

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 96 of 2015

STATE

V

BIU CABEBULA

Counsel : Ms. S. Naibe for the State.
: Mr. S. Kumar [LAC] for the Accused.

Dates of Hearing : 2, 8, 9 March, 2018
Closing Speeches : 12 March, 2018
Date of Summing Up : 13 March, 2018

SUMMING UP

(The name of the complainant is suppressed she will be referred to as "AB").

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 and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. 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.
7. 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

8. 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.

9. 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.
10. 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.
11. 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.
12. 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

13. The accused is charged with one count of rape and one count of indecent assault. (A copy of the information is with you).

FIRST COUNT

REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) & (2) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

BIU CABEBULA between the 9th of July, 2012 to the 31st of July, 2012 at Sigatoka in the Western Division, penetrated the vagina of "**AB**" with his penis without her consent.

SECOND COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

BIU CABEBULA on the 6th day of July, 2012 at Sigatoka in the Western Division, unlawfully and indecently assaulted “**AB**” by caressing her breast.

14. You will note that the first count is a representative count which covers a period between the 9th of July, 2012 to the 31st July, 2012. By a representative count the prosecution alleges that several offences as described in the information were committed during the period specified in the count. The law says that it shall be sufficient for the prosecution to prove that between the specified dates in the count at least one offence was committed.
15. To prove the first count 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 “**AB**” with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant “**AB**” was not consenting or didn’t care if she was not consenting at the time.
16. It is not necessary for the prosecution to prove that there was ejaculation or full penetration of the vagina by the penis. The slightest of penetration of the complainant’s vagina by the accused’s penis is sufficient to satisfy the act of penetration.

17. The first element of the offence of rape is concerned with the identity of the person who allegedly committed the offence. There is no dispute that it was not the accused as alleged. You are to consider this element of the offence as proven beyond reasonable doubt.
18. The second element is the act of penetration of the complainant's vagina by the accused with his penis. Like the first element the accused does not dispute this element as well. You are to consider this element of the offence as proven beyond reasonable doubt as well.
19. In respect of the third element that is 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.
20. 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.
21. 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.
22. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of rape as explained above, then you must find the accused guilty of rape. 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.

23. To prove the second count the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
- (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant **"AB"**.
24. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence.
25. The words "unlawfully" and "indecently" in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded persons would consider such act indecent.
26. Assault is the unlawful use of force on the complainant **"AB"** by the act of caressing her breast. In this context the word caressing also means touching.

FINAL AMENDED ADMITTED FACTS

27. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final amended admitted facts.
28. The admitted facts are as follows:
- 1. *Akanisi Batimala (hereinafter referred to as the "Complainant ") at the material time was a Student residing at Sigatoka Village, Sigatoka.*
 - 2. *Biu Cabebula (hereinafter referred to as the "Accused") at the material time was a Carpenter residing at Sigatoka village, Sigatoka and was 31 years old.*
 - 3. *The accused father was posted to Sigatoka Village in the year 2012 as Pastor.*
 - 4. *The accused and the Complainant were known to each other before the alleged offences occurred.*

5. *The Accused was interviewed under caution and charged in the English language.*
6. *That for the 1st count of Rape, the only issue for determination by this Court is whether or not the Complainant at the material time consented to have sexual intercourse with the Accused person."*
29. From the admitted facts you will have no problems in accepting the above as proven beyond reasonable doubt and you can rely on it.
30. The issue that needs to be determined in respect of the count of rape is whether the complainant consented to the penetration of her vagina by the accused with his penis.
31. In respect of the count of indecent assault the accused has denied all the elements of the offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant "**AB**" by caressing or touching her breast.
32. If you are satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then you must find the accused guilty of the offence of indecent assault. However, if you have a reasonable doubt in respect of any element of the offence of indecent assault then you must find the accused not guilty of the second count.
33. In this case, the accused is charged with two (2) offences, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
34. You must be satisfied that the prosecution has proved all the elements of both the offences beyond reasonable doubt in order for you to find the accused guilty of either or both the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or both the offences, then you must find the accused not guilty.

35. 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.
36. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your mind. I will refresh your memory and summarize the salient features. If I do 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 opinion in this case.

PROSECUTION CASE

37. The prosecution called two (2) witnesses to prove its case against the accused.
38. The first witness was the complainant "AB". In the year 2012 she was 15 years of age and a Form 4 student. She has two (2) sisters who are younger than her.
39. On 6 July, 2012 at about 7.30pm the complainant went to attend a church service at the Pastor's house in Sigatoka Village. After the church service finished and as the complainant and her youngest sister were about to leave for home, the accused came and offered to drop them.
40. The complainant refused the offer but the accused insisted. Whilst walking the accused told the complainant that he wanted to have sex with her. The complainant refused reason being the accused was much older than her and she was very young, however, the accused kept on saying that he was her admirer.

41. Upon reaching home, the accused told the complainant's sister to go and watch movies at her uncle's house. The complainant also wanted to go with her sister but the accused stopped her by forcefully pulling her arm.
42. The complainant repeatedly told the accused that she could not have sex with him. After the accused let go of her hand she entered her house through the front door. After locking the door she went out through the back door to bring her sisters home. When they were returning home the complainant saw the accused standing outside their kitchen. The complainant was shocked to see the accused she then told her sisters to go inside the house. While telling her sisters to go inside the house the accused came and pulled her hand and took her inside the kitchen which was outside.
43. In the kitchen the accused forced the complainant to sit on the floor and started touching her breast. The complainant ran away and went inside the house. Before going into the house the accused had told the complainant not to tell anyone about what had happened.
44. When the accused was touching her breast the complainant was afraid because this was the first time someone had done this to her. At this time the complainant's father was at the Pastor's house and her mother was working night shift.
45. The complainant did not tell her parents about what the accused had done to her since she was afraid that her father would beat her up because her father had warned her on a previous occasion that if anything happened to her he will beat her since her mother had also become pregnant whilst at school.
46. On 9 July, 2012 the accused came to the house of the complainant, at home she was with her sisters and a cousin Ana who had come from Suva. After a while the complainant's cousin wanted to eat some chaser, as the complainant was about to go to the nearby shop the accused said he was also leaving for home.

47. When the complainant was going home from the shop on the way she heard the accused calling her from a dark spot, she did not bother but continued walking home. After a while the accused came into her house the complainant was shocked to see the accused.
48. After the grog session finished, at about 1 am the next morning the complainant's mother came home from work and the accused said that he was leaving. The complainant locked the house and went to sleep with her mother and other siblings in one bedroom while her cousin Ana slept in another room.
49. While sleeping the complainant felt someone tapping her leg and also pulling it, when she woke up she saw the accused standing beside the bed in the bedroom. The complainant was shocked to see the accused in her bedroom.
50. The complainant told the accused to go inside the house since her mother was sleeping. In the living room she asked him how he was able to come inside the house.
51. The accused then pulled her hand and in the sitting room he laid the complainant on the bed took off her pants and also his pants he then inserted his penis inside her vagina and had sexual intercourse for 3 minutes.
52. When the accused was on top of her having sex, she felt pain all over her body especially her thighs. The complainant did not shout or raise alarm because she was frightened her mother would wake up and think that she was consenting to what the accused was doing to her. The complainant was really frightened when the accused had pulled her hand since he was a big man and she was a small girl.
53. The complainant did not consent to what the accused had done to her. After having sex the accused stood up got dressed and before going away he told the complainant not to tell anyone about what had happened.

54. After the accused left, the complainant went to the bathroom and she saw blood coming out from her vagina.
55. The complainant also informed the court about another incident in the same month that is July. At about 9pm after locking the doors of the house the complainant was sleeping in the bedroom with her sisters when she felt someone tapping her leg. When she woke up she was shocked to see the accused standing beside her bed.
56. The accused pulled her hand and took her to the last bedroom and inside the room he forcefully took off her clothes and inserted his penis into her vagina and had sexual intercourse for 10 minutes. The complainant was scared and tried to get away from the accused because this was not the first time he had done this to her.
57. The complainant wanted to shout but the accused had blocked her mouth with his hand and also told her not to shout. She tried to get away from him by pushing and kicking him but could not since he had held her tightly and continued to have sex with her.
58. The complainant felt weak all over and couldn't do anything, her sisters were sleeping inside their bedroom and her mother was not at home. Before leaving, the accused told the complainant not to tell anyone about what had happened.
59. The complainant did not tell her parents because she was frightened and also ashamed she did not know what to tell them or explain to them. The complainant always looked upon the accused as her brother since whenever he used to come home her parents always welcomed him.
60. On 27 February, 2013 the complainant went to the hospital with her aunt since she was sick, on this day she came to know that she was 7 months pregnant. A Doctor from the hospital reported the matter to the police.
61. At the Police Station the complainant told the police officers everything the accused had done to her, it took her so long to tell anyone because

the accused had warned her if she told anyone about what he had done to her he will do something to her.

62. In cross examination the complainant denied that she had on one occasion told the accused that she liked him she only agreed to be a friend and did not know that he was going to do what he did to her.
63. The complainant stated that the front door of her house did not have a lock but was secured by a nail, however, the back door had a bolt lock. She agreed for someone to enter her house she will have to open one of the doors. The kitchen where the first incident took place was detached from the house about 4 steps away, she denied going willingly to meet the accused in the outside kitchen.
64. The complainant agreed that she had the opportunity to shout for help when the accused was pulling her hand into the kitchen, however, she did not shout because the accused was the Pastor's son and if she did shout stories would have spread around the village of what he had done. The complainant agreed that rather than shouting she kicked and bit his arms.
65. In respect of the incident on 9 July after the accused had left, the house was securely locked before the complainant went to sleep. According to the complainant the accused had entered her house through the front door which could be easily opened since a nail was used to lock the door. She did not alert her mother when the accused tapped her leg in the bedroom because her mother does night shift and after work she is very tired and doesn't want to be disturbed.
66. The complainant agreed that when she went with the accused into the living room to tell the accused to go back to his house, she did not run to Ana who was sleeping in the last bedroom of the house.
67. Although she had the opportunity to shout in the living room she did not shout for help. The complainant disagreed with the suggestion that the only reason why she did not wake her mother or her cousin or shout for help was because she was having consensual sex with the accused. The complainant

also disagreed she had opened the door of the house to allow the accused to enter the house.

68. In respect of the third incident that happened sometimes in July the complainant agreed that the house was locked when they went to sleep but disagreed that she had opened the door for the accused. She did shout but the accused had blocked her mouth with his hand.
69. The complainant agreed that had she not been pregnant she would not have told anyone about the incidents, she denied the allegations of rape was made up by her due to the fear of being beaten by her father. According to the complainant she wanted to tell her father and when she got pregnant the whole Village was pointing to the accused family. Although she had 7 months from July 2012 to February, 2013 to report the three incidents to somebody she did not.
70. In re-examination the complainant clarified that the reason why she did not tell anyone for about 7 months was because she was really ashamed of herself which had affected her in school work even her teacher had asked her what had happened but she did not say anything.

Madam and Gentlemen Assessors

71. 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 a child of 15 years not to complain to anyone about what she had gone through. 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. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
72. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true

complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in this case did not inform anyone about the incidents until she came to know that she was pregnant on 27 February, 2013.

73. The final prosecution witness was Wati Naivalurua the aunty of the complainant. On 27 February, 2012 the witness accompanied the complainant to the Lautoka Hospital for a checkup since the complainant was usually sick. After scanning it was revealed that the complainant was 7 months pregnant.
74. Since the complainant was scared of her parents the witness informed the parents of the complainant about the complainant's pregnancy.
75. This was the prosecution case.

Madam and Gentlemen Assessors

76. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.
77. He could have remained silent but he chose to give sworn evidence and be subjected to cross-examination.

DEFENCE CASE

78. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath and decided to call 2 witnesses in his defence. The accused is not obliged to give evidence. He is not obliged to call any witnesses. He does not have to prove his innocence in effect he does not have to prove anything.
79. However, the accused decided to give evidence and also call witnesses on his behalf. You must then take into account what the accused and his witnesses adduced in evidence when considering the issues of fact which you are determining.

80. The accused informed the court that he moved to Sigatoka Village in February, 2012 after his mother had passed away. He lived there till November, 2012. The accused knew the complainant since they went to the same church and that she was his girlfriend. This relationship started sometimes in March, 2012.
81. On 6 July, 2012 there was a church service at his house. After the church service ended the accused was informed by his sister that the complainant wanted to go home so he went to drop them. The complainant's dad was drinking grog at his house.
82. When they arrived at the complainant's house, she told him that she was going to leave her younger sisters in the house and for him to wait for her in their outside kitchen which was separate from the main house.
83. After a while the complainant came into the kitchen both started kissing each other and they had sexual intercourse. He also caressed her breast but with her consent thereafter the accused changed his position to say that he did not caress her breast. The sexual intercourse lasted for 5 minutes which was consensual. The complainant lay down and undressed herself whilst he undressed himself, she did not at any time resist or run away.
84. After having sex both got dressed, the complainant told the accused to wait for her to go into her house first and then for him to leave the kitchen so that he was not seen by anyone.
85. On 9 July, 2012 the complainant came to his house asking him to go to her house. At the complainant's house he saw the complainant's cousin Ana and her 2 sisters. The accused had sex with the complainant between 9pm and 10pm that night in the outside kitchen the same place they earlier had sexual intercourse. The other members of the complainant's family were inside the house.
86. The accused went into the kitchen first thereafter the complainant came and both had sexual intercourse. The accused stated that he did not force the complainant, both got undressed and then had sexual intercourse.

87. The accused denied all the allegations made against him by the complainant. According to the accused this was the last time he had sex with the complainant. The complainant informed the accused that she was pregnant before they had sex and that he was not to inform anyone about her pregnancy.
88. In cross examination the accused agreed that he knew the complainant's family and that the complainant's father would go and drink grog while he would be at the complainant's house. The accused started admiring the complainant after she had told him that she also admired him. The relationship between the two families was good.
89. On 6 July, 2012 after the church service he had accompanied the complainant to her house and on the way he had asked the complainant to have sex with him and she had agreed. The accused disagreed with the suggestion that the complainant did not want to be the accused's girlfriend but to be a friend only. The accused maintained that he did not enter the house of the complainant that night only the complainant and her sisters had gone inside the house.
90. On 9th July, 2012 the accused agreed that he had gone to the house of the complainant, the complainant's cousin Ana was there. The accused denied all the allegations made against him and he also denied that he had left Sigatoka Village because of what he had done to the complainant.
91. In re-examination the accused clarified that he left Sigatoka Village for work one night since his father did not want him to leave.
92. The second witness for the defence was Josaia Wavoli Fifita who informed the court that he was a friend of the accused from 2005. He lived with the accused and he had come to the Village in February 2012 but left in early January, 2013.
93. The complainant would come to the house of the accused and ask for the accused about 3 times in a week. According to the witness the accused had a relationship with the complainant and he would see them going together.

94. In cross examination the witness agreed the accused would spend sometime in the complainant's house. The complainant would usually call the accused to her house and that the complainant's family trusted the accused and his family. The accused would go to the house of the complainant in the afternoon and in the night.
95. The final defence witness was Kini Salote Tavabula Seiniceva who informed the court that the accused was her brother. On 9th July, 2012 a church service was held at their home.
96. The complainant also attended with her 2 sisters, after the church service had finished the complainant asked the witness to call the accused so that he could drop them home. The complainant had asked her twice, the witness told the accused but he did not respond so the complainant went by herself to talk to the accused. Thereafter the witness saw the accused, the complainant and her two sisters going together.
97. In cross examination the witness stated that she was a good friend of the complainant and they often spent time together and that the complainant would ask for the accused to drop her home. The relationship between the two families was good. Although she would do anything for her brother but she had not been told what to say in court and was not lying for him.
98. This was the defence case.

ANALYSIS

99. The prosecution alleges in respect of the representative court of rape that there were two incidents which happened in the house of the complainant after she had retired for the night. On 9 July, 2012 whilst sleeping with her mother and sisters in one bedroom the accused entered her house and woke her. The accused pulled the complainant's hand and took her into the sitting room. In the sitting room the accused laid the complainant on the bed took off her pants and had sex with her by penetrating her vagina. The complainant did not shout or raise alarm because she was frightened. The complainant did not consent to having sex with the accused.

100. The second incident also happened in July, 2012. At about 9pm after locking the doors of the house the complainant was sleeping when she felt someone tapping her leg. When she woke up she saw the accused standing beside her bed.
101. The accused pulled her hand took her to the last bedroom and inside the room he forcefully took off her clothes and had sexual intercourse with her. The complainant was scared and wanted to shout but the accused had blocked her mouth with his hand and told her not to shout. She tried to get away from him by pushing and kicking him away but could not since he had held her tightly.
102. The complainant had felt weak and couldn't do anything her sisters were sleeping in the bedroom and her mother was not at home. The complainant did not tell her parents because she was frightened and also ashamed.
103. In respect of the second count of indecent assault the prosecution alleges that on 6 July, 2012 the accused had gone to the house of the complainant pulled her hand and took her inside the kitchen which was outside the house.
104. In the kitchen the complainant was forced to sit on the floor and the accused touched her breast she was afraid since this was the first time someone had done this to her. The complainant did not tell her parents because she was afraid that her father would beat her if she told him.
105. On 27 February, 2013 the complainant was sick and she went to the Hospital after a scan it was revealed that the complainant was 7 months pregnant. The matter was reported to the Police. At the Police Station the complainant told everything the accused had done to her.
106. The reason why the complainant did not tell anyone for 7 months from the date of the allegation was because she was really ashamed to tell anyone.

107. The accused in denying all the allegations states that he had consensual sex with the complainant in respect of the count of rape. The accused further states that he was in a relationship with the complainant who was his girlfriend. The complainant had consensual sexual intercourse in the kitchen and not inside her house.
108. In respect of the count of rape the accused maintains that he had not forced the complainant at any time and that she had the opportunity to shout or raise alarm but she did not because she had consented to have sex with him. The accused also states that the complainant cried rape after it was revealed that she was pregnant and it took her 7 months to lodge a complaint against him when she had all the opportunity to do so early.
109. In respect of the count of indecent assault the accused states that the complainant had willingly come into the kitchen where he was waiting for her. The accused did not touch the complainant's breast at all but had sexual intercourse with her with her consent.
110. Finally the accused says the complainant had made up the allegations against him after it was revealed that she was pregnant.

Madam & Gentlemen Assessors

111. It is for you to decide whether it was acceptable for the complainant not to shout or raise alarm when the accused was having sexual intercourse and touching her breast. When considering this aspect of the evidence it is important that you take into consideration all the circumstances that prevailed during each incident separately.
112. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
113. 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 forthwith 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.

114. 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.
115. 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 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 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.
116. 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.
117. 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 for both the counts. 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.
118. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

119. In this case, the accused is charged with one (1) count of rape as representative count and one (1) count of indecent assault, as mentioned earlier you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

120. Your possible opinions are:-

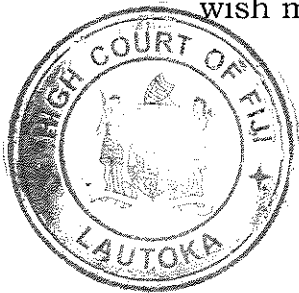
Count One: **RAPE**: GUILTY OR NOT GUILTY


Count Two: **INDECENT ASSAULT**: GUILTY OR NOT GUILTY

Madam and Gentlemen Assessors

121. 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.

122. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.




Sunil Sharma
Judge

At Lautoka
13 March, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.