

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 252 OF 2013

STATE

vs

SEMI RAIQISO

Counsels : Ms Kumar D. for the State
Mr Nainima W. and Ms Choy C. for the Accused

Dates of Trial : 18th and 19th April 2016

Summing Up : 20th April 2016

Name of the Complainant is permanently suppressed and will be referred to as A.B.

SUMMING UP

Ladies and Gentleman 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 Court room 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] Ladies and gentleman, 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. You should not draw any adverse inference against him if he decided not to give evidence exercising his legal right to do so.
- [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 by the amended information:

FIRST COUNT

Statement of Offence

ATTEMPTED RAPE : Contrary to Section 44 and 207(1) and (2)(a) of the Crimes Decree 2009.

Particulars of the Offence

SEMI RAIQISO, on the 24th day of June 2013 at Nakasi in the Central Division attempted to have carnal knowledge of **A.B.** without her consent.

[36] As you would have noted there is a single count of Attempted Rape against the accused. I shall now deal with the elements of the offence of Attempted Rape. In order to prove the count of Attempted Rape, the prosecution must prove beyond reasonable doubt that:

- (i) *the accused had an intention to penetrate the complainant's vagina with his penis;*
- (ii) *the accused did an overt act which manifests that intention;*
- (iii) *the accused did the alleged overt act without the consent of the complainant, or he was reckless as to whether she consented.*

[37] Then we must consider the important issue of consent in relation to the Attempted 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 attempted to penetrate the complainant's vagina with his penis without the complainant's consent in the instance as the amended information revealed, then you must find him guilty to the count of Attempted 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 attempted to penetrate 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 Attempted 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 Attempted 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 SEMI RAIQISO [hereinafter the 'accused person'], at the time of the alleged offence, was employed as a Security Officer.*
 2. *It is agreed that the accused person was on duty in Nakasi at B.W.H. Company during the period of 24th June 2013.*
 3. *It is agreed that the accused person was interviewed under caution by the Nakasi Police Station Crime Branch on the 25th day of June 2013 in the English language.*
 4. *It is agreed that the accused person was formally charged at the Nakasi Police Station by DC 4791 Tupua on the 26th day of June 2013 in the English language.*
- [45] The prosecution, in support of their case, called only the complainant.

Case for the Prosecution

[46] **Evidence of the complainant A. B.**

- (i) *It is her evidence that she was born on 8th March 1999 and as at present is living in the village of Naisogo with her parents. She attends Saraswati College and currently in Form 6.*
- (ii) *During the time period relating to this alleged offence, she was residing with her Grandmother at Vishnu Deo Road, Nakasi. Uncle Taniela was also living there. It was a tin house and she used to help her grandmother with the house chores. There were other buildings close to their house.*
- (iii) *In relation to the incidents concerning the count of Attempted Rape, the complainant said that on 24th June 2013, she returned to her grandmother's home after school at about 3.30 p.m. and did her homework. Then Uncle Taniela asked her to bring some Rourou leaves at about 3.45 p.m.*
- (iv) *She had gone to the nearby hill to pick Rourou leaves and when she returned, "Semi" (the accused) called her from his place of work. He was wearing a security uniform. He held a paper in his hand and the complainant thought that he is going to give it to her. He asked her name, age and the school she attends. She answered them. Thereafter she went home. Had dinner by about 7.00 p.m. and washed the dishes.*
- (v) *Thereafter, Uncle Taniela asked her to go to an Aunt's house, which was located at a distance about two minutes of walking. On her way she saw the accused standing there at his place of work. He called her. She went near him and then he took her by the arm to his place of work to ask something. No one was there. She saw a table and his belongings are kept there. Then the accused took her to a toilet.*
- (vi) *She was told not to say anything. She felt afraid. She was asked by the accused to take off her clothing. She did not. He then took off her T-shirt. When she tried to wear it, the accused had pulled it out again. He locked the door and removed her pants. He then made her lie down by holding her shoulder. He took his pants off while standing. Then he tried to take his penis out but failed. He wanted to put it in to her vagina. He did not put it in her vagina. He said he would give her money and would give anything she wanted. She did not shout or called for help as she was scared.*

(vii) *At this time her uncle called her. The accused then opened the door and she ran out firstly to the road and then to her Aunt Kalesi's house. She told her aunt that she went to buy a lolly. When her aunt asked for the second time, the complainant cried as she was afraid. She told her aunt that the accused locked her in a toilet, tried to take off her T-shirt and pants and he touched her. She also told the same thing to Police on the same day. She was also taken before a doctor for an examination of her vagina and she told the doctor what had happened to her.*

(viii) *Her Birth Certificate was marked as **P.E. No. 1.***

[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. In exercising his legal right, he opted to remain silent. I remind you of the direction I gave you earlier on this point that you should not draw any adverse inference against the accused on his election, not to offer evidence.

Analysis of all evidence

[48] The prosecution relied on the evidence of the complainant to prove its case.

[49] 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 Attempted 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 Attempted Rape, beyond a reasonable doubt.

[50] With this introduction in mind, we could proceed to consider the evidence of the prosecution for its truthfulness and reliability.

[51] 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.

- [52] The evidence of the complainant is that after the alleged act, she had told her Aunt that when asked where she was, she had gone to buy lollies. When she was questioned by her aunt for the second time, then only she disclosed that the accused had removed her clothes and also had touched her breast. In cross examination, it was clarified that she made this accusation only when she heard from her twin sister that Uncle *Taniela* had confronted the accused. She admitted this suggestion. It is for you to decide in considering the evidence, whether there is any delay in making the allegation.
- [53] 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. It is for you to consider the evidence and decide the genuineness of the allegation of the complainant and the suggestion by the accused that she fabricated this story in order to save herself from the anger of her relations.
- [54] Another consideration would be the consistency of her allegation. In dealing with the issue of consistency, I shall first refer to the events that had taken place during the course of this trial. The DPP, from the material disclosed in the statement of the complainant made to Police, decided to charge the accused for penile Rape. After the examination in chief of the complainant is over, the DPP amended the information by making the charge against the accused, to a one of Attempted Rape. That is also done based on the "*evidence*" of the complainant. It is revealed in evidence during the examination in chief of the complainant that she made a report to Police on the same day accusing the accused for touching her. During cross examination, it was elicited that she made accusation of penile rape in her statement to Police and had clearly referred to an act of vaginal penetration by the accused. However, in this Court, it was her evidence that the accused only touched her breasts.
- [55] It was also elicited during the cross examination of the complainant that she stated to Police that the accused "*kissed my breast and my nipples*" but said in her evidence that the accused only touched her breast. The complainant admitted that she did say that the accused "*kissed my breast and my nipples*" to Police. In addition, it was further elicited that she stated in her statement to Police that "*... when he was kissing my breast he was holding on to my hands*". She also admitted stating in her statement that "*... he inserted his erected penis into my vagina when he spread my legs apart.*"

- [56] It was also elicited during the cross examination of the complainant; that *“then I washed the dishes and then I went to my auntie’s house”* and she had said in her examination in chief that it was her uncle who asked her to go but failed to mention about her uncle in the Police statement. During cross examination she changed this position again by stating that her uncle had later changed his mind and it was her Grandmother who asked her to go.
- [57] 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.
- [58] I have referred to the quotations from the statement made by the complainant to the police and the evidence given by the complainant in our presence in the preceding paragraphs. The accused highlighted these inconsistencies to impress upon you that she is inconsistent in her narration of events and therefore her evidence is not truthful and unreliable. In considering the quotations from her statement to Police and evidence, I must issue a caution to you.
- [59] When you consider the quoted portion of her statement against the evidence she has given on the same fact, you cannot accept what she stated to the Police as *“evidence”*. You could use these quotations only to consider whether she made a different statement at a different time on the same issue. You must not act upon the material revealed from the quotation as that is not the evidence before us. I will give you an example. In this Court she said that the accused touched her breast. But to the Police she had told that he *“kissed her breasts and nipples”*. You can only use these two versions to decide whether she was consistent on the issue. You cannot take that he *“kissed her breasts and nipples”* as a fact and also as evidence in this case. The evidence is that the accused had touched her breast. Please bear this caution in mind when you consider these apparent inconsistencies highlighted by accused.
- [60] In addition to the consideration of consistency on evaluation of evidence; there is another factor in considering whether the evidence of the prosecution is truthful and reliable. That is the relative probability of the version of events as presented by the complainant.
- [61] The evidence of the prosecution is that the accused has only touched the breast of the complainant, having removed her T-shirt and pants. However, she made accusation of penile penetration to the Police and also to the medical officer who examined her. Then why did the complainant changed her version of events from an allegation of penile rape into an allegation of attempted Rape before this Court? There is no direct answer offered by the prosecution. You could consider the

evidence of the prosecution to find an answer, if there is one. It was submitted by the accused that she fabricated this allegation of penile Rape by the accused, when she heard that her twin sister telling her aunt, that Uncle *Taniela* has gone to confront the accused over this issue and having thought that the accused would reveal to him that he touched her breast with her consent and therefore was scared of the reaction of her family of her conduct.

- [62] On the question of relative probabilities, I wish to place the following considerations also for your consideration.
- [63] The prosecution wants you to believe that the complainant was scared when her aunt asked her where she was, she replied that she went to buy lollies. The accused wants you to consider the fact that she lied to her aunt and had taken time to make an allegation of penile rape in order to shield herself from scolding by her relations.
- [64] The accused wants you to consider the fact that the complainant, instead of taking the shorter route to her Grandmother's house, taken the longer route and had gone to her aunt's house, in order to conceal the fact that she was with the accused. She also had the opportunity to call out for help and shout, considering the fact that the work place of the accused is located in close proximity to both her aunt's place and Grandmother's place.
- [65] The accused also wants you to consider that although the complainant had said in her cross examination that she told truth to the Police, but when asked if she told the truth to Police and whether she had then lied before this Court, she had no answer to offer.
- [66] 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 whether the version of events presented by the complainant before this Court is probable or not, based on your common-sense.
- [67] Another consideration in evaluating evidence for its truthfulness and reliability is the manner of each witness in giving evidence.
- [68] You will recall the complainant, in several instances during her cross examination did not offer any answer to the questions and suggestions put to her by the accused even though she was given adequate time. These questions and suggestions that were put to her includes that she consented to touch of her breast, she willfully went up to the accused, whether she mentioned that she was told by anyone to go to aunt's place and whether she lied in Court. Please consider her demeanor in the witness box in relation to assessing truthfulness and reliability of her evidence.

- [69]** So far, I have directed you on the assessment of credibility of the witness for the prosecution. It is important to remind you of the two requirements in accepting evidence. Firstly, it must be a truthful account of what happened and secondly it must also be a reliable account of what happened. Both these tests had to be passed by a witness, if his or her evidence to be acted upon by a Court. If you do not think the evidence placed before you by the prosecution, is both truthful and reliable, then it is your duty to find the accused not guilty.
- [70]** Having considered the evidence of the prosecution on these lines, if you preferred to accept the prosecution evidence as truthful and reliable account then only you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of Attempted Rape beyond a reasonable doubt.
- [71]** As already noted the complainant had said, in relation to the count of Attempted Rape, that the accused touched her breast, removed her T-shirt, removed her pants, got her to lie down on the floor, undressed while standing and trying to get his penis out and also tried to put it into her vagina. The complainant did not offer any description in her evidence as to how the accused tried to put his penis into her vagina. The prosecution alleged that the accused attempted to insert his penis into the complainant's vagina. If you accept this evidence as sufficient proof of the accused's intention to penetrate the complainant's vagina with his penis and is an overt act which manifests his intention, and he did it without her consent or was reckless about it, then you must find the accused guilty of Attempted Rape. If you have a reasonable doubt as to any of these elements, then it is your duty to find the accused not guilty to Attempted Rape.
- [72]** In addition to attempted 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.
- [73]** 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 did not consent as she was in fear and resisted when the accused removed her T-shirt. The prosecution says these are the indications that she did not consent for the alleged act, attributed to the accused.
- [74]** 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.

[75] 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 Attempted Rape. If you do not accept that the accused thought that the complainant was consenting on that occasion, but he carried on regardless, when you consider all the circumstances, then you could convict him to the count of Attempted Rape if you find the other elements also have been proved.

[76] Ordinarily, the identity of the accused too must be proved by the prosecution beyond a reasonable doubt. However, during the trial the accused did not contest the issue of identity.

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

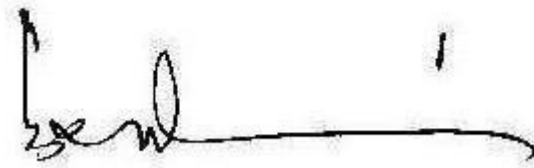
- i. If you accept the accused's claim of that he kissed the breast of the complainant with her consent and did not attempt rape, then you must find the accused not guilty to the count of Attempted Rape;*
- ii. If you reject the accused's claim, then you must proceed to consider whether there is truthful 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 Attempt of Rape, namely whether the accused had an intention to penetrate the complainant's vagina with his penis and he did an overt act which manifests that intention, 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 Attempted Rape.*

[78] 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.

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

[80] Ladies and Gentleman 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.

[81] I thank you for your patient hearing.



Achala Wengappuli
JUDGE



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