

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

**CRIMINAL CASE: HAC 187 OF 2013**

**BETWEEN** : STATE

**AND** : JEREMAIA KALOKALO

**Counsel** : Mr. A. Singh for State  
Mr. M. Fesaitu for the Accused

**Date of Hearing** : 26th and 27th of April 2016

**Date of Closing Submissions** : 27th of April 2016

**Date of Summing Up** : 27th of April 2016

**SUMMING UP**

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 accused persons 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.
10. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You then should 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 own evidence but also with other evidence presented in the case.
11. 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, where they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he testifying, his disinterestedness, his integrity, and his veracity in order to determine the credibility of the witness and his evidence.

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

12. I now draw your attention to the issue of burden and standard of proof. The accused person is presumed to be innocent until his is proven guilty. The presumption of

innocence is in force until you form your own opinion that the accused person is guilty for the offence.

13. 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.
14. 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**

15. 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;

*“Jeremaia Kalokalo Tuisawau on the 22nd day of September 2013 at Nadi in the Western Divison penetrated the vagina of Karalaini Liku, with his penis, without her consent”*

16. 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,*



17. The prosecution alleges that the accused penetrated the vagina of the victim with his penis without her consent on the 22nd of September 2013. 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
  
18. Prior to take your attention to the main elements of the offence in detail, I kindly request you to draw your attention to the admitted facts, which are before you. I do not wish the 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.
  
19. The victim of this case gave evidence behind a screen. The giving of evidence in this way is perfectly normal. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudice the evidence given by the witness. The fact that the witness gave evidence in this manner must not be considered against the accused person.
  
20. The accused in his evidence did not dispute that he was present at the house of the victim at the time the prosecution alleges this incident took place. Hence, the issue of the identity of the accused is not disputed during the course of this hearing.
  
21. 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 proven that the victim, Karalaini 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.

22. The accused and the victim are legally married and have six children. The accused and the victim adduced evidence that they had been separated from each other's during the month of September 2013.
23. In law a husband can be convicted of rape of his wife or the partner if the constituents of the offence are proved notwithstanding his relationship with the victim. A married woman is entitled to say "no" and to refuse to consent even to her husband or long-term partner. It is for you to decide in applying your combined good sense, experience and knowledge of human nature and modern behaviour whether the accused inserted his penis into the vagina of the victim in the absence of her consent.
24. If you are satisfied, that the accused had inserted his penis into the vagina of the victim and she 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 advice 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 was prevailed at the time of the alleged incident took place.
25. 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.



26. 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.
27. 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.
28. It is your duty as judges of facts to assess the evidence given by the victim, in order to determine whether the accused penetrated into the vagina of the victim with his penis and she had not consented for this alleged sexual intercourse. In doing that, you must be mindful that not to bring in to the assessment of the evidence 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.
29. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

30. The first witness of the prosecution is Karalaini Liku. She is the victim of this instant case. She stated in her evidence that the accused is her ex-husband. She could recall that she was at her house at Navatulevu on the early morning of 22nd of September 2013. She was with her boy friend Sivaniolo. She woke up after hearing the voice of her husband, the accused. She heard that the accused was talking on top of his voice and chasing Sivaniolo. He then came to the room, where she was sleeping. She was in her undergarment. He started to punch her. She felt weak. He then pulled her legs and inserted his penis into her vagina and had sexual intercourse with her. She stated in her evidence that she did not consent to the accused to have sexual intercourse with her. She kept on asking the accused to stop what he was doing. However, he did not listen to her and went ahead of having sexual intercourse with her. She explained that he punched on her upper body, around left ribs area.
31. During the cross examination, Karalaini stated that the accused did not punch Sivaniolo and only shouted at him to leave the house. They did not fight inside the room. She further stated that the accused did not come and wake her up. She got up as the accused was talking on top of his voice and chasing Sivaniolo. She stated in her evidence that she had already informed the accused that she was having an affair with Sivaniolo before this incident took place on 23rd of September 2013.
32. Subsequent of having sexual intercourse, both the accused and the victim fallen into sleep on the same place. The accused left the house in the morning. Karalaini then went to the Police Station of Nadi and reported the matter. She was then referred to a medical examination.
33. The second witness of the prosecution is Mr. Sivaniolo Nawale. He is the boy friend of the victim. He stated in his evidence that he went to a night club with Karalaini and then went to her house around 2.a.m. in the morning. He was woken up with the voice of the accused. He was sleeping with Karalaini in the bedroom. He stated in his evidence that both of them were in their undergarments while the accused came in. He was standing at the door of the room. He asked him to leave the house. The accused was angry and



chased him. He then took his cloths and went out the house. Having came out of the house he directly went to his house. He stated that the accused did not punch him.

34. The third witness of the prosecution is WDC Virisila Rakadi. She stated in her evidence that Karalaini reported this matter to the police on the 22nd of September 2013. She recorded the report made by the victim. She then visited the scene of the crime and observed the place.
35. 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.
36. The accused in his evidence stated that the victim is his wife and he is still legally married to her. They have six children from the marriage. He was with his children at Narare in the night of 21st of September 2013. He had couple of cava bowls. He was called by his wife Karalaini and told him that she was tired and going to stay at one of her aunties house at Navatulevu. That house was close to his family house at Navatulevu. So he decided to go and see her. He found that she had never come to her aunty's place in that night. He then went to his house at Navatulave, where he heard a sound of snoring coming inside the house. He could not find the lock of the door and found that it was locked from inside. He then removed few louver blades from the window and entered into the house. He found his wife and Sivaniolo were sleeping naked in his room. He went to her and wake her up. She told him hold on and slowly. She asked him to calm down. He stated that he got really angry as he saw his wife was sleeping naked with another man in his bed room. He then asked that man to leave the house. He threw few punches at him. He then started to hit his wife as he was angry. He denied that he ever had sexual intercourse or rape his wife, Karalaini on that night.
37. The accused stated in his evidence that he did not know that his wife was dating with another man until he saw them sleeping together in his bedroom. He stayed there about half an hour and then a little girl came and called Karalaini to go Aunty's house. They

both left the house together and he dropped her at her aunt's place. He then went to the Police Station. He met one police officer by the name of Jone and told him about the incident took place in the previous night. He stated that he made love bites on her neck as she requested him to do so because then she could not go to work.

38. During the cross examination the accused stated that he tried to chase both Karalaini and Sivaniolo. She then asked him whether she can dress up. She then put a t-shirt and a sulu. They then talked inside the house. After a while she asked him to put love bits on her neck so she could not go to work. At that time, she was dressed in a t-shirt and sulu. Then a little girl from Aunt's house came and knocked the door. They then went together. He dropped her at the Aunt's place and went to the police. The accused stated that he did not tell his lawyer about her dressing up and talked with him as he waited for a chance to tell the truth in court.
39. 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.

### **Analyses of Evidence**

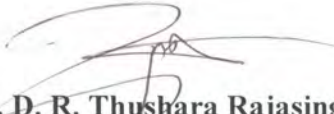
40. The prosecution and the defence presented conflicting versions of events, which took place in private between the victim and the accused. The victim claims that the accused assaulted her and then forcefully had sexual intercourse with her against her consent. The accused did not deny that he came to the house around 4 a.m. in the morning and chased her boy friend. He further admitted that he assaulted her as he was angry. However, he denied that he had sexual intercourse with her. According to the evidence given by the accused that he put love bites on the neck of Karalaini as she requested to do so.



41. The prosecution presented evidence of recent complain. Karalaini made a report to the police on the following morning. W.P.C. Virisila gave evidence that she received the report of the victim.
42. 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.
43. 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.
44. 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.
45. 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.
46. 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.
47. 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.

48. 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.
49. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



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

**At Lautoka**  
**27th of April 2016**

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