

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC. 159 OF 2015

BETWEEN:

STATE

PROSECUTION

AND:

ALAFI JONE

ACCUSED PERSON

Counsel:

Mr. E. Samisoni and Ms. S. Puamau for State
Ms. T. Kean for Accused

Dates of Hearing:

30th and 31st May 2016

Date of Summing Up:

1st June 2016

SUMMING UP

Lady and Gentlemen Assessors.

- [1] It is now my duty to sum up this case to you. I will direct you on matters of Law which you must accept and act upon. On matters of fact however, which witnesses to accept as reliable, which version of the evidence to accept, these are matters for you to decide for yourselves. So if I express my opinion to you about the facts of the case, or if I appear to do so it is a matter for you whether you accept

what I say, or form your own opinions. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.

- [2] You decide what facts are proved and what inferences you properly draw from those facts. You then apply the Law as I explain it to you and form your opinion as to whether the accused is guilty or not guilty.
- [3] The Counsel for the Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as Defence Counsel and State Counsel. Their submissions are not evidence. It is a matter for you to decide which version of the facts to accept, or reject.
- [4] You will not be asked to give reasons for your opinions, but merely your opinions themselves, and your opinions need not be unanimous but it would be desirable if you could agree on them. Your opinions are not binding on me but I can tell you, that they will carry great weight with me when I deliver my judgment.
- [5] On the question of proof, I must direct you as a matter of law that the burden of proof lies on the prosecution throughout the trial and never shifts. There is no obligation on the accused person to prove his innocence. Under our criminal justice system, accused person is presumed to be innocent until he is proved guilty.

- [6] The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
- [7] Your decisions must be solely and exclusively upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you might have heard about this case, through print or electronic media or outside of this courtroom.
- [8] Your duty is to find the facts based on the evidence apply the Law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
- [9] The written admitted facts are before you. You may consider those facts as unchallenged evidence lead from the witnesses and that those facts are proved beyond reasonable doubt.
- [10] The accused is charged with one count of Rape and one count of Assault Causing Actual Bodily Harm. You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty on the other.

- [11] The offence of Rape is defined by Law. It is the unlawful carnal knowledge of a woman or girl without her consent. The elements of the offence Rape that the prosecution has to prove beyond reasonable doubt to find the accused guilty are;
- 1 The accused had carnal knowledge of the complainant,
 - 2 Without her consent,
 - 3 He knew or believed that she was not consenting or didn't care if she was not consenting.
- [12] For the accused to be found guilty of Rape the prosecution must prove all these elements beyond reasonable doubt. If you find that any of those elements are not proved beyond reasonable doubt, then you must find the accused not guilty.
- [13] Carnal Knowledge is the penetration of the vagina by the penis. It is not necessary for the prosecution to prove that there was ejaculation, or even that there was full penetration.
- [14] The particulars of the offence of Rape in count No.1 say that the accused had carnal knowledge of Olivia Mailulu without her consent. It is an admitted fact that the accused on 24th of August 2014 had carnal knowledge of the complainant Olivia whereby the accused penetrated complainant's vagina with his penis. Therefore the remaining element that the prosecution has to prove beyond reasonable doubt is the

absence of consent. That the complainant did not consent and that the accused knew or believed that she was not consenting and was determined to have intercourse anyway.

- [15] Where the consent is obtained through fear or by threat or by exercise of authority, then that is not consent. However, it is not enough for you to be satisfied that the complainant was not consenting. You must be satisfied beyond reasonable doubt that the accused knew or believed that she was not consenting and was determined to have sexual intercourse with her anyway.
- [16] On count No 2, the accused is charged with the offence of Assault Causing Actual Bodily harm. To find the accused guilty of this offence prosecution has to prove the following elements beyond reasonable doubt.
1. The accused committed an assault
 2. That assault caused the complainant actual bodily harm.
- [17] Assault is an act by which a person intentionally or recklessly causes another to apprehend unlawful violence. The act must be accompanied by a hostile intent calculated to cause apprehension in the mind of the victim. Where the hostile intent is not present, there will be no assault, unless, of course, it is proved that the accused was reckless as to

whether the victim would apprehend immediate and unlawful violence.

[18] 'Bodily harm' has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the victim.

[19] In this case, the alleged victim Olivia said in evidence that the accused punched her face and strangled her neck. If you find that the accused punched her, or strangled her neck the way the victim testified, then the prosecution has proved the elements of the offence of Assault Causing Actual bodily Harm as charged in count No. 2.

The Evidence

[20] Prosecution called the complainant Olivia Mailulu to give evidence first. She had gone to Friends Night Club on 23/08/2014 with Luisa. She had bought drinks for them. She had met Kelera who was her friend from childhood, Kelera's boyfriend Alafi the accused, and another girl who were drinking there.

[21] Early morning on 24th August 2014 they had been still at the night club. Kelera had gone back as she was part of voluntary members of the hibiscus festival. Around 5am, her friend Luisa also had wanted to leave, she said. Accused had said that they could go together, so she had stayed back with the accused. She said that she trusted the accused

because he was her friend's boyfriend and also he was her cousin. She said that she passed out inside the club.

- [22] She said that she had gone to Newtown, Salato road to the house of Leilani. She said that she could not remember the journey to Newtown as she had been sleeping. The next thing she could remember was Alafi on top of her pulling down her pants, she said. She had struggled and had called for help, but the accused was strangling her neck trying to shut her up and also same time he had punched her face. As he was punching her face and for the amount of punches he gave, as she was weak she was out again, she said.
- [23] When she woke up, Accused had been lying next to her and she had been half naked. She said that she could see kids peeping and shouting "she is awake, she is awake". She had been underneath the house in a place like a storage place on top of a tarpaulin. Her body had been paining, she said. She could not see properly as her face was swollen, she said. Inside the vagina had been paining. She had looked for her clothes and had grabbed one 'sulu' which was hanging on the line.
- [24] She had then gone up to the house where she met Leilani. Leilani had told her that it was her house at Newtown. She had then straight gone to Valelevu Police Station and had reported the matter. She had complaint about the accused assaulting and raping her. She said that Leilani and her children were unfair as they saw everything happened

and did not call the police or anybody. Police had brought her to hospital and she was medically examined by Dr. Alipate at CWM hospital, she said.

- [25] In cross examination she said that she was drinking alcohol with the friends and they drank about 8 jugs. She said that she drank more alcohol with Alafi after her friend left.
- [26] She denied having a fight with some people in the club. She said that she could not remember Alafi coming and stopping her fighting. She denied getting punched and scratches by people when fighting. She denied receiving injuries from a fight.
- [27] She said that she was comfortable to drink with Alafi and she stayed back with Alafi because she wanted to drink more. Alafi had not forced her to stay back in the club. She said that she could not remember that Alafi and she were kissing. She could not remember leaving night club with Alafi. She could not remember whether they got into a taxi after leaving the club. She could not remember that they were looking for a room to sleep with Alafi. She said that she could not remember that she planned to have sexual intercourse with Alafi. She could not remember getting down from taxi at Leilani's house.
- [28] She denied Alafi taking her to the bedroom. She denied that she took her clothes off. She denied having sexual intercourse with Alafi in the

bedroom. She said that when she woke up Alafi took her clothes off. She denied helping Alafi to remove her clothes. She said that she cannot remember consenting to sexual intercourse with Alafi. She could not remember that Alafi put on his clothes after intercourse. When she woke up Alafi had been dressed in his trousers and a striped shirt.

- [29] She said that she told the doctor that she was drinking with his friends and she passed out and that when she woke up in an unfamiliar place, she was assaulted, and she passed out. Also she had told the doctor that when she woke up she was half naked. She said that she could not remember the injuries to the neck and back when she woke up. She could not remember the injuries to her breast.
- [30] She said that she was drunk. She said she gained consciousness at Leilani's house, when she woke up and was struggling. She said that she could remember that. She said that she was ashamed when she regained conscious.
- [31] She denied that she consented to sexual intercourse with Alafi. She said that she told the police that Alafi was her cousin. However, after showing her statement to police she said that it is not there in the statement. She said that she told the police that Kelera was Alafi's girlfriend.

- [32] She said that she told the police that she shouted for help. On showing her statement she said that it is not there in her statement. She said that the incident was fresh in her mind at the time she gave her statement to police.
- [33] She could not remember whether she signed the report for the doctor to examine her. She said that she consented for the medical examination.
- [34] In re-examination she said that she did not have any objection for the Doctor Alipate to examine her. She said that she told that she could not remember whether she consented to sexual intercourse with Alafi as she passed out when she was still in the club. She said she told that she could not remember a fight in the club because if it really happened, her cousin who was the bar Manager would have told her. She said that she did not write the statement to police but a police officer wrote.
- [35] The next witness was Dr. Alipate Vakamocea who medically examined the complainant. You heard his qualification and experience as a medical doctor which was unchallenged. The medical report that was prepared by him after examination of the complainant was produced in evidence as 'PE1'.

His specific medical findings were:

Noted swelling and bruising over face left and right. Swelling over lower left orbits and cheek bones as well as left angle of mouth.

Lacerations noted on buccal mucosa bilaterally. Contusions noted over neck. Minor marks on back. Perenal region has minor lacerations extending to posterior forchette.

- [36] Explaining to court what he has said in D12 of his report, he said that the face was swollen and bruised, left side was more than the right. Left cheek and the mouth had been swollen. Swelling may have caused by blunt trauma to the face, he said. Blunt force trauma means a punch or by a piece of wood. He demonstrated to you about the laceration of the inside cheek. Contusions on the neck were bruising, he said. He said that it may have caused with blunt force trauma, possibly by choking or strangulating.
- [37] He explained about the lacerations in the perenal region. Extending to posterior forchette means bottom part of the vagina before the anus, he explained. These lacerations would have caused by blunt force trauma as well. A penis may make those lacerations, he said. He said that all injuries including the vaginal injuries were quite fresh and may have caused within 24 hours.
- [38] He said that the findings were possibly consistent with rape. Appendix 1 of the report shows where the injuries were located, he said.
- [39] In cross examination, giving his opinion on the perenal lacerations, he said that there is a possibility that it may happen with consensual

intercourse, but usually not at the extensive nature as he noted. Answering a question whether it can cause when parties having vigorous sex, he said, yes, if you have unlubricated sex, but not usually to this extent. He said that the perenium is situated outside the vagina. He said that the laceration in the peranal region is unlikely to be caused by an infection like thrush or yeast.

[40] He said that the vaginal tissues heal very well and therefore this has happened within 24 hours. He said that he cannot confirm whether this has caused by forceful penetration. He said that the findings were consistent with the history given by the patient as mentioned in D10 of the report.

[41] When he was asked when someone is involved in a fight where punches involved on the face, how long a black eye injury would be visible, he said that it depends on the punch and how strong the tissue is. He said that a black eye was involved in this case. He said that the injuries had caused within 24 hours. He said that the injury mentioned in D12(c) cannot be caused by a fight with punches involved. The witness has prescribed the patient, treatment for sexually transmitted infections and for bacterial infections. He said that according to the history given, this treatment would prevent any infection. He said that Olivia gave her verbal consent for the examination.

[42] The last witness for the prosecution was WDC Maraia Daurewa who was the Investigating Officer in this case. Olivia has lodged the report on 24th August 2014 at 10.59 am. Nature of the complaint had been that she was raped by Alafi Jone on that early morning. She said that when a witness makes a statement it is recorded by a police officer. She said that this statement was recorded by the sexual offences unit at Totogo police station and not by her.

That was the evidence for the prosecution.

[43] Lady and Gentlemen assessors,

At the end of the prosecution case you heard me explain several options to the accused. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains on the prosecution at all times. The accused opted to remain silent. You must not draw any adverse inference from his choice to remain silent.

[44] Lady and gentlemen assessors,

You heard the evidence of many witnesses. If I did not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision.

- [45] You may have observed that when complainant Olivia gave evidence there were some inconsistencies between the evidence before this court and the statement given to the police. Those were omissions. For example, she had not told in her statement to police that Alafi was her cousin. She has not told in her statement that she shouted for help although she said in court that she did. Olivia said that the statement was written by a police officer and not by her. What you should take into consideration is only the evidence given by the witness in court and not any other previous statement given by the witness. However, you should also take into consideration the fact that such inconsistencies between the evidence before court and statement to police can affect the credibility of the witness. When you consider the credibility of the complainant on those omissions, you may also consider the circumstances under which she was at that time, her demeanour, and also whether the reason given by her for those omissions was justified.
- [46] May I also direct you that a witness can give evidence on his observations, like what he heard, what he saw, and what he perceived. Only on certain circumstances court would allow witnesses to give their opinion on a matter. Those witnesses should be experts on that particular subject. For example you get experts on medical field, experts on finger prints, experts on fire arms, drug analysis etc. Now in this case Dr. Alipate gave evidence on his medical examination of the alleged victim Olivia. His expertise on the medical field was not

challenged by the defence. Therefore the opinions he gave on his relevant subject are admissible. You may decide what weight you give to that evidence.

- [47] I will now direct you on evidence of recent complaint? In this case, the alleged victim Olivia said that she straight away went to the police station the same day and reported the matter without delay. The Investigating Police Officer in her evidence confirmed that the complaint was made the same morning. The complainant also was examined by the doctor the same day and she had told the doctor as to what happened. Doctor Alipate confirmed the history given by the complainant. Making a complaint without delay cannot be taken as corroborative evidence of what she testified in court. However, the fact that she made the complaint without delay will show her consistency and may enhance her credibility. I must also direct you that if you believe the evidence of the complainant as truth, no corroboration of her evidence is required to find the accused guilty.
- [48] The complainant says she passed out in the 'friends' night club and that she was at one Leilani's house when she woke up. She cannot remember how she went there. The accused had been on top of her pulling down her pants. She says that she struggled and called for help. The accused had punched her, strangled her neck to shut her up. Due to the punches the accused gave, she had passed out again as she was weak. When she woke up again she had been half naked and her

vagina had been painful. She had been underneath the house in a place like a storage area on top of a tarpaulin. She denied that she consented to have intercourse with the accused. She said that she cannot remember most of the things and that she was drunk.

- [49] The defence suggested that the complainant had a fight at the night club with some others. Further suggested that after leaving the club, they both got into a taxi, and that they were looking for a room to sleep together. Defence suggested that the complainant was taken to a bedroom at Leilani's house and had consensual sexual intercourse. Suggestions made by a party are not evidence unless the witness accepts the suggestion made. You decide which version you are going to accept.
- [50] I have told you the elements of the offence of Rape and Assault Causing Actual Bodily Harm you have to consider. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You may use your common sense when deciding on the facts. Assess the evidence of all witnesses and their demeanour in arriving at your opinions.
- [51] I have explained the legal principles to you. You will have to evaluate all the evidence and apply the law as I explained to you, when you


consider the charges against the accused have been proved beyond reasonable doubt.

[52] Your opinions on the charges of Rape and Assault Causing Actual Bodily Harm will be either guilty or not guilty.

[53] Lady and Gentlemen Assessors,

This concludes my summing up of the Law. Now you may retire and deliberate together and may form your individual opinions on the charges against the accused. You may peruse any of the exhibits you like to consider. When you have reached your separate opinions you will come back to court and you will be asked to state your separate opinion.




Priyantha Fernando
Judge

At Suva

01st June 2016

Solicitors

Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for Accused