *'hey what is happening, what is going on'*. Sau stated that *'[RM] was scared, Bill ran outside'* to the road. Sau stated that he then *'stood up and cleared the place where we were drinking'*. RM came to him *'and was crying to me and telling me not to tell her family or her husband'*. After this, *'We [RM and Sau] were just sitting around the porch and after that Reapi called us to have tea'*.
- iv. Sau went home at about 8am. He stated that he was not drunk. He stated that he did not talk to Miriama that day and he did not tell RM not to report the matter to the police.

[33] In cross-examination, Sau stated that he knew RM very well and knew that she was married and had a child. She accepted that RM was a respected member of the community, went to church and that she treated Sau with respect and courtesy. When asked what RM and the Accused were talking about when they were sitting on the porch, Sau stated, *'The only one thing [RM] mentioned was for her husband and family not to know what's going on'*. He was adamant that he heard what they were talking about and that the music did not prevent this. He described the Accused as his cousin-brother; their mothers are cousins. They are also good friends and go out socially at times. When asked whether he would do anything for the Accused, he said yes, but he would not lie for him in court. He stated that he did not provide a statement to the police because the police did not approach him for a statement.

[34] In response to my questions, Sau explained (by the use of the photograph booklet) where the Accused and RM were sitting on the porch. He stated that the Accused was sitting with his back to the corrugated iron and RM was to the Accused's right (the Accused had earlier stated that he had his back to the concrete wall and that RM was to his left). He stated that when he arrived to drink on the porch it was daybreak, the sun was rising but it was still dark. I asked about the conversation he earlier stated that he heard RM and the Accused have that RM did not want her husband and family to find out about them. Sau stated that in fact RM said this to him and not to the Accused (the transcript shows that Sau stated in examination in chief and cross-examination that this conversation was had between the Accused and the Complainant). Sau was aware when the Accused and RM went inside they were going to have sex. His evidence then became somewhat confusing and occasionally baffling. At one stage he stated that he told Eroni not to go inside the house because they might both be blamed for stealing mobile phones in the house. He stated that Eroni went to the toilet, returned to the porch and sat down next to him and then Sau heard the screaming inside from Miriama (this is in contrast to Miriama's evidence that she screamed when she saw Eroni standing watching the Accused on top of RM). Sau's evidence thereafter is as follows:

Judge: All right. So, after the screaming, after Bill ran out of the house, you said you spoke to RM?

Mr Salexi: Yes

Judge: RM came outside onto the porch?

Mr Salexi: Yes

Judge: Did Miri come outside?

Mr Salexi: Yes

Judge: And you spoke to Miri?

Mr Salexi: I only spoke with RM.

Judge: But Miri came outside as well?

Mr Salexi: Yes

Judge: And Reapt came outside?

Mr Salexi: Yes

Judge: All right...so did Bill stay there or did he go somewhere else after all this happened?

Mr Salesi: He was around the house.

Judge: And you stayed to have tea at Reapi's?

Mr Salesi: Yes.

Judge: And did you have tea with Reapi's family before you went back home?

Mr Salesi: Yes, I drank tea with Reapi's children, only Reapi's children that morning.

Judge: On the porch or inside?

Mr Salesi: Inside the house.

Judge: Where was Miri when you were having tea with the children?

Mr Salesi: Miri was outside at the porch with Reapi and RM talking.²

[35] In re-examination, Sau confirmed that he had told Eroni not to go inside the house after he came back to the toilet. The evidence continues:

Mr Emaxi: ...please explain...what would be the point of you telling Eroni not to go inside Reapi's sitting room, after he's already returned from Reapi's sitting room...

Mr Salesi: Because I was drinking alone and I didn't want to drink alone.

Summary of the Evidence

[36] On the evening of 3 December 2022, RM went with her then 4 year old son to Reapi's house to drink yaqona. Reapi and RM drank a considerable amount of yaqona from 7pm to about midnight. They were joined by Reapi's uncle who brought alcohol, a bottle of Jack Daniel's whiskey and several large bottles of vodka. Shortly thereafter, several men joined them, being the Accused, Eroni and Noa. By the time this group

² This is contrary to the evidence of Reapi and Miriama. Reapi stated in evidence that she did not see Sau at her house that morning. Miriama stated that RM was unconscious the entire time she saw her at Reapi's house that morning and Reapi stated that she saw RM only get up to go to the bathroom before she laid down and went back to sleep.

arrived, RM was already very 'doped' (drunk) from the yaqona. She then drank the vodka with the group, drinking nips from a half-filled medium sized glass. Music was playing, there was friendly conversation and this was all happening on the porch at Reapi's house.

[37] As the early morning wore on, some of the drinkers fell asleep where they were sitting, others continued drinking. Sometime between 2am and 3am, Reapi made dinner for her husband and they both ate. Miriama arrived at the house about this time and found a place to sleep on the living room floor. RM's son was already asleep in the living room. Reapi and her husband went to sleep in their bedroom somewhere between 3am and 3.30am. Between 6.30am and 7.30am, Miriama woke up and saw the Accused on top of RM having sex right in front of her. She also saw Eroni standing next to them, watching. Miriama screamed and ran to Reapi's door, banging on the door to seek help. Eroni ran outside. So too did the Accused. Later that same day, RM and her husband made a report to the police alleging rape against the Accused.

[38] The Prosecution case is that RM was heavily intoxicated and went to sleep just before or about the time Reapi was cooking, i.e. between 2-3am. She slept in the living room next to her son. Her level of intoxication was such that she was rendered unconscious and remembers nothing of the events from the time she went to sleep (except being woken by Reapi, shortly after going to sleep, to enquire whether she wanted to eat) until she was woken up by Reapi about midday. The Prosecution say that at about 7am while RM was unconscious from the intoxication the Accused made his way from the porch into the living room. He removed RM's underwear and proceeded to rape RM whilst she was unconscious. The Prosecution say that the Accused was aware that RM was unconscious and aware that she could not consent to any sexual intercourse. Further, RM knew nothing of the rape until she was told of it by Miriama later that day.

[39] The Defence case is that RM did not go to sleep but remained on the porch the entire time. That there was a flirtatious conversation between RM and the Accused on the porch, they agreed to have sexual intercourse, and at about 6am to 6.30am, they both went into the living room in order to have consensual sex. They were doing so when discovered by Miriama. Miriama misconstrued the matter, jumping to the wrong conclusion that the Accused was raping RM. RM subsequently pretended to be unconscious to avoid the fallout from the shame and embarrassment of being caught

having an extramarital affair with the Accused. Sau was present at the material time and confirms that RM was motivated to lie about the rape.

- [40] There are, then, two competing versions neither of which is reconcilable with the other. If I accept the Prosecution's evidence, then the Accused is guilty of the offence of rape. However, if I accept the Defence's evidence then the Accused is not guilty of the charge.

Analysis of the evidence

- [41] The sole issue to determine is consent. The Accused accepts he had carnal knowledge of RM. He says it was consensual. The question is whether RM consented and, if not, whether the Accused knew RM was not consenting. There is the added factor here of RM's intoxication. In this respect, I have regard to the following in *State v Suguturaga* [2019] FJHC 1070 (8 November 2019):

46. *In a situation where the capacity of the complainant to consent due to self-induced intoxication through drink and drugs is in issue the following points may be considered by the court (Blackstone's Criminal Practice 2018 [B3.30]):*

- a) *Consumption of alcohol or drugs may cause someone to become disinhibited and behave differently. If she is aware of what is happening, but the consumption of alcohol or drugs has caused her to consent to activity which she would ordinarily refuse, then she has consented no matter how much she may regret it later. The fact that a person makes an unwise choice does not mean that she lacked the capacity to make it. A drunken consent is still a consent if a person has the capacity to make the decision whether to agree by choice.*
- b) *However, if a complainant becomes so intoxicated that she no longer has the capacity to agree, there will be no consent. Clearly she will not have the capacity to agree by choice where she was so intoxicated through drink or drugs, and her understanding and knowledge*

are so limited that she was not in a position to decide whether or not to agree. (This relates to understanding and knowledge of what is going on, as opposed to the quality of the decision-making.)

- c) A person may reach such a state without losing consciousness. For instance, she may be in a state where she knows that she does not want to take part in any sexual activity with someone, but she is incapable of saying so. Alternatively, she may have been affected to such a degree, that, whilst having some limited awareness of what is happening, she is incapable of making any decision at all.*
- d) If a person is asleep or has lost consciousness through drink or drugs, she cannot consent, and that is so even though her body responds to the accused's advances.*

[42] Both the Prosecution and the Defence accept that RM drank alcohol at the material time. The Accused stated that RM was not that drunk. If the alcohol and yaqona caused her to behave differently, less inhibited than usual, and to consent to activity she would ordinarily refuse then she has consented no matter how much she may have regretted it later. If, as the Prosecution allege, RM was asleep or lost consciousness as a result of the yaqona and alcohol, then she cannot consent.

[43] There are material contradictions as between the witnesses for the Prosecution and the witnesses for the Defence. I must decide which evidence is reliable and who is telling the truth. I keep in mind the following factors when determining the credibility and reliability of a witness such as: promptness, spontaneity, probability, improbability, consistency, inconsistency, contradictions, omissions, interestedness, disinterestedness, bias, and the demeanour and deportment in court - see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomon Qurui* (HC Criminal - HAC 14 of 2022)). In *Liberato and Others v The Queen* [1985] HCA 66; 159 CLR 507 at 515 the court discussed the approach to be taken where there are conflicting versions of evidence given by the Prosecution and the Defence witnesses. Brennan J stated:

When a case turns on a conflict between the evidence of a Prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the Prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification".³

[44] In *State of UP v M K Anthony* (1985) 1 SCC 505, the Court stated:

While appreciating the evidence of a witness, the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinize the evidence more particularly to find out whether deficiencies, drawbacks, and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and a refined lawyer.⁴

[45] In *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* (1983) 3 SCC 217, the Court stated:

³ My emphasis.

⁴ My emphasis.

A witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen ... The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another ... It is unrealistic to expect a witness to be a human tape recorder In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time sense of individuals, which varies from person to person... Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on...⁵

[46] I have carefully considered the evidence of all the witnesses provided at trial. This includes their demeanor, their reactions to questions, any internal inconsistencies as well as inconsistencies with the other witnesses. I have also read the written transcript of the evidence provided at trial.

[47] I found RM to be a reliable and straightforward witness. She did not embellish her evidence. She made concessions in cross-examination such as accepting that an extramarital affair would reflect badly on her if it was true. She explained why she did not wish to report the matter to the police, instead wishing to only have the matter raised with the Accused's parents. She also explained why her husband wanted to report the matter to the police. I did not find her to be defensive when confronted by accusations in cross-examination about her conduct. She accepted that she could not recall events done or said when she 'blacked out'. However, she was adamant that up until the time that she went to sleep, she could recall matters such as not having a flirtatious conversation with the Accused and not making later arrangements to have sex with the Accused. She was also adamant that she did not see Sau on the porch at any time prior to going to sleep. Understandably, RM appeared nervous when providing evidence and appeared to be trying to hold her emotions in check. She became teary and emotional when describing the moment that Miriama told her about

⁵ My emphasis.

the rape. She was also emotional when explaining, in re-examination, why she had wanted the Accused's parents to deal with the matter. I found her to be a truthful witness.

[48] The importance of Reapi's evidence is that it was consistent with both RM and Miriama on important matters. She corroborated RM on the fact that RM went inside to sleep in the early hours of 4 December 2022, about the time she was cooking dinner. She confirms that RM was heavily intoxicated from drinking yaqona and alcohol over a 7-8 hour period. Reapi's evidence is also important in that it contradicts the evidence of the Accused and Sau on material aspects of their version of the events. For example, the Accused stated that RM stayed up drinking on the porch up until they went inside to have sexual intercourse. Reapi not only states that RM went to sleep inside but that when Reapi finally went to sleep the Accused was the lone person awake and drinking on the porch. She also stated that Sau was not at her house that morning after the screaming by Miriama – contrary to the evidence of Sau. I am satisfied that Reapi was a truthful witness.

[49] The critical evidence for the Prosecution is clearly Miriama's evidence. She saw the Accused on top of RM. This evidence is not denied. Miriama stated that she initially feared that the woman beneath the Accused was her daughter. The Defence say that this fear caused Miriama to misconstrue that the two were, in fact, having consensual intercourse. I do not accept this. This impression may well have initially played a rôle in her understanding of what was happening. However, it is clear from her description of the other aspects of the events that morning that RM did not visibly appear to be engaged in consensual intercourse and appeared to be unconscious. Miriama stated that the Accused was the only person active and that RM's head was rolling from side to side. She described RM as '*She looks dead*'. After the Accused ran outside, Miriama tried to shake RM to wake her but was unable to do so. RM remained unconscious. She also stated that RM's private parts were exposed as her black dress was pulled up to her stomach. If RM was pretending to be asleep she would have covered herself to protect her modesty, particularly with everyone waking up and moving about the house. Miriama did not accept, in cross-examination, that RM was pretending to be asleep. Miriama states that RM remained unconscious until she left to go home. Reapi's evidence is that when she returned from speaking to the Accused outside, RM was sitting up staring and then went to the bathroom, after which she went back to sleep. Is this inconsistent with Miriama's evidence and does it support the Defence's assertion that RM was pretending? I am satisfied that it does

not. Both Miriama and Reapi's recollections can be correct. Miriama will not have been watching RM the entire time that morning. It is conceivable that RM woke up briefly in a dazed intoxicated state. This is consistent with Reapi's evidence that RM was sitting up 'staring'. She may well have gone to the bathroom in this state. RM states that she does not recall the events at the time. Reapi stated that RM went back to sleep and did not wake up again until woken by Reapi 5 hours later – this is consistent with RM still being in an intoxicated state.

[50] Miriama corroborates RM's evidence that Sau tried to persuade RM not to report the matter to the police. Miriama is an independent witness and I accept her evidence as being a true account of what she saw and heard.

[51] The Prosecution witnesses have come under scrutiny by the Defence. Certain parts of their evidence are inconsistent with each other. I also note that Miriama did not mention Sau's presence at her house in her police statement. The Court is permitted to take into account these inconsistencies in order to consider whether the witnesses are believable and credible. It is obvious that the passage of time can affect one's accuracy of memory. It cannot be expected that every detail will be the same from one account to the next. If there is an inconsistency, it is necessary to decide, firstly, whether the inconsistency is significant and, secondly, whether the inconsistency affects adversely the reliability and credibility of the witness. If it is significant, then it is for this Court to consider whether there is an acceptable explanation. If there is an acceptable explanation for the change, then this Court may conclude that the underlying reliability of the witness' evidence is unaffected. If the inconsistency is fundamental, then it is for this Court to decide to what extent it influences the reliability of the witness' evidence. As the Court of Appeal observed in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.201 (2 October 2015) at [16]:

*[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (supra):*

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory

and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder.

[52] There were a number of inconsistencies between the Prosecution witnesses, some of which have already been identified. The times that events occurred, who was present and when, and so on. Reapi says they drank 8 bags of yaqona while RM says it was 4 bags. RM says that Sau approached her to dissuade her from reporting the matter before she went to speak with Miriama but Miriama says it occurred at her place. I would be surprised if there were no inconsistencies. A considerable amount of yaqona and alcohol was consumed in the period from 7pm on 3 December. Add to that the lateness by which most went to sleep. It has also been almost 2 years since the events occurred and memories will naturally have faded. The inconsistencies do not shake the core evidence of the witnesses. The fact remains that RM drank a considerable amount of yaqona and alcohol and was, according to both Reapi and RM, very drunk. Also, irrespective when and where Sau tried to dissuade RM, both RM and Miriama witnessed it.

[53] In terms of the Defence's evidence, the Accused states that he had consensual sexual intercourse with RM. His witness, Sau, corroborates his evidence on material aspects. The Defence claim that RM is lying about the matter in order to protect herself and avoid the shame and consequences of RM's husband and family knowing of the truth of the extramarital affair.

[54] As the Defence has raised a motive on the part of the Complainant, I have directed my mind to the Jovanovic direction to remind myself that an accused has no burden to prove a motive or prove a reason for a complainant to lie. The Court of Appeal in *Rohocika v State* [2023] FJCA 251 (29 November 2023) stated at 32 to 34:

In R v Jovanovic (1997) 42 NSWLR 520 Sperling J set out a draft direction that emphasised that:

It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered.

Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about.

[33] *The same has been stated as follows in NSW Criminal Trial Courts Bench Book at 3-625:*

If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58], Jovanovic v R (1997) 42 NSWLR 520 at 521-522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: Jovanovic v R at 523.

[34] *NSW Criminal Trial Courts Bench Book also states that:*

A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) Evidence Act 1995. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: South v R [2007] NSWCCA 117 at [42], MAJW v R [2009] NSWCCA 255 at [31].

[55] The Accused stated RM stayed up drinking on the porch, did not go to sleep at any time inside the house, and that they both went inside the living room together to have consensual sex. I am satisfied that the Accused is not telling the truth. A significant aspect of the Accused's version is that RM did not go to sleep and stayed on the porch the entire time. I have already found that she did go to sleep at about 2-3am. RM gave evidence to this effect. Most importantly, Reapi corroborates her on this matter.

Reapi is the Accused's cousin and their relationship is good. Reapi has no reason to lie and I am satisfied it is not a matter that Reapi could be mistaken about. Reapi even recalls waking up RM to ask her whether RM wanted to eat. Miriama's evidence is also at odds with the Accused's version. Rather than appearing to be engaged in consensual sex, Miriama described RM as being "dead" like and not responding to anything at the time the Accused was on top of RM. Miriama believed that RM was unconscious. Efforts to wake RM after the Accused ran out of the house were unsuccessful.

[56] Was RM pretending to be unconscious to protect her reputation? As I have already stated, I found RM to be a reliable and honest witness. I do not accept that RM lied or pretended to be sleep on the morning of 4 December 2022 in order to protect her reputation. If the fear of the affair being discovered was sufficient motivation for RM to agree to the matter being reported to the police (placing the Accused at great risk of being sent to prison) why agree in the first place to have sexual intercourse on the living room floor in broad daylight, only an arms-length away from her son and Miriama. On the Accused's version of the events, they had an opportunity to have sex when it was dark, when everybody had gone to sleep at about 3,30am. But instead, according to the Accused, they waited about 3-4 hours until daylight to do so. The Accused's version makes no sense.

[57] With respect to Sau, I am satisfied that he was not present at Reapi's house that morning. Reapi stated that Sau was not there. I do not accept that she would forget Sau being there given Sau's evidence that he cleaned up the porch and had tea with Reapi's children. There were a number of unsatisfactory aspects of Sau's evidence. He stated that the Accused was sitting on the porch with his back to the corrugated iron. The Accused stated that his back was to the concrete wall. Sau says that RM was sitting to the Accused's right. Both the Accused and Reapi state that RM was sitting to his left. The positions of the Accused and RM are not significant in themselves but taken with the rest of Sau's evidence reinforces my view that Sau was not present. His confusing account regarding Eroni's movements immediately before Miriama screamed is yet another example of the unsatisfactory evidence he provided. Sau denied that he had tried to dissuade RM from reporting the matter to the police but both RM and Miriama contradict him. While RM may have a reason to do so, Miriama does not.

[58] Finally, I have considered whether RM blacked out and is unable to now recall having had consensual intercourse with the Accused. I have discounted this as it is not consistent with even the Accused's version of the events.

Conclusion

[59] As stated, despite the fact that I do not accept the Accused's evidence does not mean that the Accused is guilty. Also, that I do not accept that RM lied about the rape to protect her reputation does not mean that the Accused is guilty. The Prosecution is not relieved of its burden to prove beyond a reasonable doubt that the offence was committed by the Accused. Having listened to all the evidence carefully I am sure that RM did not consent to the sexual intercourse on 4 December 2022. She was in no condition to consent. I am satisfied that RM was heavily intoxicated from drinking yaqona and alcohol and that she went to sleep in this intoxicated state at about 3am. The Accused remained drinking on the porch. At about 6.30am when everyone was asleep in the house the Accused went inside and raped RM while she was unconscious and unable to consent to the sexual intercourse. The Accused would have been aware that RM did not consent when he saw RM unconscious and when he removed her underpants.

[60] Accordingly, the Court is satisfied beyond a reasonable doubt that the Accused on 4 December 2022 had carnal knowledge of RM without her consent and knowing that she had not consented and/or knowing that she was unable to consent because of her intoxicated condition.

[61] In view of the above, I find the Accused guilty as charged of rape contrary to s 207(1) and (2)(a) of the Crimes Act, and he is, accordingly, convicted.



D.K.L. Tuiqereqere
JUDGE

Solicitors:

To: Office of Director of Public Prosecutions for the State
Office of Legal Aid Commission for the Accused