

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 69 of 2014

STATE

V

MACIU LIBU

Counsel : Ms. R. Uce for the State.
: Accused in person.

Dates of Hearing : 4, 5 September, 2017
Closing Speeches : 6 September, 2017
Date of Summing Up : 6 September, 2017

SUMMING UP

Madam and Gentlemen Assessors

[1] It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

[2] In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

- [3] So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
- [4] 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 own opinion as to whether the accused is guilty or not.
- [5] State Counsel and the accused have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State Counsel and accused in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
- [6] You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

- [9] As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

- [10] 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 person'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.
- [11] Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
- [12] You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.
- [13] Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

- [14] The accused is charged with the following offence: (a copy of the information is with you).

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

MACIU LIBU on the 3rd of May, 2014 at Lautoka in the Western Division, had carnal knowledge of **SEINI BATIUVI**, without her consent.

- [15] Carnal knowledge means sexual intercourse that is the penetration of the penis into the vagina.
- [16] To prove the offence of rape the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
- (a) The accused;
 - (b) Penetrated the vagina of the complainant Seini Batiuvi with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
- [17] The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
- [18] In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time that is on 3rd of May, 2014.
- [19] The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
- [20] The second element is the act of penetration of the complainant's vagina by the penis.
- [21] The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free

will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.

- [22] If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
- [23] You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
- [24] If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
- [25] If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offence he is charged with.
- [26] As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.

PROSECUTION CASE

- [27] The prosecution called three (3) witnesses to prove its case against the accused.
- [28] The first prosecution witness was the complainant Seini Batiuvi on 3rd May, 2014 between 7.30pm and 8pm she was walking alone from the roundabout of the South Seas Club towards the Value City Shop in the heart of Lautoka City. She was about to go past the corner on the side of this shop when the witness felt somebody grabbed the right side collar of her t-shirt and pulled her to the side of the Value City Shop into a dark passage.
- [29] When the witness was pulled inside the passage she heard this person saying in Itaukei language "*you are my wife*". The witness replied she was not his wife at this time the witness received a punch on her stomach. As the witness sat on the ground she received two more punches on the lower part of her stomach after this he started to undress her by taking off her t-shirt, bra, trousers and panty. At this time the witness was lying down on the ground.
- [30] This person removed his t-shirt then pulled his trousers down to his knees and came on top of the witness and inserted his penis into her vagina. She felt pain on the lower part of her stomach this person was on top of her for around 10 minutes.
- [31] There were no lights in the area the only light was from South Seas Club about 3 to 4 meters away. The light at the end of the passage was quite far away.
- [32] The witness was able to see that this person had dreadlocks hair in his hand he had a shoe shine brush and a box used for shoe shining.

He was wearing a black t-shirt and black long trousers and a cap he was of dark complexion a bit tall but not a very big person.

- [33] When he was on top of her she could see his face at this time she saw a security officer about 6 meters away to whom she called out. The first time she called out it wasn't loud enough it was when she called out the second time the security officer looked towards her. At this time this person left her.
- [34] The witness ran towards the security officer by taking her clothes with her seeking help. When she reached the security officer she wore her clothes and informed the security officer of what had happened to her by this time this person had left the scene.
- [35] When her clothes were been removed the witness did not do anything because she was feeling weak and her stomach was paining and she could not also move herself because he had locked both her legs using his legs. The witness did not scream because of pain in the stomach and she was experiencing shortness of breath so her voice was not loud enough.
- [36] The matter was reported to the Police thereafter she was medically examined at the Hospital. The witness was hospitalized for 2 to 3 weeks. One day on her way home she decided to go for shopping. At the Jack's shop the witness saw the same man sitting outside the shop with other shoe shine boys.
- [37] The witness went to the Lautoka Police Station and informed the Woman Police Officer Asenaca. This Police Officer showed the witness some photographs and for the witness to identify the person who had raped her on the night of 3rd May. From the photographs she was able to recognize the accused thereafter an identification

parade was organized by the Police and that she was able to identify the accused as the person who had raped her that night.

Madam and Gentlemen Assessors

- [38] In regards to the evidence given by the complainant that she was shown the photograph of the accused at the Police Station I direct you to disregard any inference that the accused may have any previous police history or has something to do with the Police or any inclination as to why the Police had possession of his photograph. There may be many reasons why the Police had possession of the accused's photograph. Accordingly no adverse inference ought to be drawn against the accused in this regard.
- [39] You are to approach this aspect of the complainant's evidence with special caution because experience has demonstrated even honest witnesses have given identification from photograph which have been proved to be unreliable.
- [40] In cross examination the witness denied the accused had met her at the traffic lights at the old Globe Theater and that they held hands and walked towards Asha Bhai Building. She also denied that at the Asha Bhai Building the accused told her to have sex with him and he will give her \$20.00.
- [41] The witness agreed that when the accused was on top of her she sought help from a security officer. She denied been asked by the accused to sit on top of him, however, she agreed the accused had grabbed her.
- [42] In re-examination the witness clarified that prior to the incident she had not met the accused.

- [43] Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for the complainant to complain to the security officer about the alleged incident of rape. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all.
- [44] A victim's reluctance to complain in full as to what had happened could be due to shame or respect for an elder or shyness when talking about matters of sexual nature. Here according to the complainant she did complain to the security officer who was about 6 meters away from the scene where she was raped by the accused.
- [45] The second prosecution witness was Retired Inspector Sainiana Lewaicei this witness retired from the Fiji Police Force in September 2015. In 2014 she was based at the Lautoka Police Station. On 22 May, 2014 the witness was instructed to conduct an identification parade. The identification parade was conducted in the police station premises in the bure.
- [46] According to the witness in the identification parade there were nine men chosen by the Investigating Officer of the same features as the suspect. The suspect and the victim were kept separately. The suspect was escorted to the parade the witness spoke to the suspect who preferred to stand between number 4 and number 5.
- [47] The victim was escorted by a female Police Officer to where the parade was conducted. The witness informed the victim that she has to walk into the lineup if she recognizes the person who had raped her she may point or touch the suspect.

- [48] The victim had pointed towards the accused. After this the victim was escorted back to the CID office. The men in the identification parade were of the same features as the suspect with dreadlocks hair of similar height and dark complexion.
- [49] In cross examination the witness denied that she had escorted the victim to the identification parade with another Police Officer. She also denied saying to the victim whilst escorting her not to be scared of the accused but to point at him.
- [50] In re-examination the witness clarified that she was in the bure when the victim was escorted to the lineup by another Police Officer.
- [51] The final prosecution witness was Doctor Agnes Dunn who had medically examined the victim on 3rd May, 2014 at the Lautoka Hospital. The Doctor graduated with an MBBS Degree in 2011 from the Fiji School of Medicine this is her sixth year as a Medical Practitioner.
- [52] The Fiji Police Medical Examination Form of the complainant dated 3rd May, 2014 was tendered and marked as prosecution exhibit no. 1.
- [53] The initial impression of the complainant was that she was in discomfort and disbelief, since the complainant had complained of having stomach pain that is the reason why the Doctor had written discomfort.
- [54] The specific medical findings were:
“(a) no bruises on abdomen;
(b) vaginal appeared jaggeded.”

- [55] The Doctor explained there was no obvious bruises on the abdomen the outer part of the body based on the history of the patient that she was punched on her stomach. As for the vagina been jagged according to the Doctor it appeared there was some force used on the vaginal wall that appeared jagged by any penetrating force for example blunt penetrating force such as a penis or any tool to penetrate the vagina.
- [56] In the professional opinion of the Doctor the complainant had suffered acute injury meaning it happened a few hours ago.
- [57] The summary and conclusions of the Doctor was that the complainant was a victim of sexual abuse/rape by unknown Fijian man where he penetrated unprotected. In her professional opinion the history related by the patient was consistent with her medical findings. The vaginal injury could have been caused by a penis.
- [58] In cross examination the Doctor stated that she was not aware if the complainant had been taken for the surgery of her stomach.

Madam and Gentlemen Assessors

- [59] You have heard the evidence of Dr. Dunn who has been called as an expert witness on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The Medical Report of the complainant is before you and what the Doctor said in her evidence as a whole is to assist you.

[60] An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the Doctor.

[61] You should remember that this evidence of the Doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.

[62] This was the prosecution case.

DEFENCE CASE

Madam and Gentlemen Assessors

[63] At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent and not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent.

[64] According to the line of cross examination the accused takes up the position that he did not penetrate the vagina of the complainant as alleged and that the complainant did not tell the truth to the court. According to the accused on the night of the alleged offending he had

met the complainant at the traffic lights near the old Globe Theater and that they held hands and walked towards Asha Bhai Building where he told the complainant to have sex with him and he will give her \$20.00. At the alleged scene the accused asked the complainant to sit on top of him but she didn't she got hold of her clothes and ran away.

[65] This was the defence case.

ANALYSIS

Madam and Gentlemen Assessors

[66] You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.

[67] The prosecution alleges that the accused on 3rd May, 2014 between 7.30pm and 8pm grabbed the right side collar of the complainant's t-shirt and pulled the complainant to the side of the Value City Shop into a dark passage.

[68] When the witness was pulled inside the passage she heard the accused saying in Itaukei language "*you are my wife*" when the complainant replied she was not his wife she received a punch on her stomach. As the witness sat on the ground she received two more punches on the lower part of her stomach after this he started to undress her by taking off her clothes. At this time the witness was lying down on the ground.

- [69] The accused removed his t-shirt pulled his trousers down to his knees and came on top of the witness and inserted his penis into her vagina for around 10 minutes.
- [70] There were no lights in the area the only light was from South Seas Club about 3 to 4 meters away. The light at the end of the passage was quite far away.
- [71] The witness was able to see the accused who had dreadlocks hair, in his hand he had a shoe shine brush and a box used for shoe shining. He was wearing a black t-shirt, black long trousers, a cap and was of dark complexion a bit tall but not a very big person.
- [72] When the accused came on top of her she could see his face at this time she saw a security officer about 6 meters away to whom she called out. The security officer looked towards her. At this time the accused left her.
- [73] When her clothes were been removed the witness did not do anything because she was weak and her stomach was paining and she could not also move herself because he had locked both her legs using his legs. The witness did not scream because of pain in the stomach and she was experiencing shortness of breath so her voice was not loud enough.
- [74] The matter was reported to the Police thereafter she was medically examined at the Hospital.
- [75] The second prosecution witness was Retired Inspector Sainiana Lewaicei on 22 May, 2014 the witness was instructed to conduct an identification parade. The identification parade was conducted in the police station premises in the bure.

- [76] In the identification parade there were nine men chosen by the Investigating Officer of the same features as the accused. The accused and the victim were kept separately. The accused was escorted to the parade by another Police Officer the witness spoke to the accused before the parade who preferred to stand between the 4th and 5th person.
- [77] The victim was escorted by a female Police Officer to where the parade was conducted. The witness informed the victim that she has to walk into the lineup if she recognizes the person who had raped her she may point or touch the suspect.
- [78] The victim had pointed towards the accused. After this the victim was escorted back to the CID office. The other men in the identification parade were of the same features as the accused with dreadlocks hair of similar height and dark complexion.
- [79] The final witness for the prosecution was Dr. Agnes Dunn, who had examined the complainant on 3rd May, 2014.
- [80] The Doctor explained there was no obvious bruises on the abdomen on the outer part of the body based on the history of the patient that she was punched on her stomach. As for the vagina been jagged according to the Doctor it appeared there was some force used on the vaginal wall.
- [81] In the professional opinion of the Doctor the complainant had suffered acute injury meaning it happened a few hours ago and that the history related by the patient was consistent with the Doctor's

medical findings. The vaginal injury could have been caused by a penis.

[82] The accused has denied the allegation of rape. He takes up the position that he did not penetrate the vagina of the complainant as alleged. On the night of the alleged offending he had met the complainant and that they held hands and walked towards Asha Bhai Building where he told the complainant to have sex with him and he will give her \$20.00. At the alleged scene the accused asked the complainant to sit on top of him but she didn't she got hold of her clothes and ran away.

Madam and Gentlemen Assessors

[83] You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence. In testing the credibility of a witness, you can consider whether there is a delay in making a complaint to someone or to an authority or to Police on the first available opportunity about the incident that is alleged to have occurred. If the complaint is prompt that usually leave no room for fabrication.

[84] Bear in mind 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 case the complaint made to the security officer is genuine and what weight you attach to this.

[85] 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 observed all the

witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

[86] In deciding 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. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

[87] You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

[88] It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.

[89] If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the

prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.

[90] The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

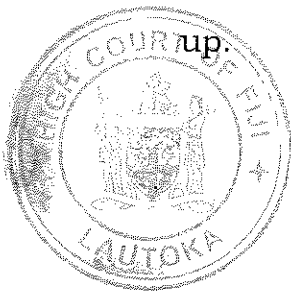
[91] Your possible opinions are:-


COUNT ONE: **RAPE** ACCUSED - GUILTY OR NOT GUILTY

Madam and Gentlemen Assessors

[92] This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.

[93] Before you do so, I would like to ask State Counsel and the accused if there is anything they might wish me to add or alter in my summing




Sunil Sharma
Judge

At Lautoka

6 September, 2017

Solicitors

Office of the Director of Public Prosecutions for the State.

Accused in person.