

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO. HAC 338 OF 2011S**

**STATE**

**VS**

**LUKE MAYA**

**Counsels** : **Ms. L. Koto for the State**  
**Accused in Person**  
**Hearings** : **25<sup>th</sup> and 26<sup>th</sup> March, 2013**  
**Summing Up** : **27<sup>th</sup> March, 2013**

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**SUMMING UP**

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**A. ROLE OF JUDGE AND ASSESSORS**

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State Counsel and the accused have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State Counsel and accused, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

**C. THE INFORMATION**

7. You have a copy of the information with you, and I will now read the same to you:

*"... [read from the information]...."*

**D. THE MAIN ISSUE**

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:
  - (i) Did the accused, on 8<sup>th</sup> October, 2011, at Nasinu in the Central Division, rape the complainant?

**E. THE OFFENCE AND ITS ELEMENT**

9. For the accused to be found guilty of “rape”, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused had sexual intercourse with the complainant, that is, his penis penetrated the complainant’s vagina;
  - (ii) without the complainant’s consent; and
  - (iii) he knew the complainant was not consenting to sex, at the time.
10. In law, the slightest penetration of the complainant’s vagina by the accused’s penis, is sufficient to constitute “sexual intercourse”, and it’s irrelevant whether or not the accused ejaculated.
11. Consent is to “agree freely and voluntarily and out of her own free will”. If consent was obtained by force, threat, intimidation or fear of bodily harm to herself, that “consent” is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all.
12. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to sex, at the time. You will have to look at the parties’ conduct, at the time, and the surrounding circumstances, to decide this issue.

**F. THE PROSECUTION’S CASE**

13. The prosecution’s case were as follows. The accused and the complainant had been living in a defacto-relationship for 11 years prior to 8<sup>th</sup> October 2011. The accused was 42 years old, while the complainant was 36 years old. They resided in a Government Barrack in Narere, with their three children. Sometime in September 2011, the couple broke up, and the accused went to live with another woman, at his sister’s house.
14. According to the prosecution, the accused and the complainant were not staying together on 8<sup>th</sup> October 2011. In the morning, the complainant was doing her washing at her residence, and was hanging her clothes to dry, outside her house. Her children were in the sitting room. It was after 9

am. According to the prosecution, the accused came to the complainant's house drunk. He forcefully got hold of the complainant, and took her into the house.

15. According to the prosecution, the accused forcefully dragged the complainant into her bedroom. In the bedroom, he forcefully pushed her onto her bed. The complainant struggled to free herself by kicking the accused in the neck. However, the accused overpowered her. He assaulted her on the thigh, and forcefully took off her clothes. He then forcefully inserted his erected penis into her vagina, without her consent. He had sex with her for about 5 minutes, and according to the prosecution, he knew she was not consenting to the same, at the time. The accused slept for an hour in the complainant's bedroom, and then left for his other woman.
16. Five days after the incident, the complainant reported the matter to police. An investigation was carried out. She was taken to CWM Hospital for a medical examination. The accused was caution interviewed by police on 16<sup>th</sup> October, 2011. He was formally charged with rape on the same day. The prosecution is asking you, as assessors and judges of fact, that given the above, you are to find him guilty as charged. That was the case for the prosecution.

**G. THE ACCUSED'S CASE**

17. On the 25<sup>th</sup> March, 2013, the first day of the trial, the accused pleaded not guilty to the charge of rape, when the information was put to him. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was put to his defence, he choose to remain silent and called no witness, in his defence.
18. As a matter of law, I must direct you that nothing negative whatsoever should be imputed to the accused, when he choose to remain silent, and call no witness. That was, in fact, his right. The burden to prove the accused's guilt beyond reasonable doubt, remained with the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything, at all. He is entitled to remain silent, fold his arms, as he did here, and require the prosecution to prove the charges, against him, beyond reasonable doubt. That was his right.

19. However, all is not lost for you, as far as the accused's position in the case, was concerned. He was caution interviewed by DC 3627 Kiban at Nasinu Police Station on 16<sup>th</sup> October, 2011. He was asked a total of 60 questions and he gave 60 answers. The caution interview statement was tendered as Prosecution Exhibit No. 1. In the interview notes, the accused admitted having sexual intercourse with the complainant, at the material time. However, he said, he did so with her consent. We will discuss this matter further, when we analyze the evidence later. Suffice to say, at this stage that, because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the accused.

#### H. **ANALYSIS OF THE EVIDENCE**

20. The State's case against the accused is grounded on three particular type of evidence, that is;
- (i) the complainant's evidence;
  - (ii) the complainant's medical report; and
  - (iii) the accused's alleged confession in his police caution interview statements (Prosecution Exhibit No. 1).

We will discuss these evidence below.

##### **(i) The Complainant's Evidence:**

21. The State's case against the accused is grounded basically on the complainant's evidence. In other words, the State's case against the accused stands or falls, on whether or not, you, as assessors and judges of fact, accept the complainant, as a credible witness. You have watched her give evidence in court. Was she forthright, or was she evasive? Was she hiding anything from you? How did you assess her when answering questions? What was her demeanour like? Do you find her to be a credible witness? Your decision on this case will depend on how you answer the above questions. If you find her to be a credible witness, then you are entitle to accept some or the whole of her evidence, and you will have to find the accused guilty as charged. If you find her not to be a credible witness, then you are entitle to reject some or the whole of her evidence, and you will find him not guilty as charged. It is entirely a matter for you.
22. In this case, the complainant said, she was hanging out her clothes, outside her house, on 8<sup>th</sup> October, 2011, after 9 am. She said, the accused came to her drunk. She said, the accused then

forced her into her house and into her bedroom. She said, he dragged her there. He then pushed her onto her bed. She said, she struggled to free herself, by kicking him in the neck. However, he overpowered her by assaulting her thigh. She said, she got weak. She said, he forcefully took off her clothes, inserted his penis into her vagina, and had sex with her for about 5 minutes. After sex, she said, he slept for an hour, and left her house. She said, she did not consent to him having sex with her, at the time. She appeared to say that, the accused well knew she was not consenting to sex at the time. If you accept the complainant's evidence, you must find the accused guilty as charged. If you reject the complainant's evidence, you must find the accused not guilty as charged. It is a matter entirely for you.

**(ii) The Complainant's Medical Report [Prosecution Exhibit No. 3]:**

23. After the alleged rape incident on 8<sup>th</sup> October, 2011, the complainant said, she did not report the matter because one of her sons was disturbed by what the accused did to her, and he nearly committed suicide. However, 5 days later she reported the matter to police. She was taken to CWM Hospital, and was medically examined by Doctor Viliame Nasila [PW5]. PW5 submitted his medical report in court as Prosecution Exhibit No. 3. In the report, he recorded his medical findings.
24. You must carefully read and understand the contents of the medical report. The medical report records the views of a professional person, in this case, Doctor Nasila, after examining the complainant. He is not interested in the outcome of the case, but for the correctness of his factual finding, after examining his patient. In other words, he has no hidden agenda to push in this case, but for his factual findings.
25. In D(10) of the report, the doctor recorded the history of the case as related by the complainant, as follows, **"...The alleged forcefully had sexual intercourse with the patient. He forced patient on bed hit her thigh with his elbow and bit her left thigh. Then he forced her to do oral sex on him and then had forceful sexual intercourse with the patient. At the same time he made marks on her neck..."** In D(12) of the report, the doctor recorded his medical findings. You must carefully read and consider this medical findings. Regarding his medical findings, Doctor Nasila in his evidence said, **"...Considering the history as related by patient, the medical findings are**

**consistent with the history, as recorded in D(10) of the report. The report support the view that there was a struggle between the accused and the complainant. The medical findings is consistent with what the patient told me in D(10) of the report. The injuries had been on the patient for 5 days...”**

26. The doctor had said his views above. It appeared to support the complainant’s version of events. If you accept the doctor’s evidence, it will have the effect of strengthening the complainant’s evidence, and making her out to be a more credible witness. If you reject the doctor’s evidence, then you will have to work on the complainant’s evidence alone, to decide whether or not the accused is guilty as charged. It is a matter entirely for you.

**(iii) The Accused’s Alleged Confession in his Caution Interview Statements [Prosecution Exhibit No. 1:**

27. On 16<sup>th</sup> October, 2011, DC 3627 Kiban Kaburoro [PW3] caution interviewed the accused, at Nasinu Police Station. He asked a total of 60 questions, and the accused gave 60 answers. PW3 submitted the caution interview statements as Prosecution Exhibit No. 1. In question and answer 56 of the caution interview notes, the accused admitted that no force, threats or promise was done on him to give his statements. In other words, he appeared to be saying that he gave his statements voluntarily and out of his own free will.
28. As a piece of evidence, the accused’s caution interview statement, from the prosecution’s point of view, is important in that the accused admitted having sexual intercourse with the complainant, at the material time. [See Questions and Answers 31, 33, 37, 38, 39, 40, 50 and 51] So, it would appear that by admitting the above, the first element of rape as described in paragraph 9(i) hereof, appeared to be satisfied. From the defence’s point of view, the caution interview statements is also important in that the accused appeared to be saying that, the complainant consented to having sex with him, at the time [see Questions and Answers 32, 44, 45, 46, 47, 48, 49 and 51] If this is accepted by you, then you must find the accused not guilty as charged. If you accept that sexual intercourse occurred between the two, then the accused’s admission appear to further confirm the complainant’s version of event that the accused had sex with her, at the material time.

29. However, in considering the accused's alleged confession, I must, as a matter of law, direct you as follows. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, before you can accept a confession, you must be satisfied beyond reasonable that it was given voluntarily by its maker. The prosecution must satisfy you beyond reasonable doubt that the accused gave his statements voluntarily, that is, he gave his statements out of his own free will. Evidence that the accused had been assaulted, threatened or unfairly induced into giving those statements, will negate free will, and as judges of fact, you are entitled to disregard them. However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of fact, you are entitled to rely on them for or against the accused.
30. The accused said in his interview that no force, threats or promises was done on him by the police to give his caution interview statements. DC 3627 Kibau [PW3] said, he did not assault, threaten or made promises to him before, during and after the caution interview. He said, he gave the accused his legal rights and the standard caution. He said, the accused gave his statements voluntarily. What you make of the accused's caution interview statements, as a piece of evidence, is entirely a matter for you.

**I. SUMMARY**

31. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.
32. Your possible opinions are as follows:
- (i) Rape : Accused: Guilty or Not Guilty



33. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions.

**Salesi Temo**

**JUDGE**

**Solicitor for the State : Office of the Director of Public Prosecution, Suva**

**Solicitor for the Accused : In Person**