

IN THE HIGH COURT OF FIJI  
AT LABASA  
CRIMINAL JURISDICTION  
CRIMINAL CASE NO. HAC 048 OF 2015LAB

STATE

VS

EPELI LEALEAVONO

Counsels : Mr. R. Kumar for State  
Accused in Person, but trial in absentia

Hearings : 11 December, 2017

Summing Up : 12 December, 2017

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**SUMMING UP**

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**A. ROLE OF JUDGE AND ASSESSORS**

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my 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 fact.
2. State Counsel had made a closing submission to you, about how you should find the facts of this case. The accused had chosen, by his conduct, not to attend the trial, and thus by his conduct, had chosen to exercise his right to remain silent. The right to make a closing

submission to you, is the prerogative of the parties, and they are designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representative of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest 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 is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that 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 so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based 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 outside of this courtroom. 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, and to apply the law to those facts, without fear, favour or ill will.

**C. TRIAL IN ABSENTIA**

7. You will notice that from the beginning of the trial yesterday, that is, 11 December 2017, Epell Lealeavono (the accused) was not present in the dock, in court. On 20 July 2017, the court granted the prosecution's application to proceed in the absence of the accused.

8. Section 14(2)(h)(i) of Fiji's 2013 Constitution reads as follows:

*"...Every person charged with an offence has the right – (h) to be present when being tried, unless – (i) the court is satisfied that the person has been served with a summon or similar process requiring his attendance at the trial, and has chosen not to attend..."*

9. In a pre-trial conference on 18 February 2016, in his presence, the prosecution and the accused agreed for a trial from 26 to 30 September 2016. On 23 October 2015, he waived his right to counsel and choose to represent himself. He was warned on 18 February 2016 that if he absconded from trial, he will be tried in absentia in accordance with the law stated in paragraph 8 hereof. He was then released on bail.

10. On 17 May 2016, the accused failed to appear in court. He had not appeared in court ever since. He was aware of the present court proceeding, but by his conduct, has chosen not to attend. In the meantime, the court trial date had been amended to start from yesterday. Because of the above, the prosecution applied for the accused to be tried in absentia on 20 July 2017. Although the prosecution's application was granted, the court hoped he would turn up yesterday, so that the trial would proceed in his presence.

11. However, as assessors and judges of fact, you cannot hold his non-attendance at the trial to his disadvantage. You cannot use his non-attendance to decide against him, or you cannot view his non-attendance negatively. Despite his non-attendance, he still has the right to a fair trial. The burden is still on the prosecution to prove his guilt beyond a reasonable doubt, and that stays with them from the start to the end of the trial. The accused does not have to prove anything, at all. In fact, he is entitled to remain silent, as he has chosen in this case by not attending trial, and require the prosecution to prove his guilt beyond a reasonable doubt. The burden of proof is not on the accused.

**D. INFORMATION**

12. You have a copy of the information with you, and I will now read the same to you:

*"... [read from the information]..."*

**E. THE MAIN ISSUES**

13. In this case, as assessors and judges of fact, each of you will have to answer the following questions:
- (i) On count no. 1, did the accused, on 29 September 2015, at Taveuni in the Northern Division, dishonestly obtained \$500 from the complainant (PW1) by deceiving her?
  - (ii) On count no. 2, did the accused, on 30 September 2015, at Taveuni in the Northern Division, rape the complainant (PW1)?

**F. THE OFFENCES AND THEIR ELEMENTS**

14. We will discuss count no. 2 (rape) first, as it is the more serious offence of the two counts. For the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt the following elements:
- (i) the accused had sexual intercourse with the complainant, that is, his penis penetrated the complainant's vagina;
  - (ii) without the complainant's consent; and
  - (iii) he knew the complainant was not consenting to sex, at the time
15. In law, the slightest penetration of the complainant's vagina by the accused's penis, is sufficient to constitute "sexual intercourse", and it's irrelevant whether or not the accused ejaculated.
16. Consent is 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 to herself, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all.
17. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to sex, at the time. You will have to look at the parties' conduct, at the time, and the surrounding circumstances, to decide this issue.
18. On count no.1, for the accused to be found guilty of "obtaining a financial advantage by deception", the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused
  - (ii) by a deception
  - (iii) dishonestly obtains

- (iv) a financial advantage
- (v) from the complainant

19. The offence is really about the accused tricking the complainant and thereafter dishonestly obtaining money from her. For example, I promise to give you something valuable, and I asked you for an advance of the money. You give me the money, but I failed to deliver the valuable good to you. That is basically dishonestly obtaining money by tricking or deceiving you.
20. There are two counts in the information. Please, carefully consider them separately and come to a separate considered decision on each of them, in the light of the evidence presented at the trial.

**G. THE PROSECUTION'S CASE**

21. The prosecution's case were as follows. The complainant (PW1) was a businesswoman. She owns a retail shop and buys and sells grog (i.e. kava). On 29 September 2015, she was at her home waiting for the customers to sell her grog. According to the prosecution, Epeli Lealeavono (the accused) came to her home between 10am to 11am on that day. He came in his vehicle. The prosecution alleged that Epeli wanted to sell PW1 some grog. Epeli allegedly told PW1 that he can sell her grog at a cheaper rate. However, according to the prosecution, Epeli allegedly wanted \$500 cash in advance.
22. The parties agreed and PW1 allegedly gave Epeli \$500 cash. According to the prosecution PW1 and Epeli allegedly knew each other as they had been dealing in the buying and selling of grog for the previous months. According to the prosecution, Epeli allegedly failed to deliver the grog on 29 September 2015 after receiving the \$500 cash. PW1 repeatedly called Epeli on 30 September 2015 to bring the grog she had allegedly paid for. According to the prosecution, Epeli arrived at her shop at 11am on 30 September 2015.
23. PW1 asked for her grog. Epeli allegedly told her the grog was still in the bush, and if she wanted to see it, he was prepared to take her there. According to the prosecution, PW1 trusted Epeli and they allegedly went looking for her grog in the bush. Epeli took PW1 into the bush using his vehicle. According to the prosecution, Epeli allegedly took her deep into the bush, and arrived at a tin house. In the tin house was an old mattress and bed sheets. On arriving at the camp, the prosecution alleged that Epeli forced himself on PW1, forcefully threatened to kill

her if she didn't comply with his demands, took PW1 into the tin house and penetrated PW1's vagina with his penis without her consent. The prosecution alleged Epeli knew she was not consenting to sex with him at the time.

24. The matter was later reported to the police. An investigation was carried out. Epeli was arrested by police. He was later taken to court and charged for the offences in the information. Because of the above, the prosecution is asking you, as assessors and judges of facts, to find the accused guilty as charged on both counts. That was the case for the prosecution.

#### H. THE ACCUSED'S CASE

25. On 22 October 2015, the accused waived his right to counsel. On 18 February 2016, the information was put to the accused and he pleaded not guilty to both charges. In other words, he denied the allegations against him. On 11 December 2017, the first day of the trial, the information was again read in court. Because the accused was not present in court and was being tried in absentia, the court entered a not guilty plea on both charges on his behalf in the interest of justice.

26. At the end of the prosecution's case, a prima facie case was found against the accused, and he was called upon to make his defence, although he was not present in court. The options available to the accused was re-put to him in court, although he was not present. Because, he was, by conduct, not present in court, he was deemed to have chosen to exercise his right to remain silent.

27. So, the accused's case was really simple. By conduct, he has chosen not to attend trial, thus he was deemed to have chosen to exercise his right to remain silent. At this point, I direct you to take on board the direction I gave you in paragraph 11 hereof.

#### I. ANALYSIS OF THE EVIDENCE

##### (a) Introduction:

28. In analyzing the evidence, please bear in mind the directions I gave you in paragraph 4, 5 and 6 hereof on the burden and standard of proof. On the question of the accused being tried in absentia, please take on board the directions I gave you in paragraphs 7, 8, 9, 10 and 11 hereof. In the acceptance and/or rejection of the evidence presented at the trial, please take on board the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence,

we will first consider the State's case against the accused, then the accused's case, then the need to look at the whole evidence.

**(b) State's Case Against the Accused:**

29. The State's case against the accused was based fundamentally on the complainant's (PW1) verbal evidence given in court. She gave evidence to you yesterday and I am sure her evidence is still fresh in your mind. You heard her in court. You watched her demeanour in court. I will not bore you with the details of her evidence, but I will summarize the salient points as far as the elements of the offences are concerned. Remember, a crime can be proven with one witness alone, if you, as assessors and judges of fact, accept her evidence.
30. On the rape allegation, she said, the accused tricked her to go deeper into the bush on the pretext of getting her \$500 worth of grog. Once he had succeeded in getting her to a secluded spot, he put his plans into action. PW1 said, he threatened to kill her if she didn't comply with his demands. Then, PW1 said, he forced her into the tin house. PW1 said, he forced her to a mattress. PW1 said, he forcefully removed her pants. PW1 said, he then inserted his penis into her vagina and had sex with her for about 5 minutes, without her consent. PW1 said, he well knew she was not consenting to sex at the time, because he threatened to kill her if she did not comply (count no. 2).
31. On count no. 1, PW1 said, she gave the accused \$500 cash for the grog. PW1 said, to this day the accused had not produce to her the grog, and had not returned her money.
32. If you find PW1's evidence as credible and you accept the same, you must find him guilty as charged on both counts. If otherwise, you must find the accused not guilty as charged on both counts. It is a matter entirely for you.

**(c) The Accused's Case**

33. The accused, by not attending trial, is deemed to have chosen to exercise his right to remain silent. Please, take on board my direction in paragraph 11 hereof.

**(d) Considering the whole Evidence**

34. In this case, there is only one witness, that is, the complainant (PW1). You must carefully consider her evidence as a whole.

J. SUMMARY

35. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt, so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt, so that you are not sure of the accused's guilt, you must find him not guilty as charged.

36. Your possible opinions are as follows:

- |      |             |   |   |   |                      |
|------|-------------|---|---|---|----------------------|
| (i)  | Count no. 1 | : | Obtaining Financial<br>Advantage by Deception | : | Guilty or Not Guilty |
| (ii) | Count no. 2 | : | Rape  | : | Guilty or Not Guilty |

37. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

  
**Salesi Temo**  
**JUDGE**



<b>Solicitor for the State</b>	:	<b>Office of the Director of Public Prosecution, Labasa.</b>
<b>Solicitor for the Accused</b>	:	<b>Accused in Person</b>