

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 06 of 2014

STATE

vs.

ERONI CEVAMACA

Counsels : Mr. T. Qalinauci and Ms. S. Naibe for the State
: Mr. J. Singh for the Accused

Dates of Hearing : 6, 7 December, 2016
Closing Speeches : 8 December, 2016
Date of Summing Up : 13 December, 2016

SUMMING UP

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an 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 facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

8. As a matter of law, the burden of proof rests 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 or she is proven guilty.
9. During the closing speeches the learned State Counsel made reference to an old man and the question posed was “where is the old man” implying that the accused has to call this person as a witness to prove his innocence. I direct you to disregard this aspect since the accused does not have to prove anything it is for the prosecution to prove the guilt of the accused.
10. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means 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.

11. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
12. 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 without fear, favour or ill will.
13. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsels and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

14. The accused is charged with the following offence: (a copy of the information is with you).

COUNT ONE

Statement of Offence

RAPE: Contrary to Section 207 (1) of (2) (a) of the Crimes Decree, 2009.

Particulars of Offence

ERONI CEVAMACA, on the 11th day of January 2014, at Lautoka in the Western Division, inserted his penis into the vagina of LITIA LEWAIRAVU, without her consent.

15. To prove the offence of rape the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis;
 - (c) Without her consent;

(d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

16. The slightest of penetration of the complainant's vagina by the accused's penis is sufficient to satisfy the act of penetration.

AGREED FACTS

17. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you. This means you should consider these facts as proven beyond reasonable doubt.

18. The Final Agreed Facts are as follows:

1. **ERONI CEVAMACA** (the accused) was born on the 11th of November 1983.

2. **LITIA LEWAIKAVU** is the complainant in this case and 27 years old.

3. On the 11th day of January 2014 at Mali Lane, Tavakubu Housing the Accused had sexual intercourse with the complainant.

4. **LITIA LEWAIKAVU** was examined by Dr. J. Nabiano at the Lautoka Hospital on the 11th January 2014.

5. **ERONI CEVAMACA** was interviewed under caution on the 12th of January 2014 by WDC Asenaca Taufu.

6. **ERONI CEVAMACA** was charged on the 13th of January 2014 by DC 4189 Farasiko.

19. From the Agreed Facts, you will have no problems in accepting as proven beyond reasonable doubt that the accused on 11th January 2014 at Mali Lane, Tavakubu Housing had sexual intercourse with the complainant. The Accused was born on 11th November, 1983 and the complainant was 27 years of age. On 11th January, 2014 the complainant was examined by Dr. J. Nabiano at the Lautoka Hospital. The accused was interviewed under caution by WDC Asenaca Taufu on 12th January, 2014 and he was charged by DC 4189 Farasiko on 13th January, 2014.

20. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time that is on 11th January, 2014.
21. The first element of the offence is concerned with the identity of the person who committed the offence. There is no dispute that it was not the accused as alleged. You are to consider this element of the offence as proven beyond reasonable doubt.
22. The second element is the act of penetration of the complainant's vagina by the accused with his penis. Like the first element there is no dispute that it was not the accused who had penetrated the vagina of the complainant as alleged. You are to consider this element of the offence as proven beyond reasonable doubt as well.
23. This leaves you to consider the third element of consent, you should bear in mind that consent means 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 or by exercise of authority, then that consent is no consent at all.
24. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
25. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
26. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.

27. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offence he is charged with.
28. As a matter of law, I have to direct you that an offence of sexual nature as in this case does not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.

PROSECUTION CASE

29. The prosecution called two (2) witnesses to prove its case against the accused.
30. The first witness was the complainant who informed the court that in the early hours of the morning of 11th January, 2014 at around 1.00 am the complainant, Jone and three of her employer's visitors one of whom was Lesi went clubbing from Dark Angel Nightclub to Zone Nightclub.
31. At the Zone Nightclub the complainant and her group were sitting, drinking and dancing. Later the complainant met the accused through Jone and her employer's visitors. The accused was accompanied by two elderly men. The complainant and her group were invited by the accused and the two men with him to join them for drinks at the house of the accused.
32. It was after 3.00 am in the morning all arrived at the house of the accused in a 7-seater van. Inside the house the complainant, Jone and one of the elderly men were in the sitting room waiting for the drinks to arrive. Lesi and her boyfriend went into one of the bedrooms while the accused was lying in another bedroom. In the sitting room the complainant was lying on Jone's lap.
33. After a while Jone stood up and went outside. The complainant also stood up to go to the washroom. At this time the accused was standing on the doorway of his bedroom. According to the complainant the accused asked her to have sexual intercourse with him to which the complainant refused.

34. The accused pulled her hand at the same time Jone came and pulled her other hand. At this time the complainant was screaming. When Jone was pulling her hand the accused punched Jone's hand and at this time Jone's watch fell on the floor. Jone then ran outside the house.
35. Accused pulled the complainant inside the bedroom and pushed her on the bed. Since the complainant was screaming the accused covered her mouth and also punched her thighs three (3) times. The complainant further told the court that she was struggling with the accused and in her words "he was all over me". The complainant was wearing leggings and a top the accused had only removed one side of her leggings. The accused was wearing three quarter Lee blue in colour and she forgot what he was wearing on top. The accused was built, tall and dark in complexion.
36. According to the complainant the accused was also forcing himself and swearing at her. The accused then inserted his penis into her vagina and had sexual intercourse with her for five (5) minutes. The complainant could feel his penis in her vagina and at this time she was also screaming.
37. After this the complainant ran outside the room, she heard the accused call the elderly man who was sleeping in the sitting room to come into the bedroom. When the complainant went back to get her clothes she heard the accused tell the elderly man to drag her inside the bedroom but the elderly man did not do so. It was the accused who then dragged the complainant inside the bedroom and asked the elderly man to come in the room. The accused then closed the door of the bedroom with the complainant and the elderly man inside.
38. The complainant was crying for help to the elderly man in the bedroom who then released her. After the elderly man released her the complainant was looking for Jone but could not find him. The complainant then went to the house of her employer Venina also known as Nina who lived in Kashmir which was close by to the accused house. When she arrived at Venina's house Jone was there.
39. Matter was then reported to the Police.

40. In cross examination the complainant agreed that it was around 3.00 am on 11th January when they were leaving Zone Nightclub she met the accused. The complainant stated that the accused had approached Lesi's boyfriend to come to his house.
41. The complainant also informed the court that she did not know the accused, however, she had agreed to accompany the others to the house of the accused. It was the accused who had paid the van fare. When the complainant and others got off near the house of the accused she followed him into his house.
42. The complainant clarified that she met the accused on her way back from the washroom and that was when she was dragged inside the bedroom by the accused.
43. The complainant agreed with the suggestion that she had told the Police on 11th January, 2014 via her police statement which was rephrased to her as follows:
- "You got off the van, you went inside the house, you did not see any drinks, you came outside the house, you are going home you met your boyfriend Ashneel Kumar on the road, had an argument, you decided to come back to Eroni's house".*
44. The complainant further agreed that the chain of events she had described to the Police was different from the one she told the court. She stated that whatever she told the court was the truth. In regards to the above complainant admitted that she had lied to the Police.
45. Furthermore she agreed when it was put to her in cross examination that when asked by the accused to have sexual intercourse with him the complainant refused. Thereafter she was referred to her police statement dated 11th Janaury,2014 in particular line 37 at the back of page 1 which stated:

"Then I went and sat beside Jone who was sitting down. Then I lied down beside Jone, when one of the three guys I do not know his name but he was renting at the house. He was tall, dark complexion and broad built," then at line 43,

“he then came towards me and said, ‘lako mada mai ke o iko’ meaning ‘you just come here to me’ and at the same time he pulled me towards one of the bedrooms.”

46. The complainant agreed that the chain of events immediately before being pulled into the bedroom by the accused is different from what she had told the court. The complainant upon questioning as to which version was the true version whether she was going to the washroom or she was lying down beside Jone she answered *“On my way back from the washroom”*.
47. The complainant disagreed to the suggestion that in her police statement there was no mention of the accused approaching her to have sexual intercourse with him.
48. However, the complainant was unable to point out where it was stated in her police statement that the accused had approached her to have sexual intercourse with him and she had refused.
49. The complainant admitted that the accused had not approached her to have sexual intercourse with him. The complainant further stated that the evidence that she had given under oath in examination in chief was not correct when she said the accused had asked her to have sexual intercourse with him before been dragged into the bedroom.
50. Furthermore the complainant confirmed that the statement she gave to the Police was correct to the extent that her t-shirt got torn when Jone and the accused were pulling her in which the accused managed to pull her inside the bedroom.
51. In respect of the punching of her thighs the complainant informed the court that the accused had punched her right thigh three (3) times. The complainant was then referred to her police statement line 49 at the back of page 1:

“Then I felt him put me on a bed and it was very dark inside the bedroom and then he punched both my thighs when I was trying to push him away and I screamed’.

52. The complainant agreed that everything was fresh in her mind when she gave her police statement and she also agreed that the version she gave the Police was different from the version she had told the court. However, the complainant stated that the evidence she gave in court was the truth. The complainant further maintained that she had started screaming from the time the accused started pulling her hand at the doorway of his bedroom and not when the accused was punching her thighs as per her police statement.
53. In respect of the punches the complainant informed the court that the punches were hard punches resulting in unbearable and intense pain and that she had screamed in pain. Complainant also told the court that no sign of any trauma was seen from the punching of her thigh.
54. The complainant agreed that on the day of the incident she was also wearing her panty but she had not mentioned about her panty in her evidence in court and that her police statement was correct.
55. In respect of her clothing it was put to the complainant that the manner in which she had described the removal of her leggings by the accused which is that only one side of the legging was removed she could not have come back into the room looking for her clothing. The complainant agreed that there was an inconsistency between what she had told the court and what she had told the Police, however she maintained that she had told the correct version to the court. She further agreed that one of her leggings was not completely removed, however, she did not agree that no clothes were left behind in the bedroom for her to go back to.
56. The complainant agreed that she stayed at Mali Lane, Tavakubu Housing which was about 4 or 5 metres away from the accused's house. The complainant also agreed that the house of the accused was in a densely populated area yet despite her screaming nobody came to assist her.
57. The complainant did not agree that being couple of houses away from the accused's house she had seen him, however, she agreed that the accused comes to her house to drink grog and that she knew him by face.
58. The complainant agreed that in her evidence she mentioned that she did not know the accused at all.

59. The complainant knows Ashneel Kumar who is her boyfriend whom she had met that night. She also agreed that there was an argument between her boyfriend and her and the argument was because she was at the accused's house.
60. The complainant disagreed that to save her image and her relationship with her boyfriend she lied that the accused had raped her. She maintained that the accused had sexual intercourse with her without her consent. The complainant also disagreed that there was no arrangement for further drinks at the accused's house. She also denied that the story of rape was made up by the complainant and her friends to make her look good in the "eyes" of her boyfriend.
61. The complainant also disagreed that the accused outside Zone Nightclub had approached her to have sex with him at his home and she had agreed.
62. In re-examination the complainant told the court that the accused had asked to have sexual intercourse with her but she refused. The complainant further clarified that she was wearing a panty, leggings and a top before she was raped by the accused. She further maintained that the accused had raped her.
63. The final prosecution witness was Jone Namakadre. He informed the court that on 10th January, 2014 in the evening he was having a drinking party with his friend Venina and the complainant. After 10.00 pm Jone and the complainant went to Angel Nightclub and then to Zone Nightclub only the two of them.
64. Jone told the complainant that he did not want anyone to join them. Before the Zone Nightclub closed both went outside and planned to buy drinks to drink at home. After a while Jone saw Lesi who was with three men, one of them was Lesi's boyfriend.
65. One of the three men suggested that all of them should go and drink at one place, for all to contribute as it was safe to drink at home. From Zone Nightclub all went to Mali Lane in Tavakubu Housing.
66. At Mali Lane the accused directed everyone to his house. When Jone

went inside the house he realized he knew the owner of the house.

67. The accused went into his bedroom which was the first one on the left. At this time the complainant was not with Jone since she was with her boyfriend on the main road. According to Jone, Lesi and her boyfriend went to the second bedroom and an elderly man was in the sitting room with him. Since it was hot Jone laid down at the door of the first bedroom. Thereafter the accused brought pillows to the elderly man and said the drinks were coming.
68. Jone informed the court that he did not know the accused. Jone then went outside the house to smoke. He saw the complainant coming from the main road. After smoking Jone went into the house followed by the complainant. He lay near the doorway of the bedroom with the complainant when the accused came quietly from his room and pulled the complainant's leg. Jone thought he was playing.
69. The accused pulled the complainant and said something in the i-Taukei language like "*Lako mada mai ke o iko*" meaning for the complainant to go to him. The complainant grabbed Jone and started screaming. She pulled his left hand and then the accused hit his left hand on the wrist.
70. According to Jone the complainant was trying to defend herself by trying to grab the frame of the door. Jone saw the accused punched the complainant's thighs once that is when the complainant released the frame of the door. The accused pulled the complainant right inside the room, closed the door and locked it.
71. Jone was trying to open it by pulling the door handle he then went to the elderly man sleeping in the house so that he could help Jone get the complainant out of the room. The elderly man did not assist him. Jone again went and pulled the handle of the door when he heard the complainant continue screaming inside the bedroom. He was unable to open the door.
72. After five (5) minutes the accused came out of the bedroom he went to the elderly man tapping his shoulder to wake him up and for him to have his turn inside the room.

73. The complainant was still inside the bedroom when Jone saw her with the tights she was trying to put on her panty on one side of the leg then the accused and the elderly man went inside the room. The accused came outside and closed the door with the elderly man inside the room. The accused went outside and lit his cigarette. Jone asked him if he could get the complainant out of the room the accused swore at him in the i-Taukei language "*caiti tamamu*" meaning fuck your father.
74. The accused continued swearing and told Jone to fuck off from his house. Jone put on his sneakers and went down the steps and then started talking back to the accused and also threatened him to start looking for a house to rent. Upon hearing this accused stood up and started swearing and then ran after Jone.
75. Jone ran to the main road where he lost one of his sneakers he looked back but did not see the accused. Thereafter he went to Venina's house. From Venina's house he again came to check on the complainant and he saw the accused sitting and drinking kava at the complainant's house. He saw the complainant on the main road when he spoke to her she was lost he saw love bites on her neck, the neck of the t-shirt was a bit slack and the joint parts of the tights were torn.
76. The complainant was taken home given a glass of water and Jone started calling the Crime Stoppers. None of the Police Officers came so the next day in the morning the complainant was taken to the Police Station.

Cross Examination of Jone

77. Jone agreed in his evidence he had informed the court that when he came out of the house to smoke the complainant came after arguing with her boyfriend. The complainant entered the house, which was the first time she had entered.
78. Jone was then referred to his police statement dated 11th January, 2014 at the back of page 1, the first portion from line 23 to line 27:

"When we entered the house there were no drinks inside but then the older one of the three guys then told us that the drinks are coming. Then Litia left the house and I sat inside the house waiting for the drinks to arrive," and the second portion from line 33 to 34:

“Then after about 5 minutes Litia returned and asked me where is the drinks?”

79. Jone agreed that the version of events stated in his police statement of how the complainant came into the house and how she went out was different from the version he had told the court, however, he maintained that whatever he told the court was the truth.
80. In cross examination Jone confirmed that whilst lying down with the complainant in the sitting room the accused came out of the bedroom got hold of the complainant’s leg trying to drag her into the room. However, the witness was unable to remember which leg of the complainant was held by the accused.
81. According to Jone when the complainant was resisting the accused he was pulling her into the bedroom she grabbed his left hand. Jone agreed that in his examination in chief he told the court that the accused had hit his hand when dragging the complainant to the bedroom, however, in cross examination Jone disagreed that to make the complainant let go of Jone’s hand the accused had punched his hand. Thereafter Jone stated that when the complainant was grabbing the frame of the door the accused punched his hand.
82. Furthermore Jone was shown his police statement dated 11th January, 2014 and referred to page 1 line 36 to line 44:

“After a while the owner of the house came and said ‘Lako mada ga mai ke o iko’ meaning you just come here to me and pulled Litia. I then pulled Litia and this man hit my hand and my hand let go of Litia. Litia did not want to go with him and struggled but this man managed to drag Litia inside the bedroom. I then called out to Litia but he closed the bedroom door.”

83. Jone agreed that he had given two different stories, one version to the Police and one version to the court but he maintained that the version he told the court was the truth.
84. Jone also agreed that in his police statement he did not inform the Police about the complainant holding onto the frame of the door. Jone further

stated that he also had not informed the Police about the accused punching the complainant on her thigh. Jone was referred to his police statement dated 11th January, 2014 line 32 and line 33 as follows:

“She then stated that, that guy forcefully punched both her thighs and forcefully had sex with her.”

Jone agreed that he did not see the accused punching the complainant on the thigh.

85. Jone agreed that when he left the accused house after being chased by him he met the complainant's boyfriend. He was not sure whether he had told the boyfriend that the complainant had been raped but told him that one guy had locked the complainant in the room.
86. Jone disagreed that outside the Nightclub when he had met the accused and his friends the accused had approached the complainant to go to his house to have sex with him.
87. Jone also disagreed that in order to take revenge from the accused for chasing him out of his house and swearing at him and in order to save the relationship of the complainant with her boyfriend the witness, complainant and their employer had concocted a story against the accused.

Re-Examination of Jone Namakadre

88. The reason why Jone did not seek assistance from the complainant's house was firstly because it was quite early in the morning and he didn't know there was a grog drinking session going on there. Secondly when he got chased by the accused he ran out of Mali Lane towards Kermode Road.
89. Furthermore Jone did not seek any assistance from the complainant's boyfriend because he saw them arguing and he didn't know he was the complainant's boyfriend.
90. To a question asked by the court Jone in reply to question by defence counsel informed the court that he had not mentioned in his police statement when everything was fresh in his mind that the accused had

told the elderly man to have his turn in the bedroom. The witness was referred to his police statement of 11th January, 2014 line 45 to 48 back of page 1:

“After about 5 to 7 minutes the man came outside and woke the old man who was sleeping in the sitting room and told him to go inside the bedroom in which he just come out of.”

91. Jone agreed that after two years in court he was telling a different story but maintained he told the correct version in court.
92. This was the end of the prosecution case.

Ladies and Gentleman Assessors

93. During the cross examination of the complainant and Jone Namakadre their police statements of 11th January, 2014 were shown to them and they were questioned about the inconsistencies between what they had told the Police when everything was fresh in their mind and what they had told the court under oath.
94. Both the prosecution witnesses agreed there was a difference between the two versions i.e. between their police statement and their evidence in court.

Ladies and Gentleman Assessors

95. The learned counsel for the accused in this regard was cross-examining both the prosecution witnesses about some inconsistencies in the statement they gave to the police when the facts were fresh in their mind with their evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant and Jone Namakadre with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witnesses are believable and credible as witnesses. However, the police statement itself is not evidence of the truth of its contents.

96. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
97. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witnesses.

Ladies and Gentleman Assessors

98. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.

He could have remained silent but he chose to give sworn evidence and be subjected to cross-examination.

DEFENCE CASE

99. The accused informed the court that on 10th January, 2014 the accused was at his home drinking beer with his two friends. After finishing the drinks all decided to go to the City for clubbing.
100. At the Zone Nightclub the accused bought some more drinks. At about 3.00 am the next day that is 11th January, 2014 they left the Nightclub. Outside the Nightclub while waiting for transport to go home the accused saw the complainant who he recognized by face as his neighbour living a few blocks away from his house at Mali Lane.
101. The complainant was with another girl and Jone, there was a conversation between the accused and the complainant during which he invited the complainant to come to his house with the intention of having sex.

102. The accused stopped a 7-seater van and all boarded the van, upon arrival at his house the accused paid the fare. The accused took the lead while the others followed. Upon entering the house the accused went into the first bedroom, after 5 to 10 minutes he came out of the bedroom to look for the complainant.
103. The complainant was sitting in the sitting room with Jone while his friend Naresia was sleeping there. The accused asked the complainant to go into the room, the complainant stood up and he escorted her into the room. According to the accused his other friend Tomu and his girlfriend were in the other bedroom.
104. In the bedroom both took off their clothes waist downwards and they had sexual intercourse for two minutes. After having sexual intercourse the accused came out of the room, Jone wasn't there only Naresia was there.
105. The accused then went outside the house to smoke after a while Jone came and started to threaten the accused to leave the house since it belonged to Jone's cousin. The accused then chased Jone and later ran after Jone since Jone kept arguing. Whilst returning home he met a friend on the way who invited the accused to join in a grog session at a friend's house in the neighbourhood, when he returned home from the grog session the complainant was not there.
106. In the evening of 11th January, 2014 the accused was arrested by the Police. The caution interview of the accused dated 12th January, 2014 is marked as Defence Exhibit No. 1. The next day 13th January, 2014 the Accused was charged by the Police which is marked as Defence Exhibit No. 2.
107. According to the accused he did not see any resistance or reluctance on the part of the complainant she consented to having sex with him he did not drag her to the bedroom or punch her thighs and that there was no indication from the complainant that she did not want to have sex with him. The accused also stated that he did not cover her mouth nor did he forcefully take off her leggings and panty.
108. In cross examination the accused agreed that he was married and that marriage was sacred, however, on 11th January, 2014 he wanted to have

sex with the complainant. The reason was he was intoxicated, drunk and that he had made a mistake.

109. The accused did not agree that he had invited the complainant to his house for more drinks. He maintained that in the house he requested the complainant to have sex with him to which she agreed. The accused denied pulling the complainant into his bedroom or punching her thigh or that the complainant was screaming when she was pulled into the bedroom. The accused also denied pulling one side of the complainant's legging in the bedroom or that he was all over the complainant when inserting his penis into her vagina.
110. The accused agreed and maintained that he had sexual intercourse with the complainant but with her consent, after having sex with the complainant he did not wake Naresia who was sleeping in the sitting room.
111. The accused agreed that Jone was present in the sitting room when he went into the bedroom with the complainant.
112. On re-examination the accused clarified by saying that he made a mistake by meeting the complainant outside the Nightclub and taking her out for sexual intercourse. Furthermore the complainant had entered the bedroom by herself while Jone was in the sitting room and after having sex with the complainant Jone was not in the sitting room.
113. The final witness for the defence was Dr. Jone Nabaro who is a graduate of Fiji School of Medicine with an MBBS Degree. He has been a Medical Practitioner for the past seven (7) years, has worked for Kese Medical Centre in Yasawa, Naviti and at the Tavua Subdivisional Hospital. Currently he is working at the Lautoka Hospital in General Outpatient and Emergency Department. The witness also has a Post Graduate Diploma in Emergency Medicine from the Fiji National University.
114. On 11th January, 2014 the Doctor had examined the complainant at the Emergency Department of the Lautoka Hospital as per the Fiji Police Medical Examination Form.

115. The history given by the patient was that she was allegedly raped early in the morning after she came from drinking and she was also complaining of thigh pain.
116. According to the Doctor the patient was calm and not in distress. A physical examination was conducted and the Doctor's specific medical findings were:
 - No laceration or tears were noted, there was just a bit of blood noted on his examination gloves upon vaginal examination. There were also no obvious bruising or swelling on the patient's thighs.
117. In his professional opinion the Doctor was unable to conclusively state if rape had occurred as per his physical findings of the patient. The Fiji Police Medical Examination Form dated 11th January, 2014 is marked as Defence Exhibit No. 3.
118. In cross examination the Doctor informed the court that if the patient had sustained significant injuries then it will be possible there will be evidence on physical examination, however, it depends on the severity of the blows.
119. In respect of blood seen in the vaginal area the Doctor stated that it could have been through penetrative injuries or patient could be menstruating at the time. The Doctor maintained that according to his report no laceration or tears were noted on the patient but the Doctor did not rule out the possibility that sometimes lacerations could not be detected.
120. In re-examination the Doctor clarified that hard punches three times could possibly cause significant injuries, however, in his examination of the patient he did not see any significant injuries including any sign of forceful penetration.
121. In a follow up to a question asked by the court, in answer to the State counsel the Doctor stated that even if forceful penetration takes place not in all cases such penetration will cause a tear or laceration.
122. This was the Defence case.

Ladies and Gentleman Assessors

123. You have heard the evidence of Dr. Nabaro who has been called as an expert on behalf of the defence. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The Medical Report of the complainant is before you and what the Doctor said in his evidence as a whole is to assist you.
124. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the Doctor.
125. You should remember that this evidence of the Doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.

ANALYSIS

Ladies and Gentleman Assessors

126. You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.
127. The Prosecution alleges that the accused with his two friends met the complainant and her friends at a Nightclub during the early hours of 11th January, 2014. The accused invited the complainant and her friends for drinks at his house at Mali Lane, Tavakubu, Lautoka.
128. After about 3.00 am all went in a 7-seater van to the house where the accused was renting. In the house the complainant and her friend Jone were waiting for drinks to arrive but none came.

129. The accused was in his bedroom. The complainant, her friend Jone and a friend of the accused were in the sitting room. The complainant was lying down on Jone's lap after a while Jone stood up and went outside, complainant also went to the washroom and upon returning from the washroom she met the accused standing on the doorway of his bedroom.
130. The accused asked the complainant to have sexual intercourse with him but the complainant refused. The accused pulled her hand and at the same time Jone came and pulled the other hand of the complainant.
131. The complainant started screaming, while Jone was pulling her hand the accused punched Jone's hand and as a result Jone's watch fell after which Jone ran outside.
132. The accused pulled the complainant inside the room and pushed her on the bed, the complainant screamed but the accused covered her mouth and at this time punched her thigh three times. In the bedroom there were no lights and it was dark.
133. She was struggling with the accused on the bed and according to her the accused was all over her. The complainant was screaming.
134. According to the complainant she was wearing a leggings and top. The accused removed one side of her leggings and then penetrated his penis into her vagina. The accused was swearing as well. The accused had sexual intercourse with the complainant for 5 minutes.
135. After the accused had finished having sexual intercourse the complainant ran outside the bedroom, the accused called his friend who was sleeping in the sitting room to come into the bedroom. The complainant came back to look for her clothes when she heard the accused telling his friend to drag the complainant inside the bedroom.
136. The friend of the accused did not drag her but the accused dragged the complainant and pushed her inside the room. The complainant heard the accused calling his friend into the room. After the friend of the accused came into the room the accused closed the door behind him. The complainant was crying for help and this man released her from the room.

137. After leaving the house of the accused the complainant went to the house of her employer who lived close by when she arrived there she saw Jone, the Police were notified.
138. The other prosecution witness was Jone Namakadre he informed the court that he was with the complainant and together they went clubbing it was only the two of them. According to Jone he had informed the complainant that he did not want anyone else to join them. Before the Nightclub closed both went outside and planned to buy more drinks to drink at home.
139. Outside the Nightclub they met a female friend Lesi who was with other 3 men. One of the men was Lesi's boyfriend. A suggestion was made by an elderly man in the group they had met for everyone to contribute and that it was safe to drink at home.
140. As a result all went in a 7-seater van to the house of the accused. When Jone entered the house he realized he knew the person who owned the house. All except the complainant went into the house, the accused went straight into the first bedroom.
141. The complainant was on the main road with her boyfriend having an argument. Since it was hot Jone laid down near the door of the first bedroom. The friend of the accused was also there. Jone went outside to smoke later he saw the complainant on her way back to the house from the main road.
142. The complainant followed Jone into the house after he finished smoking. Jone was lying down near the doorway of the bedroom with the complainant when the accused quietly came from the bedroom and pulled the complainant's leg. Jone thought the accused was playing.
143. When the accused pulled the complainant he said in the i-Taukei language "*lako mada mai eke*" meaning for the complainant to go to him.
144. The complainant grabbed Jone and started screaming she pulled Jone's left hand, at this time the accused hit Jone on his left hand on the wrist. The complainant was trying to stop herself from being pulled by trying to grab the frame of the door. Jone saw the accused hit the thighs of the complainant once, this was the time the complainant released the door

frame. The accused pulled the complainant inside the room closed the door and locked it.

145. Jone tried to open the door by pulling the handle but could not. He went to the friend of the accused for help to get the complainant out of the room but he did not assist.
146. Jone again went and pulled the handle of the bedroom door when he heard the complainant screaming in the room he was unable to open the door. After 5 minutes the accused came out of the bedroom went to his friend, tapped his shoulder to wake him up and to have his turn inside the room.
147. When the accused was outside the house Jone approached him to get the complainant out of the room. The accused swore at Jone in i-Taukei "*caiti tamamu*" meaning fuck your father. The accused continued swearing at the witness and told him to "fuck off" from his house.
148. Jone also replied and threatened him to start looking for another house to rent the accused stood up and started swearing and running after him. Jone went to the house of the complainant's employer, after a while Jone came looking for the complainant and on his way he saw the accused sitting and drinking kava at the house of the complainant, moving on he saw the complainant on the main road. He spoke to her she was lost, he saw love bites on her neck, the neck of her t-shirt was slack and the joint parts of the tights were torn.
149. The matter was then reported to the Police.

Ladies and Gentleman Assessors

150. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath and also decided to call a witness in his defence. The accused is not obliged to give evidence. He is not obliged to call any witnesses. He does not have to prove his innocence in effect he does not have to prove anything.

151. However, the accused decided to give evidence and also to call a witness on his behalf. You must then take into account what the accused and his witness adduced in evidence when considering the issues of fact which you are determining.
152. It is for you to decide whether you believe the evidence of the accused and his witness. If you consider that the account given by the defence through the evidence is or may be true, then you must find the accused not guilty.
153. The accused in his evidence told the court that he knew the complainant by face who was his neighbour living a few blocks away from where he was renting. Both the complainant and the accused were with their friends, outside a Nightclub.
154. There was a conversation between the accused and the complainant and the accused invited her to come to his house so that both can have sex, the complainant agreed.
155. All went to the house of the accused, he paid the van fare. After entering the house the accused went straight into the bedroom in particular the first room. After a while the accused came out of his room he saw the complainant, Jone and Naresia his friend in the sitting room.
156. The accused asked the complainant if they could go inside the bedroom the complainant stood up and went with him into the bedroom. In the room both took off their clothes below the waist and had sexual intercourse for 2 minutes.
157. The accused denied inviting the complainant for drinks to his house, or dragging her into the bedroom or punching her thighs or forcefully having sexual intercourse with her. According to him the complainant had agreed to have sex with him outside the Nightclub and had come over with her friends and she had consented to have sex with him. The Police had arrested and caution interviewed him on 12th January, 2014 which is tendered and marked as Defence Exhibit No. 1 he was charged by the Police on 13th January, 2014 the charge statement is tendered and marked as Defence Exhibit No. 2. The accused mentioned he told the Police what had happened that morning.

158. On the day of the incident, the complainant was medically examined by Dr. Nabaro. The Doctor testified that in his professional opinion he was unable to conclusively state if the complainant had been raped after conducting a physical examination of the complainant.
159. As explained earlier your decision must be based exclusively upon the evidence which have been heard in this court. You must bear in mind that evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you an I suffer in so far as our memory is concerned.

Ladies and Gentleman Assessors

160. You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence. In testing the credibility of a witness, you can consider whether there is a delay in making a complaint to someone or to an authority or to Police on the first available opportunity about the incident that is alleged to have occurred. If the complainant is prompt that usually leave no room for fabrication.
161. Bear in mind a late complainant does not necessarily signify a false complaint any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether in this case the complaint the complainant made to the Police is genuine and what weight you attach to this.
162. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were evasive or straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
163. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject

such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

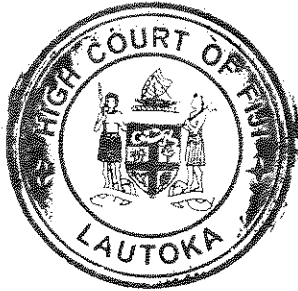
164. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
165. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
166. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence and do not believe a single word accused told in court still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
167. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
168. Your possible opinions are:-


Count One:

RAPE:

GUILTY OR NOT GUILTY

169. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.
170. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.




Sunil Sharma
Judge

At Lautoka
13 December, 2016

Solicitors

Office of the Director of Public Prosecutions for the State

M/s. S. S. Law for the Accused