

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 157 OF 2014

STATE

VS

TIMOCI SULUA

Counsels : Ms M Chaudhury for the State
Mr A Chand for the Accused

Dates of Trial : 11th April 2016

Summing Up : 14th April 2016

SUMMING UP

Madam and Gentlemen Assessors,

[1] We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear more. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused have addressed

you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the presiding judge, it is my task to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give you on matters of law. It is also important to note that, if I give you a caution, you have to take it also into consideration, in coming to your opinion.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful and reliable. You will then apply relevant law, to the facts as revealed by such credible evidence. In that way you arrive at your opinion.
- [4] During my summing up to you, I may comment on the evidence; if I think it will assist you, in 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 evidence. You should ignore any comment I make on the facts unless it coincides with your own independent view.
- [5] In forming your opinion, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] It is also important to note that, in forming your opinion on the charge against the accused, it is desirable that you reach a unanimous opinion; that is, an opinion on which you all agree, whether he is guilty or not guilty. However, the final decision on questions of fact rests with me. I am not bound to conform to your opinion. However, in arriving at my judgement, I shall place much reliance upon your opinion.
- [7] I have already told you that you must reach your opinion on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] The evidence is what the witnesses said from the witness box, the documents, the things received as prosecution or defence exhibits and any admissions made by the parties.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration.

The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have heard in this Courtroom also are not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening and closing submissions made by Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, another matter which will be of concern to you is the determination of truthfulness of 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 correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.
- [14]** The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every such victim has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15]** The experience of the Courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report the incident

could be also due to shame, coupled with the cultural taboos existing in their society, in relation to an open and frank discussion of matters relating to sex, with elders. There is, in other words, no classic or typical response by victims of Rape.

- [16] A late complaint 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 matter before us, the lateness of the complaint and what weight you attach to it. It is also for you to decide when she did eventually complain as to its genuineness.
- [17] Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question.
- [18] In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Credibility concerns honesty. Reliability may be different. A witness may be honest enough, but have a poor memory or otherwise be mistaken.
- [19] Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.
- [20] Madam and gentlemen, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [21] Having placed considerations that could be used in assessing credibility of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.

- [22] When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the charge. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [23] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [24] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of Primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [25] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [26] In order to illustrate this direction, I will give you an example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that you will understand the relationship between primary fact and the inferences that could be drawn from them.

- [27] It does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [28] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove. That burden rests on the prosecution to prove the guilt of the accused.
- [29] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. Whether the accused has given evidence or not does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [30] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or level of proof, as expected by law?
- [31] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond reasonable doubt. This means that in order to convict, you must be sure that the prosecution has satisfied beyond reasonable doubt of every element that goes to make up the offence charged. I will explain these elements later.
- [32] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence and the other matters of which you must be satisfied, such as identity, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such doubt, then your duty is to find the accused guilty.
- [33] You should dismiss all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion has any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinion.
- [34] Let us now look at the charges contained in the information.
- [35] There is only one charge preferred by DPP, against the accused:

FIRST COUNT

Statement of Offence

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

Particulars of the Offence

TIMOCI SULUA on the 13th day of September 2013 at Suva in the Central Division penetrated the vagina of ANNE BOTITU ROKOCOKO with his tongue without her consent.

- [36] As you would have noted there is only one count of Rape. I shall now deal with the elements of the offence of Rape. In order to prove the count of Rape, the prosecution must prove beyond reasonable doubt that the accused penetrated the complainant's vagina by his tongue without the complainant's consent. The slightest penetration is sufficient to satisfy this element of the charge of Rape.
- [37] Then we must consider the important issue of consent in relation to Rape charge. It must be proved that the accused either knew that she did not consent or was reckless as to whether she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting but carried on anyway when the circumstances known to him it was unreasonable to do so. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond reasonable doubt.
- [38] A person of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was over 13 years of age and therefore, had the capacity to consent. More directions on the issue of consent will be made as we proceed.
- [39] If you are satisfied beyond reasonable doubt that the accused penetrated the complainant's vagina with his tongue without the complainant's consent in the instance as the information revealed, then you must find him guilty to the count of Rape.
- [40] Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence must also be proved by the prosecution. What it means is that it was this accused and none other had penetrated the complainant's vagina on that date and time. There must be positive evidence as to the identification of the accused. However, in this matter identity of the accused is not disputed.
- [41] If you find that the prosecution failed to establish any of these elements in relation to the count of Rape, then you must find the accused not guilty.
- [42] In our law, no corroboration is needed to prove an allegation of Sexual Offence; and Rape is obviously considered as Sexual Offence.
- [43] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[44] The parties have consented to treat the following facts as “agreed facts” without placing necessary evidence to prove them:

1. *It is agreed that the complainant in this matter is Anne BotituRokocoko of Suvavou Village, Suva.*
2. *It is agreed that TimociSulua is charged with one count of Rape, contrary to Section 207 (1) and (2)(b) of the Crimes Decree No. 44 of 2009.*
3. *It is agreed that on Friday 13th September 2013, TimociSulua was drinking beer at the residence of AnareBurasalei at Suvavou Village, Suva.*
4. *It is agreed that on Friday 13th September 2013, TimociSulua entered the house of AnareBurasalei, where the complainant, Anne BotituRokocoko was asleep.*
5. *It is agreed that on Friday 13th September 2013, TimociSulua approached the complainant, Anne BotituRokocoko and pulled her surf shorts and panty down to her ankles.*
6. *It is agreed that on Friday 13th September 2013, the accused intended to have sexual intercourse with Anne BotituRokocoko.*
7. *It is agreed that the accused was interviewed under caution by DC 4122 NacanieliLomani in English on the 14th September 2013.*
8. *It is agreed that the accused was formally charged by PC 3965 Bola Tupua in English on the 14th September 2013.*

[45] The prosecution, in support of their case, called only the complainant.

Case for the Prosecution

[46] Evidence of the complainant Anne BotituRokocoko.

- (i) *It is her evidence that in 2013, she was living in the village of Savavou with her husband Anare, in his house. There was a funeral in the village and having attended it, the complainant returned to their house with her husband and a nephew. Then they drank grog. A group of boys of the village, after a clubbing episode, also have come to their house with a carton of beer.*
- (ii) *Their drinking session started at about 4.30 a.m. with grog and continued with beer until about 8.30 a.m. on 13th September 2013,*

the day of the incident. The complainant also had consumed alcohol and continued drinking with the group. As the drinking session turned noisy, they shifted to the nearby beach, but had to return home due to raining. They continued drinking on her veranda. The time is about 9.00 a.m.

- (iii) Then the complainant's son came home and wanted the complainant to come to his school for parent's interview. As she was drunk, the complainant asked her husband to accompany their son to school.*
- (iv) In relation to the incidents concerning the count of Rape, the complainant said that after her husband left, the boys went somewhere else to continue drinking, leaving the complainant and her three female friends behind. Four females continued with drinking until two of them left the complainant's house. Then the complainant and her friend went to sleep on the floor as it was about 12.00 noon.*
- (v) In her sleep the complainant felt someone trying to pull her pants down. She had surf pants on and also her panties. Then that someone started to play with her vagina. He had licked her vagina. She opened her eyes and saw the accused. She had seen pieces of toilet paper on the sides of his mouth. As the complainant saw the accused, she stood up. While pulling her pants up with her left hand, she had punched the accused with her right hand. Then the accused ran out of the front door.*
- (vi) Thereafter, the complainant had picked up her mobile phone and called Police. When her friend Akata woke up, she related the incident to her as well. According to the complainant the incident happened around 2.30 to 3.00 p.m.*
- (vii) The complainant knew the accused as he is also from the same village.*

[47] That was the case for the prosecution. You then heard me explaining several options to the accused. I explained to him that he could remain silent or give sworn evidence and call witnesses on his behalf. He could also address Court. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests on prosecution at all times. But he opted to offer evidence under oath.

Case for the Accused

[48] Evidence of the Accused

- (i) He says that he knew the complainant as they are from the same village. On 12th September 2013, he attended a funeral in the village. There he drank grog from 4.00 p.m. to 1.00 a.m in the following morning. Then he returned home to sleep. He woke up at about 8.00 a.m. and gone to RB supermarket, passing the complainant's house. There were people in the house and they were drinking.*
- (ii) One person called Sikeli called the accused to join them. They were drinking Rum and Beer. When the accused joined them, there were three cartons of Beer and 40 ounces of Rum. He was drinking there till about 11.00 a.m. and had thereafter returned home. He then asked his mother to cook his lunch and went to sleep.*
- (ii) He was woken up when the lunch was ready and he had his lunch. He then used toilet papers to wipe his hands clean. Then he thought of joining the drinking party again. He went to the complainant's house. No one was there to be seen but the doors were open. He saw the complainant and Akata were sleeping. He had then developed a desire for the complainant and had thereafter pulled her pants and panties down up to her knees with difficulty.*
- (iv) As he pulled down her panties, he saw the complainant had a pad on. He thought she was having her menstrual cycle. When the accused saw the pad, he was disgusted as he did not like it. At that point, the complainant woke up and started punching him. He was punched on his head and chest. Then the accused stood up and ran away. The entire episode was over within two to three minutes. He denied licking the complainant's vagina and when the Police questioned him, he said the same thing to them.*

Analysis of all evidence

- [49]** The prosecution relied on the evidence of the complainant to prove its case while the accused gave evidence in support of his case.
- [50]** Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty to the count of Rape, since the prosecution has

failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved all the elements of the offence of Rape, beyond a reasonable doubt.

- [51] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution also on the evidence of the accused. You must consider his evidence also for its consistency and for probability of his version. If you find the evidence of the accused is truthful and reliable, then you must find the accused not guilty, since here again the prosecution has failed to prove its case. However, I must caution you that if you reject the evidence of the accused as not truthful and also unreliable, that does not mean the prosecution case, is automatically proved. They have to prove their case independently of the accused and that too on the evidence they presented before you.
- [52] With this caution in mind, we could proceed to consider the evidence of the prosecution as well as that of the accused for truthfulness and reliability.
- [53] At the beginning of this summing up, I described some considerations you might want to apply to the evidence in order to satisfy yourselves as to the truthfulness and reliability of the evidence. One such consideration is whether the complainant complained about the act of sexual aggression without a reasonable delay. If a prompt complaint is made, although not necessarily, it supports the proposition that opportunity to fabricate a false allegation is less, as there is little opportunity to the complainant to carefully think it over.
- [54] The evidence of the complainant is that after the alleged act, she had called the Police and reported the incident. She then related the incident again to her friend who had woken up by then. In cross examination, it was clarified that she made a statement to Police on 13th September 2013 at 3.20 p.m. It is also her evidence that the incident took place at about 2.30 p.m. on that day. It is for you to consider whether there is any delay in making the allegation. Promptness of her complaint could, of course, enhance credibility of the complainant as a truthful and reliable witness. However, if you consider that she made her allegation promptly, you must also remember that this is not an accurate indication of the truthfulness of the allegation.
- [55] Another consideration would be the consistency of her allegation. In dealing with the issue of consistency, I shall first refer to the evidence of the complainant. It is revealed in evidence that she made a report to Police on the same day accusing the accused for licking her vagina. During cross examination, no inconsistency was

pointed out on this issue, although the accused did point out several other instances where she had said a different version to Police.

- [56] It was elicited during the cross examination of the complainant that she failed to mention to Police that she took a rest after the responsibilities in relation to the funeral are over. The complainant admitted that she did not. In addition, it was further elicited that although she said in her examination in chief that the incident happened at about 2.30 p.m., she had mentioned to Police that it had happened at about 1.00 – 1.30 p.m. This too she admitted.
- [57] It was also elicited during the cross examination of the complainant; that the accused was also among the drinking party although she denied it in her examination in chief. She admitted the presence of the accused only in the morning of the day of the incident. She denied him consuming alcohol but admitted she may have not seen him drinking.
- [58] These are the inconsistencies in the prosecution case. Considering these items of evidence, it is your responsibility to decide whether the complainant was consistent in her evidence and; whether and to what extent these admitted inconsistencies affect her truthfulness and reliability as a witness.
- [59] Similarly you have to consider any inconsistency in the accused's evidence and decide its effect on truthfulness of his evidence. The accused in his evidence said that when he pulled down the complainant's pants and panties, he saw that she had put on a pad. The accused then inferred that she must be having her periods. This position was not put to the complainant when she gave evidence. The accused said this fact only in his evidence. As you did with the complainant's evidence, you must employ same yardstick in evaluating the truthfulness of the evidence of the accused. Here also it is your responsibility to consider whether the position advanced by the accused is consistent and if it is or not, then to what extent it affects truthfulness of the evidence of the accused.
- [60] In addition to above mentioned considerations on evaluation of evidence; there is another factor in considering whether the evidence of the prosecution and the accused are truthful and reliable. That is the relative probability of the versions of events as presented by the parties.
- [61] The evidence of the prosecution is that complainant had gone to sleep in her house after a long session of drinking grog and beer. She woke up when she felt someone pulling her pants down. Then that person "*played with*" her vagina. Then she opened up her eyes and saw the accused licking her vagina. She immediately got up. She had sworn at the accused and whilst pulling up her pants with one hand, she

punched the accused with the other. The accused fled. Then she phoned the Police to report the incident.

- [62] The accused presents a slightly a different picture. He denied licking her vagina. It is his claim, that when he returned to the complainant's house after his lunch, he wiped his hands with a toilet paper. He saw the complainant and her friend were sleeping. Then a desire arose in him to have sexual intercourse with the complainant. He then removed her pants and panties. Then he saw a pad on her private parts. He thought that the complainant must be having her menstrual period. The accused was disgusted. In that moment the complainant woke up, punched him on his chest and forehead. He then ran away from the house.
- [63] The accused says the allegation of licking her vagina is a fabrication by the complainant. He wants you to consider the facts that the complainant was tired, she was under the influence of large amount of liquor, deprived of her sleep, woken up by the accused in her sleep;she had to undergo the hassle of making a Police complaint and was frustrated. It is said by the accused that these factors had a combined effect on the complainant in making this false allegation.
- [64] The prosecution says that the accused was driven by his desire to have sexual intercourse with the complainant and had licked her vagina, as she alleges, in order to derive sexual satisfaction.
- [65] On the question of relative probabilities, I wish to place the following considerations also for your consideration.
- [66] The accused wants you to consider her distorted perception of consuming large amount of alcohol over a long duration of period resulted in making this allegation. She admitted that she is not sure about it but when the suggestion was put to her that she is not sure of what happened she denied it. The prosecution wants you to consider the fact that she was mentally alert, even after a long session of drinking consuming large volume of grog and beer and she had instructed her husband to go with their son to school. The complainant said that she is used to taking large amounts of alcohol and would have such drinking sessions 2/3 times a week. It is also relevant to consider in relation to this issue that she made her statement to Police at 3.20 p.m. and had the mental alertnessto make accusations about the accused licking her vagina. She also had punched the accused when she realised what was happening.
- [67] In addition, the accused wants you to consider the probability of the complainant's slow reaction when she felt someone pulled her pants down. The complainant said in her evidence that she initially thought it was her husband.

- [68] You will recall the accused, in his closing address invited you to consider the three minute time period with a demonstration. The evidence is that the complainant said in her examination in chief that she observed the accused for three minutes. The complainant also said that she had no clock and relied on her mobile phone to know the time. Whether the evidence of this witness in relation to time period of three minutes was given after measuring the time using a clock or by mere verbal expression of giving out a general time period should be decided by you using your common sense and experience in life.
- [69] There could be many other probabilities you would like to consider arising out of the evidence placed before us. You may consider all these probabilities and should decide which one is the more probable one, based on your common-sense.
- [70] Another consideration in evaluating evidence for its truthfulness and reliability is the manner of each witness in giving evidence.
- [71] You will recall the complainant and the accused giving evidence and how they faced their cross examination. Please consider their demeanour in the witness box in relation to truthfulness and reliability of their evidence.
- [72] I must caution you over one other important matter. When I present the accused's version, alongside the version of the complainant, you might get an impression that the accused must prove that the complainant had fabricated this allegation against him due to anger of frustration. That is wrong. He is under no legal duty to disprove the case for the prosecution. He is not even under a legal duty to offer evidence. He could have remained silent. However, when he does give evidence, then, as already directed, it must first be evaluated for its credibility and reliability.
- [73] So far, I have directed you on the assessment of credibility of the witness for the prosecution and of the accused. If you reject the evidence of the accused and preferred to accept the prosecution evidence as truthful and reliable then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of Rape beyond a reasonable doubt.
- [74] As already noted the complainant had said, in relation to the count of Rape, that the accused licked her vagina. The information alleged that the accused inserted his tongue into the complainant's vagina. The complainant said she saw the accused licking her vagina. She also felt someone "*played with*" her vagina. The accused says that there is no evidence whether the he had put his tongue inside or the outside of the vagina. We do not have medical evidence explain the anatomy of female genitalia. If you accept this evidence as sufficient proof of penetration of the complainant's vagina on that occasion, then you must find the accused guilty of Rape. If you are not satisfied that penetration had occurred, then you must consider the lesser or

alternative offence of sexual assault, notwithstanding that the accused is not charged with sexual assault.

- [75] The accused is guilty of sexual assault if he unlawfully and indecently assaulted the complainant. The word "*unlawfully*" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. In addition to the complainant's evidence, the accused also admits removing the complainant's pants and her panties and observing her private part to note there was a pad placed on it.
- [76] In addition to penetration, the prosecution must prove lack of consent. I shall direct you on the issue of consent before proceeding to the issue of identity of the accused. It is our law that consent of a person must freely and voluntarily be given. She must have the necessary mental capacity to give consent.
- [77] Even if there is consent, if that consent is obtained by force, threat, fear of bodily harm, or exercise of authority then also it cannot be considered as consent acceptable to law. The prosecution wants you to believe that the complainant was fast asleep when the accused removed her pants. She was therefore not in a position to consent. More importantly, when the accused was licking her vagina, there also the complainant did not consent. According to the prosecution, the moment she saw the accused, she swore at him and punched him. The prosecution says these are the indications that she did not consent for the alleged act attributed to the accused.
- [78] In relation to the issue of consent, there is another aspect you must consider. As I have already directed you earlier on my summing up, the prosecution must prove that there was no consent by the complainant or the accused was reckless about it. What that means is whether the accused realised that there was a risk that she was not consenting but carried on with his act anyway when in the circumstances known to him it was unreasonable to do so.
- [79] You must consider whether he genuinely believed she was consenting under the circumstances. If you think so, then you must find the accused not guilty to the count of Rape. If you do not accept that he thought the complainant was consenting on that occasion, but the accused carried on regardless when you consider all the circumstances, then you could convict him to the count of Rape if you find the other elements also have been proved. The accused, in his cross examination admitted that he knew the complainant did not consent and that he did not care whether she consented or not when he removed her clothing.
- [80] The identity of the accused too must be proved by the prosecution beyond a reasonable doubt. However, according to the admitted facts, the accused admitted

that it was he who removed the complainant's pants. In the circumstances, identity is not disputed and therefore need not be proved by the prosecution.

[81] In summary and before I conclude my summing up let me repeat some important points in the following form:

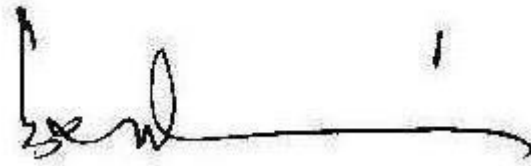
- i. If you accept the accused's denial of licking the complainant's vagina, then you must find the accused not guilty to the count of Rape;*
- ii. If you reject the accused's denial, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iii. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty.*
- iv. If you find the prosecution evidence is both truthful and reliable then only you must consider whether elements of the charge of Rape, namely penetration and lack of consent has been proved beyond a reasonable doubt. If it is so you must find the accused guilty to the count of Rape.*
- v. If you find there was no consent but you entertain a reasonable doubt whether there was penetration, then you must find the accused not guilty to Rape. But then you must proceed to consider whether he guilty or not to the alternative count of Sexual Assault.*

[82] If you have any reasonable doubt about the prosecution case as a whole or an element of the offence, then you must find the accused not guilty.

[82] Any re directions, the parties may request?

[83] Madam and Gentlemen assessors, this concludes my summing up of law and evidence. Now you may retire and deliberate together and may form your individual opinions. When you have reached your individual opinions you will come back to Court, and then you will be asked to state your opinion.

[84] I thank you for your patient hearing.



Achala Wengappuli

JUDGE



Solicitor for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : Legal Aid Commission, Suva.