

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: HAC 63 OF 2012**

STATE

-v-

USAIA MASIWALE

**Counsels** : Ms. L. Latu for the State  
Ms. L. Raisua for the accused  
**Date of Trial** : 4 August 2014 to 5 August 2014  
**Date of Summing Up** : 6 August 2014

**SUMMING UP**

Madam Assessors and Gentlemen Assessor:

1. We have now reached the final phase of this case. The law requires me – as the Judge who presided over this trial – to sum up the case to you on law and evidence. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.

4. In other words you are the Judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Defence and the state counsel made submissions to you about the facts of this case. That is their duty as the defence counsel and the state counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
12. In accessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she

evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.

13. I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinions. That is – as you could hear from evidence – this case involved an alleged incident of rape. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law, to which every one of us is subject to. I will deal with the law as it is applicable to the offence with which the accused-person is charged, in a short while.
14. In this case the prosecution and the defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of court time.
15. The agreed facts of this case are:
  1. It is agreed that Usaia Masiwale aged 20 years; Pointsman of Korovou Village, Tavua is the Defendant in this case.
  2. It is agreed that Nacanieli Naisau aged 18 years, Unemployed of Korovou Village, Tavua is the complainant in this case.
  3. It is agreed that on the 08<sup>th</sup> of April 2012, the complainant and the defendant resided in Korovou Village in Tavua.
  4. It is agreed that the complainant was medically examined by Dr. Farun on the 08<sup>th</sup> of April 2012, Medical Officer of Tavua Hospital.
  5. It is agreed that the Defendant was interviewed under caution on the 09<sup>th</sup> of April 2012 and charged by the Police for one count of Rape contrary to Section 207 (1) (2) (a) of the Crimes Decree No. 44 of 2009 on 09<sup>th</sup> of April 2012.

6. It is agreed that the State filed Information and Disclosures against the Defendant on one count of Rape contrary to Section 207 (1) (2) (a) of the Crimes Decree No. 44 of 2009.

16. The charge against the accused is a charge of rape under Section 207(1) (2) (a) of the Crimes Decree No. 44 of 2009. The particulars of the offence, as alleged by the prosecution are:

***Statement of Offence***

**RAPE:** Contrary to Section 207 (1) and (2) (a) of the Crimes Decree, No. 44 of 2009.

***Particulars of Offence***

**USAIA MASIWALE** on the 8<sup>th</sup> day of April 2012 at Tavua in the Western Division penetrated the anus of **NACANIELI NAISAU** with his penis without his consent.

17. I will now deal with the elements of the offence. The offence of rape is defined under Section 207 of the Crimes Decree. Section 207(1) of the Decree makes the offence of rape an offence triable before this court. Section 207 (2) states as follows:

A person rapes another person if:

- (a) The person has carnal knowledge with or of the other person without other person's consent; or
- (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
- (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

18. According to Section 206 (5) of the Crimes Decree carnal knowledge includes sodomy. Other parts of the offence are irrelevant to the facts of this case.

19. Consent as defined by Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent. A child under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The complainant in this case was above 13 years of age on 7.4.2012 and therefore, he had the capacity under the law to consent. So, the prosecution has to prove the absence of consent on the part of the complainant and the accused knew that he was

not consenting. Further, bear in mind submission without physical resistance by a person to an act of another person shall not alone constitute consent.

20. A person's consent to an act is not freely and voluntarily given if it is obtained-

- (i) by force; or
- (ii) by threat or intimidation; or
- (iii) by fear of bodily harm; or
- (iv) by exercise of authority; or
- (v) by false and fraudulent representations about the nature or the purpose of the act.

21. So, the elements of the offence in this case are that the accused penetrated the anus of victim to some extent with penis, which means that the insertion of a penis fully into anus is not necessary and the complainant did not consent for that and the accused knew that he was not consenting.

22. Evidence that the accused has been identified by a witness as doing something must, when disputed by the accused, be approached with special caution because experience has demonstrated, even honest witnesses have given identification which have been proved to be unreliable. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.

23. In assessing the identification evidence, you must take following matters into account:

- (i) Whether the witness has known the accused earlier?
- (ii) For how long did the witness have the accused under observation and from what distance?
- (iii) Did the witness have any special reason to remember?
- (iv) In what light was the observation made?
- (v) Whether there was any obstacle to obstruct the view?

24. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. In this case, for example, the complainant was witness who offered direct evidence, if you believe him as to what she saw, heard and felt.

25. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, Medical Report is an example if you believe that such a record was made. Then you can act on such evidence. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time on the document upon examination of the victim.
26. Expert evidence is also important to borne in mind. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only, as described earlier. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions express on a particular fact to aid court and you to decide the issues/s before court on the basis of their learning, skill and experience.
27. The doctor in this case, for example, came before court as an expert witness. The doctor, unlike any other witness, gives evidence and tells us his conclusion or opinion based on examination of the victim. That evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if his reasons are convincing and acceptable to you; and, if such opinion is reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence in the case.
28. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

**Test of means of opportunity:** That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically created just out of a case against the other party.

**Probability and Improbability:** That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case. Or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

**Belatedness:** That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

**Spontaneity:** This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

**Consistency:** That is whether a witness telling a story on the same lines without variations and contradictions. You must see whether a witness is shown to have given a different version elsewhere. If so, what the witness has told court contradicts with his/her earlier version.

You must consider whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another for example by a police officer in recording the statement where the witness is alleged to have given that version.

You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.

You must also consider the issue of omission to mention something that was adverted to in evidence on a previous occasion on the same lines. You must consider whether such omission is material to affect credibility and weight of the evidence. If the omission is so grave, you may even consider that to be a contradiction so as to affect the credibility or weight of the evidence or both.

In dealing with consistency you must see whether there is consistency *per se* and *inter se* that is whether the story is consistent within a witness himself or herself and whether the story is consistent between or among witnesses. In deciding that, you must bear in mind that the evidence comes from human beings. They cannot have photographic or videographic memory. All inherent weaknesses that you and I suffer, insofar as our memory is concerned, the memory of a witness also can be subject to same inherent weaknesses.

Please remember that there is no rule in law that credibility is indivisible. Therefore, you are free to accept one part of a witness's evidence, if you are convinced beyond doubt and reject the rest as being unacceptable.

29. You need to consider all those matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may

think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.

30. I will now deal with the summary of evidence in this case.
31. Prosecution called complainant as the first witness. He is 20 years old now. He stated that in April 2012 he went to Tavua town with Tokasa and Nai and had a drink. They drank ½ bottle of Rum. Then they have gone to Korovou. They have joined some boys drinking at a bus shelter. After drinking they have gone and sat in front of Nai's house. Usaia had come passing them at that time. Then they have gone inside. Both of them have lied down on a single bed. He couldn't feel himself. While he was sleeping he found his short pulled down to knee. Usaia inserted his penis into his anus. He was pushing him away and Nai was talking to him. Although he was drunk he was not really drunk. He was trying to stop him. He was scared. He did not give him permission to insert the penis to his anus. After Usaia left, both of them got up and locked the window and the door. Then they went back to sleep.
32. Following morning Nai told about this to her parents. They asked him. Then Nai's father told him to go the station to report the matter. He identified the accused as Usaia. He went for a medical examination.
33. Under cross examination he stated that he was not really drunk after having Rum. He was really drunk after having Beer at the bus shelter. He said that he could still recall what happened. He admitted that there was no electricity at Nai's house. But there were two burning kerosene lamps there. He admitted that Nai told him the name. He denied the suggestions that Usaia did not come or commit the act on him. He said that Draveto and Ilisapeci did not get up while all of this was happening. He said that he was not mistaken about the identity of Usaia. He denied the suggestion that the accused was fast asleep at his house.
34. You watched him giving evidence in court. What was his demeanor like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of the complainant beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charge.



35. The next witness for the prosecution was Doctor. He is doctor with 22 years' experience. He had examined the complainant on 8.4.2012. He gave a history of sexual assault by a Fijian youth previous night. There were no injuries in the anal area. He tendered the medical report marked P1.
36. Under cross examination he stated that injuries in the anal area from penile penetration will depend on the resistance and the force used. It is possible to note injuries if the complainant was subjected to this for the first time.
37. The Doctor is an independent witness. He had examined the complainant the following day. You have to decide whether that evidence is confirming the evidence of the victim or creating any reasonable doubt in the prosecution case.
38. The third witness for the prosecution was Nai. She confirmed the story of the complainant. She said that when she was sitting on mat in front of her house, Usaia came with his forehead covered with a Red T-shirt. When they were lying down for about one hour, Usaia came through the window, step on to a basket of clothes and came to the bed. Usaia took off complainant's pants and had sex with him. She told Usaia to go away. Usaia was drunk. She said that Usaia inserted his penis in to the anus of the complainant. Usaia is her first cousin. Her father's younger sister's son. She related this to her parents following morning and later reported the matter to the police. She identified the accused in Court as Usaia. She did not hear complainant speaking to Usaia.
39. Under cross examination she admitted that she was drunk. But said she was not fully drunk. She said that they left bus shelter after 9.00 p.m. and not after midnight. She said that there was a tube light near the place when she saw Usaia while they were sitting on a mat. She denied the suggestions that it was not Usaia that come through the window that night. She further denied that she was mistaken in identity as she was drunk. Her answer was that she was not really drunk. She admitted that her family and accused's family were not in good terms and her father had prohibited the accused from coming to her house.
40. There are differences in her evidence from the complainant's evidence. She had not seen the complainant resisting the sexual act or speaking to the accused. You have to decide whether such differences are probable when two persons are speaking about an incident or those create a reasonable doubt in the prosecution case.
41. In re-examination she said that she could not sleep that night as she felt like vomiting.

42. You watched her giving evidence in court. What was her demeanor like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of Nai beyond reasonable doubt then you have to decide whether that evidence is confirming the evidence of the complainant.
43. After the prosecution case was closed you heard me explaining the accused his rights in defence.
44. The accused elected to give evidence. He stated that he was drinking beer with others at the Korovou bus stand till 7.00 p.m. on 7.4.2012. Then he had gone to a shop for smoke and gone home by 9.00 p.m. He had dinner and went to sleep. He said the allegation is false and he can't do that at his uncle's house. He further said that it was not his preference to do that kind of thing to gay. He had told the same to police.
45. Under cross examination he stated that he was shocked to hear the allegation against him. He said that complainant admires him and calls him when he goes for training. He was ashamed to tell that to police as some police officers who were playing with him were around. He denied the allegation against him.
46. As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a defence.
47. You watched the accused giving evidence in court. What was his demeanor like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? His position taken up in Court is same as his caution interview statement. In other words his evidence is consistent. It is up to you to decide whether you could accept his version and his version is sufficient to establish a reasonable doubt in the prosecution case. If you accept his version accused should be discharged. Even if you reject his version still the prosecution should prove it's case beyond reasonable doubt.

48. I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
49. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:
- (i) You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offence.
  - (ii) Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.
  - (iii) The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offence. The situation then would be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be Guilty.
50. Mother of the accused was also called as a defence witness. She stated that accused came home around 9.00 p.m. that night. He had dinner and went to lie down. It is difficult to wake him up as he had pneumonia during childhood. When her husband came home around midnight the accused was sleeping. She normally checks about her children in midnight. If they were not there she asks them next morning.
51. Under cross examination she stated that she will do anything for her son. But she said she did not come to save her son but to tell the truth. Although she went to police station to make a statement she was not allowed to go inside.
52. You watched her giving evidence in Court. It is up to you to decide whether she is telling the truth and her evidence is sufficient to establish a reasonable doubt in the prosecution case. If you believe her evidence she confirms that accused was at home and confirms his alibi.
53. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should be reminded yourselves of all that evidence and form your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.

54. Please remember, there is no rule for you to look for corroboration of the victim's story to bring home an opinion of guilty in a rape case. The case can stand or fall on the testimony of the victim depending on how you are going to look at his evidence. You may, however, consider whether there are items of evidence to support the victim's evidence if you think that it is safe to look for such supporting evidence. Corroboration is, therefore, to have some independent evidence to support the victim's story of rape.

55. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and 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.

56. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of the charge you must find him guilty for the charge. 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 accused's guilt, you must find him not guilty for the charge.

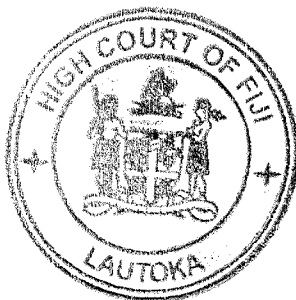
57. Your possible opinions are as follows:

Charge of Rape

Accused Guilty or Not Guilty

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

59. Any re-directions?



  
Sudharshana De Silva  
JUDGE

At Lautoka  
06<sup>th</sup> August 2014

Solicitors : Office of the Director of Public Prosecution for State  
Office of the Legal Aid Commission for Accused