

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

**Crim. Case No: HAC 135 of 2017**

**STATE**

**v.**

**TEVITA NAODELE TOUTOU**

**Counsel:** Mr. M. Vosawale with Ms. S. Tivao for State  
Ms. V. Filipe for Accused

**Hearing:** 24<sup>th</sup> to 26<sup>th</sup> October 2017  
**Summing Up:** 30<sup>th</sup> October 2017

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**SUMMING UP**

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1. The name of the complainant is suppressed.
2. 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.
3. 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.
4. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or

refuse. You will then apply the law, as I explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

5. I may comment on the facts 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 facts. Hence, it is entirely upon you to accept or disregard any comments I make on facts, unless it coincides with your own independent opinion. I say so because you are the judges of the facts.
6. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes 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 defence 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.
7. 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 put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. 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 I will give the greatest possible weight on your opinions when I form and deliver 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.

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

9. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
10. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
11. 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’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused 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**

12. The accused is charged with one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and two counts of Rape, contrary to Section 207 (1) and (2) (a) of Crimes Act. The particulars of the offences are before you. Therefore, I do not wish to reproduce them in my summing up.
13. The main elements of the offence of Sexual Assault are that:
  - i) The accused,
  - ii) Unlawfully and Indecently,
  - iii) Assault the complainant.

14. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. It is your duty as Assessors to consider and decide whether the acts of fondling the breast and touching the vagina of the complainant by the accused is an indecent act amounting to sexual assault.
15. The main elements of the offence of rape as charged in the information are that:
  - i) The Accused,
  - ii) Penetrated into the vagina of the complainant with his penis,
  - iii) The complainant did not consent to the accused to penetrate into her vagina with his penis,
  - iv) The Accused knew or believed or was reckless as to whether or not she was consenting for him to insert his penis in that manner.

#### **Representative Count**

16. It has been stated in the information that all these three counts are Representative Counts. The prosecution alleges that the accused committed the offence of Sexual Assault between 1st day of February 2010 and 31st of December 2010. According to the particulars of offence of the second count, the prosecution alleges that the accused had penetrated the vagina of the complainant with his penis between 1st day of January 2012 and 31st day of December 2012. Likewise, in the third count, the prosecution has alleged that the accused had penetrated the vagina of the complainant with his penis between the 1st of January 2013 to 12th of March 2017. Accordingly, there is no specific date or time for these three alleged incidents, apart from three specific time period.
17. The prosecution can charge an accused in this manner, when the complainant cannot specify the time that the accused committed the alleged offence and/or the same offence has taken place number of times over a certain period of time.
18. Accordingly, you have to determine whether the prosecution has proven beyond reasonable doubt that the accused had committed the offence of Sexual Assault at least once, during the period between 1st of February 2010 and 31st of December 2010.



19. Likewise, it is your duty to determine whether the prosecution has proven beyond reasonable doubt that the accused had penetrated the vagina of the complainant with his penis, at least once, during the period between 1st of January 2012 and 31st of December 2012, and/or during the period between 1st of January 2013 to 12th of March 2017 respectively.

### **Separate Consideration**

20. The accused is charged with one count of Sexual Assault and two separate counts of Rape. It is your duty to consider each of these three counts separately. If you found the accused is guilty for one count, that does not automatically make him guilty for the remaining counts for which he is charged with.

### **Agreed Facts**

21. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and the defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.

### **Identity of the Accused.**

22. In respect of the first element of the offence of Sexual Assault and the Rape, the prosecution has to prove beyond reasonable doubt that it was the accused who actually unlawfully and indecently assaulted the complainant and then penetrated her vagina with his penis.

### **Penetration**

23. Evidence of slightest penetration of the penis of the accused into the vagina of the complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

### **Consent**

24. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent to the accused to insert his penis into her vagina.

25. 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 complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.
26. The complainant must have the freedom to make the choice. It means that she must not be being pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. The consent for sexual intercourse must be comfortable to the person who made such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.
27. If you are satisfied, that the accused had inserted his penis into the vagina of the complainant 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 or knew that the complainant was freely consenting for this alleged sexual intercourse. I must advise you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual intercourse. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that prevailed at the time of the alleged incident took place.

### **Evidence of Corroboration**

28. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. The offences of Rape and Sexual Assault fall within this category. It means that if you are satisfied with the evidence given by the complainant and accept it



as reliable and credible beyond reasonable doubt, you are then not required to look for any other evidence to support the account given by the complainant.

29. 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, a rapist or a victim of rape.
30. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. As I said above, it is your duty to determine the legal culpability of the alleged act committed by the accused according to law and not the moral or emotional culpability. 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 during the course of the hearing.

#### **Evidence of the Prosecution**

31. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.
32. You have heard the evidence given by the complainant. The complainant in her evidence explained that the accused used to touch her breast and private parts when she was sleeping on the floor of the living room between the period of 1st of January 2010 to 31st of December 2010. She was living with her mother and the accused in the house. It is a big house that has been divided into several parts for several families to accommodate in it. Some of her uncles and aunties used to live in other parts while she lived with the accused and her mother in their part of the house.
33. The accused used to come home after drinking grog and started to fondle her breast while she was sleeping. He then touched her private part. When she tried to turn, he punched on her thighs. He has done it repeatedly during the period of 1st of January 2010 to 31st of December 2010. The complainant in her evidence said that she did not

agree to the accused to fondle her breast and touch her vagina. The complainant has not informed anyone about this as the accused had threatened her not to tell anyone. He had threatened her telling that he will kill her if she tells anyone else. Her mother used to work as a house girl and always come home late in the night. Until then she stayed with the accused. She was twelve years in 2010.

34. The complainant was fourteen years old in 2012. She could recall that during the period between 1st of January 2012 to 31st of December 2012, the accused used to come back home from drinking grog. He then comes to her while she was sleeping. He then undressed her and put his penis inside her vagina. She felt that his penis was going into her vagina. When she tried to turn over, he had punched on her thighs. When she tried to turn and touch her mother, he had punched her chest and head. She had tried to shout and scream, but the accused had punched on her chest. During this period, she used to sleep in the living room with her mother. The complainant said that she did not inform her mother about this, because the accused had threatened her that if she tells her mother, he will kill both of them. He had further said that he is not afraid to go to prison by doing it. The complainant said that she did not agree to the accused to put his penis into her vagina during this period between 1st of January 2012 and 31st of December 2012. She had told the accused that what he was doing to her, was supposed to done to her mother. The accused had then told her that it is better to do it with the complainant than with her mother. According to the evidence given by the complainant, the accused had repeatedly inserted his penis into her vagina on many occasions during the period between 1st of January 2012 and 31st of December 2012.
35. The complainant further said that the accused tore her school uniform when she was trying to go for a camp organized by the church. She then managed to find another school uniform. The accused had told her to stop going to school, but she had continued her schooling. While giving evidence regarding the incidents that took place during the period between 1st of January 2013 to 12th of March 2017, the complainant said that the accused forced her to go to her uncle's place as he did not like her to stay at their house. However, after a week time, he came and took her back.



36. During the period between 1st of January 2013 to 12th of March 2017, the accused had always forced her to lie down for him to insert his penis in to her vagina. It has happened many occasions during this period. The complainant in her evidence said that she did not agree for this. She had resisted and put her legs crossed to each other. He then punched on her thighs. The complainant had tried to tell her mother but the accused had threatened her not to tell her mother about this, if she does, he will kill both of them. According to the evidence given by the complainant, the last time the accused penetrated her vagina with his penis was in March 2017.
37. In March 2017, the complainant had gone to visit her aunty, Amalaini Rokovara and told her what the accused has done to her over the period between 2010 to 2017.
38. You may recall that the complainant during the cross examination said that the following evidence which she stated in her evidence has not been recorded in the statement that she made to the police. they are that:
- i) The accused used to look at her when she came back from the bathroom in 2010,
  - ii) The accused came home after drinking grog,
  - iii) When she tried to call her mother, the accused had slapped her mouth,
  - iv) In 2012, the accused came home after drinking grog and undressed her. He then put his penis into her vagina. When she tried to turn over he had punched on her thighs.
39. The complainant during the cross examination further said that the mother woke up after hearing the accused punching the complainant in the night. The accused then punched her mother as well when she tried to ask him what happened. He sometimes had a piece of hose pipe or knife in his hand when he threatened her not to tell anyone about this incident.
40. During the re-examination, the complainant said that so many things were in her mind about these incidents, when she made her statement to the police. That was the reason she failed to mention some of the facts which she stated in her evidence in court.

41. The second witness of the prosecution is Amalaini Rokovara. She is the aunty of the complainant. The aunty in her evidence said that the complainant came to visit her on the 18th of April 2017. The complainant had complained to her aunty about a chest pain. The aunty then asked what happened. The complainant did not response. The aunty had asked her three times. Only then the complainant started to tell her that the accused used to fondle her breast and touched her private part. He then penetrated her vagina with his penis. The complainant was crying when she told these information to the aunty. The aunty then took her to the police station to report the matter.
42. The last witness of the prosecution is the Doctor, who conducted the medical examination of the complainant. She tendered the medical report as an exhibit of the prosecution.

### **Evidence of Defence**

43. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted not to give evidence.
44. The accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

### **Analysis**

45. You have heard the evidence given by the complainant during the course of this hearing. According to the evidence given by the complainant, these alleged incidents had taken place in private between the accused and the complainant. The complainant claims that the accused sexually assaulted her and then forcefully penetrated her vagina with his penis without her consent. The accused opted not to give evidence, but extensively cross examined the complainant during the cross examination, emphasizing the inconsistent nature of the evidence given by the complainant.

### **Evaluation of Evidence**

46. In order to determine whether the prosecution has proven beyond reasonable doubt that the accused had sexually assaulted and then penetrated the vagina of the complainant



with his penis without her consent, you have to consider the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what the 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 the witness is telling the truth and is correctly recalling the facts about which she has testified. You can accept part of the witness's evidence and reject other parts. The witness may tell the truth about one matter and lie about another; he/she may be accurate in saying one thing and not accurate in another thing.

47. In assessing evidence of the witness, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is testifying 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 her own evidence but also with other evidence presented in the case.
48. It is your duty as judges of facts to consider the demeanours of the witness, how she react to being cross examined and re-examined, was she evasive, in order to decide the credibility of the witness and the evidence.

#### **Evidence given in Close Court**

49. You have seen that the complainant gave evidence in a closed court. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudice the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the accused.

#### **Delay in Reporting**

50. It has been said on behalf of the accused that the fact the complainant did not report what had happened to her as soon as possible makes it less likely that the complaint she eventually made was true. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. 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. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint, likewise an immediate complaint does not necessarily demonstrate a true complaint.

51. The complainant in her evidence said that when she tried to shout or scream, the accused punched on her mouth. He also had threatened her that he will kill her if she tells to someone else about these incidents. The complainant had tried to call her mother but the accused had punched her. When her mother got up and asked what happened, the accused had punched her mother as well. He has threatened the complainant not to tell the mother, if she does, he will kill both of them. The accused had further said that he will not afraid to go to prison. Moreover, the complainant said that the last time the accused penetrate her vagina with his penis was in March 2017, that was few weeks before she related this matter to her aunty.
52. During the course of evidence given by the complainant, the learned counsel for the defence suggested to the complainant that she could have shouted for help. In her closing address the learned counsel for the defence has submitted to you that the complainant's failure to shout demonstrates that the victim was not telling the truth. This is an argument which you have to consider with care. When you do, you should not assume that there is any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the courts is that people who are being subjected to non-consensual sexual activity may respond in a variety of different ways. Moreover, the complainant in her evidence explained the surrounding of her house in the village.

### **Inconsistencies**

53. I now take your attention to the inconsistent nature of the evidence given by the victim as suggested by the learned counsel for the defence.
54. The complainant admitted during the cross examination that the following facts have not been recorded in her statement made to the police, they are that:



- i) The accused used to look at her when she came back from the bathroom in 2010,
- ii) The accused came back home after drinking grog,
- iii) When she tried to call her mother, the accused had slapped her mouth,
- iv) In 2012, the accused came back home after drinking grog and undressed her. He then put his penis into her vagina. When she tried to turn over he had punched on her thighs.

55. I now explain you the purpose of considering the previously made statement of the complainant with her evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such a statement when you consider whether the complainant is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents. The evidence is what a witness testifies in court.

56. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.

57. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

58. When you consider the inconstant nature of the evidence given by the complainant with her statement made to the police, you have to take into consideration that the said statement is not before you as evidence since the defence did not tender the said document as an exhibit. You only heard the questions put to the complainant by the learned counsel for the defence and the answers given by the complainant. The complainant in her evidence said that she was having so many things in her mind about

these incidents that took places over the years when she gave her statement to the police.

### **Evidence of Recent Complaint**

59. You have heard the evidence that on the 14th of April 2017, the complainant had told her aunty, who is the second witness of the prosecution, that the accused had fondled her breast and touched her vagina. The complainant had further told the aunty that the accused penetrated her vagina with his penis. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between the complainant and the accused. Aunty of the complainant was not present and witnessed what happened between complainant and the accused.
60. You are entitled to consider the evidence of recent complaint in order to decide whether or not the complainant has told the truth. The prosecution proposed you that the complainant's complaint to her aunty is consistent with her account of this alleged incident and therefore she is more likely to be truthful. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the accused and the complainant. It therefore cannot of itself prove that the complaint is true.

### **Directions**

61. Madam and gentlemen, upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged, you can find the accused guilty for the said offence of Sexual Assault.
62. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged, you must find the accused is not guilty for the said offence of Sexual Assault.




63. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under the second count, you can find the accused guilty for the said offence of Rape.
64. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under the second count you must find the accused is not guilty for the said count of Rape.
65. Likewise, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under the third count, you can find the accused guilty for the said offence of Rape.
66. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under the third count, you must find the accused is not guilty for the said count of Rape.

### **Conclusion**

67. Madam and Gentlemen assessors. I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
68. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



  
R.D.R.T. Rajasinghe  
**Judge**

**At Suva**  
30<sup>th</sup> October 2017

### **Solicitors**

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