

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

**CRIMINAL CASE: HAC 87 OF 2015**

**BETWEEN** : STATE

**AND** : MARIKA TUBEINAVATU

**Counsel** : Ms. J. Fatiaki with Mr. T. Tuienuku for State  
Mr. M. Fesaitu for the Accused

**Date of Hearing** : 21st of March 2016

**Date of Closing Submissions** : 22nd of March 2016

**Date of Summing Up** : 23rd of March 2016

**SUMMING UP**

Madam Assessors and Gentleman Assessor.

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
2. Our functions are different. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.

3. You are to determine the facts of the case, based on the evidence that has been placed before you during the course of the hearing. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
4. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion. I say so because you are the sole judges of the facts.
5. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits and agreed fact. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purpose of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony, agreed facts and the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.
7. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that your opinion will assist me in reaching my judgment.

8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.
9. Matters which will concern you are 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.

### **Burden and Standard of Proof**

10. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence based on the evidence presented during the course of this hearing.
11. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused person is presumed to be innocent until he is proven guilty. Accordingly, the burden of proof rest on the prosecution throughout the trial and it never shifts to the accused person. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
12. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused person's guilt. If there is a riddle in your mind as to the guilt of the accused person after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused person beyond reasonable doubt. If you found any reasonable doubt as to the

commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

**Information**

13. The accused is being charged with one count of Rape Contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars of the offence are that;

*“Marika Tubeinavatu on the 7th of August 2014 at Sigatoka in the Western Division had carnal knowledge of Anastacia Owen without her consent”*

14. Section 207 (2) (a) of the Crimes Decree states that;

*“A person rapes another person if -*

- i) the person has carnal knowledge with or of the other person without the other person’s consent,*

15. The prosecution alleges that the accused penetrated the vagina of the victim with his penis without the consent of the victim on the 7th of August 2014. Accordingly the main elements of the offence that the prosecution is required to prove beyond reasonable doubt are that;

i) The Accused,

ii) Penetrated into the vagina of the victim with his penis,

iii) The victim did not consent to the accused to penetrate into her vagina with his penis,

iv) The Accused knew the complainant was not consenting for him to insert his penis in that manner

16. Prior to take your attention to the main elements of the offence in detail, I kindly request you to draw your attention to the two sets of admitted facts, which are before you. I do not wish to reproduce them in my summing up. These are the facts that the prosecution and the accused has agreed without dispute. Hence, you are allowed to consider these facts as proven facts beyond reasonable doubt by the prosecution.
17. According to the admitted facts, the accused has admitted that he got on top of Ms. Owen and then pulled her shorts and undergarment to one side. He has further admitted that he then had sexual intercourse with Ms. Owen by inserting his penis into her vagina. Hence, the accused has admitted the physical element of the offence as charged. Wherefore, the main dispute in this matter is whether Ms. Owen consented to have sexual intercourse with the accused. The prosecution alleges that she did not consent for such an act. According to the version of the prosecution, the accused came on top of her while she was sleeping and inserted his penis into her vagina. On the other hand the accused states that he came to her while she was inside her room and asked her whether he can have sex with her, for which she replied "anytime". He then had a sexual intercourse with her.
18. Let me now draw your attention to the issue of consent. As I mentioned above, it is your duty to decide whether the prosecution has proved that the victim, Ms. Owen did not give her consent to the accused to insert his penis into her vagina. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the victim consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.
19. If you are satisfied, that the victim had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed that the victim was freely consenting for this alleged sexual intercourse. I must advise you that belief in consent is not the same thing as a hope or expectation that the victim was consenting. You must consider whether the accused knew either that the victim was not in a condition or a position to make a choice freely and voluntarily, or the victim had made no choice to agree to sexual intercourse. If you conclude that the accused believed that the victim was

consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that prevailed at the time of the alleged incident took place.

20. You must bear in mind that offence of sexual nature do not need the evidence of collaboration. It means that if you are satisfied with the evidence given by the victim and accept it as reliable and truthful, you are not required to look for any other evidence to support the account given by the victim.
21. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist, or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape or a rapist or a victim of rape.
22. Offences of this nature can take place in any circumstance between any kind of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses and the exhibits during the course the hearing. Any person who has been raped must have undergone trauma. It is impossible to predict how the victim react, either on the period following the incident or when speaking publicly about it either in court or in the police station. The victim's reaction to the alleged incident and subsequent behaviours could depend on various factors, such as the victim's relationship with the perpetrator, the position held by the perpetrator in her life and her social surroundings, nature of her character, circumstances of the offending environment, etc.
23. It is your duty as judges of facts to assess the evidence given by the victim, in order to determine whether she has consented or not for this alleged sexual intercourse. In doing that, you must be mindful that not to bring to that assessment of the evidence of victim any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not.

Demeanour of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

24. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.
25. The first witness of the prosecution is Detective Corporal Sunil Dutt, who is the investigation officer of this matter. He tendered two photographs of a room and a bed as prosecution exhibits stating it was the place this alleged incident took place. He further tendered a rough sketch plan of the place that this incident allegedly took place as another exhibit of the prosecution.
26. The Second witness of the prosecution is Ms. Anastacia Owen. She is the victim of this matter. She lives in Maui, Hawaii. She came to Fiji on the 10th of July 2014 to do community work with the church of Bahai Faith. She stayed with Volavola Family at Nasama Village, Sigatoka. She stayed with Volavola family for approximately one month.
27. Ms. Owen stated in her evidence that she was sick with fever and flue on the 7th of August 2014, so she stayed at home. The mother of the accused went to town during the day leaving her and the accused, Marika alone at home. Before she left the town, she had asked Ms. Owen, whether she would like to join with her. Mother of the accused had given Ms. Owen some pill and told her that it will make her drowsy and tired if she takes the pills. Ms. Owen then took those pills and fallen into sleep. She was sleeping on her bed. There is a window close to her bed. Her head was closed to the window when she was sleeping. She suddenly woke up as she felt someone was on top of her. She found Marika, the accused was on top of her. She stated in her evidence that Marika raped her. She tried to pushed him away and scream at him to get off from her. She found at that time a loud music was playing inside the house. Marika get off from her in a while and told her not to tell anything. He repeatedly told her that not to tell anything. He then went into another room. At that time, Ms. Owen took her sulu and ran out of the house and sat under a tree where people can see her. She waited there until Maikali, the brother of the accused, return home from work. She had met Maikali in 2013 when she attended to a youth conference of

Bahai Faith in Fiji and made arrangement for her this visit for community work and stay with the family of Maikali. She explained in her evidence the reason why she did not directly go to the Police and report the matter. She stated that the Volavola family had been looking after her very well. She felt that if she go to police and report the matter it would amount as betraying the love and respect the Volavola family had for her.

28. Ms. Owen told Maikali about what Marika did to her. Maikali then took her for a walk as she was depressed. Upon returning from the walk, Maikali shared this incident with his family. On the next day, they had a family meeting where everyone told her not to tell anything about this incident to anyone.
29. During her cross examination, she stated that the accused did not ask her to have sex. She further denied that she consented for such request. She stated that she did not agree to have sex with the accused on that day. She further denied that uncle Mikaele pressurised her to go to police and report this incident. He has actually asked her not to tell anyone about this matter.
30. The last witness of the prosecution is Maikali Tuvuli. He is the brother of the accused. He stated in his evidence that he went to the town on his way back home from his work on 7th of August 2014. He went to the town to buy water as Ms. Owen was sick. He then went back home. He saw Ms. Owen and his brother Marika was at home. Ms. Owen was lying on her bed. She then told him that she is frighten and Marika touched her body. Maikali later explained what he actually meant by touching, which is Fijian explanation for raping. Maikali told her that wait until his parents return home. Once the parent arrived, he called Ms. Owen and his parents. Ms. Owen then told them that Marika raped her.
31. During the cross examination, Maikali stated that their Uncle Mikaele was not present when Ms. Own shared what happened to her with his parents on the night of 7th of August 2014. The family had another gathering on the following day, for which Uncle Mikaele also attended.



32. At the conclusion of the prosecution case, the accused person was explained about his rights in defence. The accused person opted to give evidence on oaths. However, he advised the court that he does not wish to call any other witnesses for his defence.
33. The accused in his evidence denied this allegation. He stated that he went to the room of Ms. Owen and asked her to have sex. She replied saying “ anytime”. He then got on top of her. She removed her trouser. However, he pulled it back and only to pulled her shorts and undergarment to one side. He then had sexual intercourse with her. He stated that she was awake at that time and consented to have sexual intercourse with him.
34. During the cross examination, the accused stated that he knew that Ms. Owen was sick on that day. She had shown him the pills given to her by his mother. He further stated that he and Ms. Owen had no issues until this incident came up during her stay with his family.
35. I have summarised the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

### Analyse of Evidence

36. The prosecution and the defence presented conflicting versions of events, which took place in private between the victim and the accused. The prosecution presented evidence of recent complain. Ms. Owen has told Maikali about this incident in few hours later when he came home. Maikali in his evidence stated that Ms.Owen told him about this incident when he came home from work. She explained in her evidence the reason for not directly go to police and report the matter. The accused also in his evidence admitted that Ms. Owen has a great respect and love for his family.
37. At this point, I must emphasis that, you are only allowed to consider the evidence of recent complaint as an evidence to support or to prove the consistency of the victim’s conduct

with her testimony. It is not an evidence to prove the facts complained by the victim. It will only assist you in order to determine the credibility and the reliability of the testimony of the victim.

38. Ladies and Gentleman, it is your duty now to consider whether the evidence presented by the prosecution is reliable and truthful. If you accept them as reliable and truthful, then you can consider whether you accept them as proven facts. Likewise, you must consider whether the evidence presented by the accused could be accepted as reliable and truthful.
39. You observed and witnessed that all the witnesses gave evidence in court. It is your duty as judges of facts to consider the demeanour of the witnesses, how they react to being cross examined and re-examined, whether they were evasive, in order to decide the credibility of the witness and the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness, not only with his/her evidence, but also with other evidence presented in the case. It will assist you in assessing the evidence presented in the case and forming your decision to accept or refuse the evidence or witnesses or part of them.
40. You heard the evidence presented by the accused, where he denied this allegation. If you accepted the version of the accused person as reliable and truthful, then the case of the prosecution fails. You must then acquit the accused from this charge.
41. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.
42. Even if you reject the version of the accused person that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.

43. Upon consideration of all evidence, if you believe that the count of rape is proved beyond reasonable doubt, you can find the accused is guilty of the charge. If you believe that that charge is not proved beyond reasonable doubt, then you must find the accused not guilty.
44. Madam and gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions on the charge against the accused person. You will be asked individually for your opinion and are not required to give reasons for your opinion. Once you have reached your opinion, you may please inform the clerks, so that the court could be reconvened.
45. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?

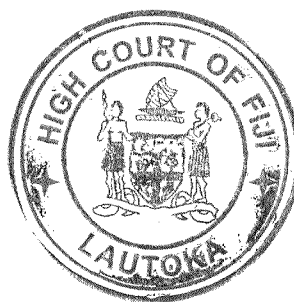


**R. D. R. Thushara Rajasinghe**

**Judge**

**At Lautoka**

**23rd of March 2016**



**Solicitors : Office of the Director of Public Prosecutions**  
**Office of Legal Aid Commission**