



correct and act upon it. You must apply the law as I direct you, as throughout the trial, "*the law*" has been my area of responsibility.

- (ii) In as much as I am entrusted with the responsibility of the area of "*Law*", Madam Assessors and Gentleman Assessor, you hold the responsibility of the "*facts*". You are Judges of the facts. It is you who should decide whose evidence is to be relied upon, what evidence is to be accepted, what weight is to be put on a particular piece of evidence, etc.
- (iii) Therefore, if I express any particular view or opinion or if I appear to do so about the facts of this case in my summing up, it is solely a matter for you to decide whether or not to accept what I say. You can either agree with my contention or ignore the same and formulate your own opinions. In the same vein, Counsel for the Prosecution and Defence have already addressed you on the facts, but, once again, you need not adopt their views of the facts, unless you do agree with their contention and analysis. The Counsel has a right to make such comments when performing their roles and duties. If you strongly think that those comments and analysis do appeal to your common sense and judgment, you are free to use them as you see fit. But, when I direct you on the Law and legal principles, you have to accept that as true and accurate and should act upon that. In the same vein, I might overlook or omit certain evidence, which in your analysis, is important. You can formulate your own opinions by giving due consideration to any piece of evidence you think necessary.
- (iv) You have to take into account all the evidence, both oral and documentary. You can accept all of what a witness says or reject all or accept a portion of it and reject the rest. As judges of facts, you are the masters of what to accept from the evidence placed before this court. You will not at any time be asked to give reasons for your opinions. Your opinions need not be unanimous. But it would be desirable if you three can agree upon on the final decision. As the Judge who presides this case, your opinions are not binding on me, but, I assure you that I will give your opinions full weight when I decide upon the final judgment of the Court.

- (v) It is of utmost importance that you must judge or reach to a decision of this case solely based on the evidence that you heard and saw in this court room and nothing else. There will be no more evidence. You may have read or seen about this case in the printed or electronic media or elsewhere before or during the trial. You must totally disregard those. It is your duty to apply the law or the legal principles, which I am going to explain to you in a short while, to the evidence you have heard and saw within the four corners of this court house.

## 2. THE BURDEN AND STANDARD OF PROOF

- (i) Before summarizing and analyzing the already lead evidence in this court, it is my duty to enlighten you on several legal principles, which are involved in a criminal trial of this nature. Firstly, the issue of '**PROOF**'. As a matter of law, I must direct you that the responsibility or the onus of proving the case against the Accused rests upon the Prosecution. That is a continuing responsibility casts upon the prosecution throughout the trial and it never shifts to the Accused. There is no obligation or duty upon the Accused to prove anything, including his innocence or otherwise. Accused, though charged before a court of law, is presumed to be innocent until he is found guilty by a competent court of law.
- (ii) What is the standard that the Prosecution has to adopt in proving the case against the Accused? In legal literature, it is said that "*the Prosecution should prove its case against the Accused beyond reasonable doubt*". Its simplified version is that if you are to find the Accused guilty of the offence charged, you must be satisfied to an extent where you are sure of his guilt. I re-iterate, that you must be "**sure**" of the guilt and nothing less will do. There is no mathematically proven formula for you to be "**sure**". In the final analysis, it rests on the robust common sense of yours, which should not be fixed from over emotional responses.
- (iii) If you have any reasonable doubt, the benefit of such doubt should be given to the Accused. Then it is your duty to express an opinion of "**NOT GUILTY**". But, it has to be borne in mind that such '*doubts*' must be '*reasonable*'. If it is to be '*reasonable*', it should be actual and substantial doubts as to the guilt of the Accused which arose from the evidence, but should not be an imaginary or trivial or a merely possible doubt. The doubt, if the Accused is going to have any

benefit, should be based upon reason and common sense grown out of the evidence.

**3. THE INFORMATION**

- (i) You have been provided with a copy of the information. Please read it now.

“SAMUELA TUIVESI is charged with the following offence:

*Statement of Offence*

**RAPE:** contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of the Offence*

**SAMUELA TUIVESI** on the 5<sup>th</sup> day of February, 2012, at Khalsa Road, Valelevu in the Central Division, had carnal knowledge of **A.S.** without her consent.”

**4. ELEMENTS OF THE OFFENCE**

- (i) The charge against the accused is based on Section 207 (1) (2) (a) of the Crimes Decree 2009. For the prosecution to bring home this charge successfully, they have to prove the following elements in the charge.

- The accused, (Samuela Tuivesi in this instance)
- had carnal knowledge of A.S.,
- without her consent.

- (ii) Carnal knowledge or sexual intercourse is proved when the penis of the Accused has penetrated the complainant’s vagina. In the eyes of law, even a slightest penetration of the complainant’s vagina by the penis of the Accused is sufficed to establish “*sexual intercourse*”. Ejaculation is irrelevant and not essential in proving the “*penetration*”. In this instance, ‘penetration’ is not a contested issue, as both parties have agreed on that.



- (iii) If the complainant agrees freely and voluntarily out of her own free will to perform the sexual intercourse in issue, she is said to have '*consented*' to the alleged sexual act. But, if that '*consent*' was obtained by force or threat or intimidation or putting her in fear of bodily harm or false and fraudulent representations about the nature and purpose of the act or sexual intercourse, that is not a "*free and voluntary*" consent on the part of the complainant. Furthermore, if the consent was obtained by exercise of the authority of the accused, it is not a free and voluntary '*consent*'. Therefore, '*consent*' is not proper or legitimate in the eyes of law, though it is visible on the face of it, had it been obtained in such a manner described above. It is this '*consent*' is disputed by the parties in this trial.
- (iv) As a matter of law, I am directing you that there is no need to look for any corroboration of the complainant's evidence for an Accused to be convicted on a charge of 'Rape'. If the evidence of the complainant is so convincing that you can place your reliance beyond reasonable doubt, you can solely act upon it even in the absence of any corroborative evidence. As a matter of law I am directing you that the absence of injuries or remarks for physical resistance on the complainant does not necessarily mean that she '*consented*' to the sexual act in issue.
- (v) At the same time, the Accused must know that the complainant was not consenting to have sex at the time in issue or that he was reckless in having sexual intercourse with her without knowing whether she was consenting to the act or not. The issue you have to answer in this instance is "**Did the Accused rape the complainant on 5<sup>th</sup> day of February 2012 or not?**".
- (vi) You would recall that a medical professional took the stand as an '*expert*' in her respective subject area. Expert evidence is permitted in the criminal trials to provide the panel of assessors and the court a better view on certain scientific information, which is outside our experience and knowledge. An expert witness is entitled to express an opinion in relation to the issues arisen within their subject area of expertise. Nevertheless, after a careful consideration of the expert opinion, you can either accept such opinion or reject it. Once again it is for you to decide whose evidence and whose opinion you are going to accept or reject.

- (vii) The prosecution says that the accused made a confession to the police during his cautioned interview and for you to rely on it. Now, madam assessors and gentleman assessor, you must consider whether the accused made such an admission or confession or not. If you are sure that he did so and it is true, you may take it into consideration when considering your decision. But, if you are not sure, that the accused made such admission or confession, simply disregard it. The caution interview statement provided to you refers to questions and answers pertaining to two different incidents. Questions 64 to 100 do not have any bearing to this charge. Therefore, you should not take those questions and answers into consideration when you deliberate this matter.

## 5. THE CASE OF THE PROSECUTION

- (i) Ms. A.S., the complainant took the stand first for the prosecution. She had been staying with her aunty and uncle in her grandmother's house at Khalsa Road, New Town. She had done a part time cleaning job at one old Indian couple's house. She said that the alleged incident took place on 5<sup>th</sup> of February 2012. Whilst she was waiting at Dan's Car Wash for one of her friends, after returning from work, she had met the accused with two other men.
- (ii) According to Ms. A.S., she was called by the accused for a 'drink'. Even though she had refused to join them, the accused had pulled her by hands and taken with them saying that it would only be three (3) cans. They had gone under a house. After finishing the three cans, the accused had asked the other two to go and buy some more drinks. Then he had started touching her breasts. Despite her resistance and struggle, the accused had pushed her down and laid on top of her. After pulling her pants, he had removed his clothes and inserted his penis into her vagina. Ms. A.S. said that she was scared at that time that he will kill her and therefore she had to give up the struggle as she was helpless. She said that she did not tell this incident to anybody as she was scared that if she does so, the accused will chase her grandmother from the house she lived as the land belongs to the accused.

- (iii) Doctor Unaisi Tabua had examined the complainant on 10<sup>th</sup> February 2012 at CWM. She tendered the Medical Report of Ms. A.S. to court as Prosecution Exhibit No. 1. The history given to her by Ms. A.S. was read in open court. It says that;

*"According to patient, joined a drinking party of 3 on Monday with other 2 guys, known to her, after 3/4 glasses, feel unconscious, woke up the next day to be told, that she was found naked with four other guys "doesn't know them" and didn't know what happened. But previous day (Sunday) she was raped by her distant uncle who threatened her if she didn't come to him freely he would chase them away from their home since he's the landowner, despite her refusal and efforts to get away from him, he forcefully penetrated her and had intercourse with her. He is also one of the guys she drank with on Monday."*

- (iv) Referring to her specific medical findings, Doctor Tabua said that she did not notice any lacerations or bruises on Ms. A.S.'s body, but noted the remnants of her hymen. She opined that there could be a possibility for the bruises and lacerations to be disappeared within 48 – 72 hours. Based on the hymenal remnants and the history, the doctor said that she cannot overrule the possibility of a 'sexual assault'.
- (v) The last witness of the prosecution was, Detective Corporal 2561 Vinod Chand. He was the Interviewing officer of the accused. He tendered the caution interview statement of the accused as Prosecution Exhibit No. 2. He said that he offered all the legal rights to the accused before the interview. He stressed that before or during or after the interview the accused was not induced, threatened, intimidated, coerced or oppressed, but, he looked healthy and friendly.
- (vi) The Charge Statement of the accused was tendered to court with the consent of both parties.
- (vii) That is the case of the prosecution. Then the Court called for the defence.

## 6. THE DEFENCE CASE

- (i) Mr. Samuela Tuivesi, the accused offered evidence from the witness box. He said prior to this incident, which took place on 5<sup>th</sup> February 2012, he did not have any knowledge of Ms. A.S. and it was after her uncle reported the matter to the police, he told the accused that they are related.
- (ii) Mr. Tuivesi vehemently refused the allegation of 'Rape'. He said that usually he goes to Dan's car wash and have a 'drink' on a bench and on 5<sup>th</sup> February, Ms. A.S. was also there talking to one 'Pillay'. Though 'Pillay' had refused joining for a drink, Tuivesi said that Ms. A.S. joined with them. Since it started raining, he said that all three of them, (Tuivesi, Ms. A.S and Iliesa) moved under the wooden house next to the car wash.
- (iii) When Iliesa left, after about four (4) cans, Mr. Tuivesi had asked Ms. A.S. whether he could have sex with her. She had agreed to it subject to one condition; that she cannot lay on the muddy ground. Then Mr. Tuivesi had gone out of that place and brought an old mattress and an empty beer carton. After he took off his clothes, Ms. A.S. had sucked his penis. He said that he fondled and sucked her breasts. He claimed that Ms. A.S. was also aroused and hugged him. Finally he admitted that he inserted his penis into her vagina on 5<sup>th</sup> February 2012.
- (iv) Referring to the existing surrounding environment of the said wooden house, Mr. Tuivesi said that at the material time, the car wash was still open with people moving around and even the occupants of the wooden house were also there. He said not only a scream, but even a loud talk would have been heard by the people. Mr. Tuivesi refused that he is the 'uncle' of Ms. A.S. or sharing any other relationship with her.

## 7. ANALYSIS OF THE EVIDENCE

Madam assessors and gentleman assessor,



- (i) The issue to be decided now is quite clear. Did the complainant 'consent' to have sexual intercourse with the accused on 5<sup>th</sup> of February 2012 or not? Both parties supported the positive and negative aspects of this query.
- (ii) The prosecution's version is that Ms. A.S. did not consent. Ms. A.S. said that at the material time she was scared that the accused might kill her and she did not raise alarms. Further, she said that she did not divulge this to anybody after the incident since she thought that the accused will chase her grandmother from her house as that land belongs to the accused. Her 'scaredness' over her 'distant uncle' had been told by Ms. A.S. to the doctor who examined her on 10<sup>th</sup> February. Until 10<sup>th</sup> of February 2012, five (5) days after the alleged incident, she had not told this incident to anybody. Now, madam assessors and gentleman assessor, you have to decide whether you accept Ms. A.S.'s version or not.
- (iii) In contrary, defence argued that Ms. A.S. was a willing participant to the 'sexual intercourse' on 5<sup>th</sup> of February 2012. They said that she could have raised alarm at the time of the commission of the alleged offence to get the attention of the house occupants, who should have been there at home around 7pm on Sunday, had she really been non-consenting to the alleged act. They said that this has to be viewed in the light of Ms. A.S.'s admission that the accused did not threaten to kill her at the material time. When the accused said that the occupants of the wooden house were there at that time, Ms. A.S. said no. Further, they said that Ms. A.S. was silent till 10<sup>th</sup> of February, for five (5) days to talk about this incident because she consented to have sex with the accused and she reported this incident to police only after her uncle questioned her about the rumours spreading in the village. It was argued that Tacirua Police Station is walking distance to Ms. A.S.'s house whilst New Town and Valelevu stations are only a bus drive away. The accused testified that he never force or threaten Ms. A.S. to have sexual intercourse. Referring to the land ownership, he said that it belongs to his clan and therefore a decision to remove an occupant from a land had to be taken by the leaders of the clan, not by him. It is now left to you to decide whether you are going to believe his side of the story or not.
- (iv) I have already explained you the legal aspect of the doctor's evidence. The doctor who examined Ms. A.S. said that she cannot precisely say whether Ms.

A.S. was sexually assaulted or not. She said that Ms. A.S. admitted that she was sexually active or had sexual intercourse before this incident and therefore the remnants of her hymen, especially with no visible injuries, would only say that she is privy to sexual intercourse. Further, the doctor said that since the lacerations or bruises fade within 48 – 72 hours, and it was over four days after the alleged incident, she cannot overrule the possibility of sexual assault as well. It is your duty now to decide the weight that you are going to attach to doctor's evidence.

- (v) It might be helpful for you madam assessors and gentleman assessor to consider the 'history' alleged by the complainant to the doctor. Ms. A.S. had been produced to the doctor with the remark of 'been raped by six youths from Kalabu on Monday (06/02/2012) at about 6.30pm". [A-4 of Medical Examination Form; a portion filled by the police]. Ms. A.S. had then referred to two separate incidents occurred on 6<sup>th</sup> of February 2012, and mentioned the accused was also a participant to one incident. But, the prosecution does not focus the 6<sup>th</sup> February allegation in this charge. So you need not to bother to decide what happened on the 6<sup>th</sup> and the accused's involvement to that incident as there is no charge to that effect.

## 8. SUMMARY

- (i) In essence, madam assessors and gentleman assessor, you are confronted with two different versions to say how the 'sexual intercourse' took place. At this juncture, I have to tell you once again that there is no burden on the accused whatsoever to prove anything. He need not to prove that he is innocent. Nevertheless, the accused in this instance put forward his side of the story to you. It is entirely up to you to accept or reject it. If you decide to reject the accused's story that does not necessarily mean that the prosecution has proven their case beyond reasonable doubt. The prosecution, still must prove all the elements of the offence to your fullest satisfaction.
- (ii) Your possible opinions in this instance are 'GUILTY' or 'NOT GUILTY' to the charge of Rape.

- (iii) You may now retire to consider your opinions. When you are ready, you may inform one of the court clerks so that I will re-convene the court. You will be asked individually for your opinion.
- (iv) Before you retire, I would like to ask the Counsel of both parties if there is anything that they wish me to say in addition or want me to re-direct the assessors on any matter.

Ms. Madanavosa?

Ms. Nawasaitoga?



Janaka Bandara

Judge

**At Suva**

**Solicitors**

Office of the Director of Prosecution for State  
Office of the Legal Aid Commission for Accused