

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 133 OF 2014

STATE

v

AMINIO VUKICIGAU SAROGO

Counsel: Ms. R. Uce for State
Ms. V. Narara with Ms N. Pratap for Accused

Date of Trial: 12th 13th and 14th March, 2018

Date of Summing Up: 15th March, 2018

SUMMING UP

Madam Assessor and Gentlemen Assessors:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.
3. Matters of facts however, are a matter entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is

entirely a matter for you whether to accept what I say, or form your own opinions. In other words you are the judges of fact. All matters of fact are for you to decide.

4. The Counsel for Prosecution and Defence made submissions to you about the facts of this case. That is their duty as Counsel. You are not bound by their submissions. However, you may properly take their submissions into account when evaluating evidence.
5. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
6. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the prosecution and never shifts.
7. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. Remember if you have any doubt, it must be reasonable. You cannot speculate. These doubts must be based solely on the evidence or lack of evidence that you have seen and heard in this court room.
8. Your opinions must be solely and exclusively based upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial.
9. You are free to draw reasonable inferences from facts proved by evidence. Approach the evidence with detachment and objectivity.
10. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps

have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to.

11. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witness.
12. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a complainant in a rape case such as this should react to the experience. Any person, who has been raped, will have undergone trauma whether the accused was known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in court or at the police station. The experience of the courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.
13. As Assessors you were chosen from the community. You, individually and collectively represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in a trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
14. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as

accurate and truth. They are of course an important part of the case. The agreed facts of this case are:

1. That Adi Lusia Donato (hereinafter referred to as the 'Complainant') at the material time resided at Namatakula Village, Sigatoka and was 25 years of age.
2. That Aminio Vukicigau Sarogo (hereinafter referred to as the 'Accused') at the material time resided at Biausevu Village, Sigatoka and was 20 years of age.
3. That on the 15th of October 2014 at around 3.00 pm the Accused consumed kava/grog along with other people at his uncle's house.
4. That around 9.30 pm the Accused and his friends left the abovementioned place and proceeded to board a van owned by one Jone Kunisavu.
5. That whilst they were in the said van they consumed a bottle of 40 oz Red Whisky.
6. That they then proceeded to Naqwali where they then bought a carton of Fiji Gold Beer.
7. That they then picked up the Complainant from Namatakula Village along with two other women.
8. That the above mentioned persons then stopped off and consumed the said Fiji Gold Beer before proceeding to Del Corrie.
9. That the above mentioned person's arrived at the said place at around 1.00 am where they continued to consume some more alcohol.
10. That the Accused and the Complainant had sexual intercourse inside the van.
11. That after having sexual intercourse the Complainant exited the said van and boarded a taxi.
12. That the Complainant reported the matter to the Police and the Accused was arrested, interviewed under caution and charged accordingly.

13. That the only issue that needs to be determined is whether the said sexual intercourse between the Accused and the Complainant was consensual or not.
15. I have given you the copy of the Information which contains one count of Rape. The charge against Accused is as follows:

Statement of Offence

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

Particulars of Offence

AMINIO VUKICIGAU on the 15th day of October 2014 at Sigatoka in the Western Division, had carnal knowledge of **ADI LUSIA DONATO**, without her consent.

16. I will now deal with the elements of the offence of Rape. In order to prove the charge of Rape, the prosecution must prove beyond reasonable doubt that the accused penetrated complainant's vagina, with his penis.
17. On the issue of consent, the prosecution must prove that accused knew or believed that the complainant was not consenting, or he was reckless as to whether or not she was consenting. Accused is reckless if he was aware of the substantial risk that complainant was not consenting but carried on anyway, when the circumstances known to him, it was unjustifiable to take that risk.
18. Insertion of penis fully into vagina is not necessary. A slightest penetration is sufficient to satisfy this element.
19. Consent as defined in Section 206 of the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting. You should not assume that there is any classic or typical response to an unwelcome

demand for sexual activity. The experience of the courts is that people who are being subjected to nonconsensual sexual activity will respond in variety of different ways.

20. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence as to what she saw, heard or felt.
21. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.
22. While cross-examining Prosecution witnesses, Defence Counsel referred to previous witness statements recorded by police. A previous statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath as being true. You can of course use those statements to test the consistency and credibility of the witness.
23. In testing the consistency and credibility of a witness you should see whether the witness is telling a story on the same lines without variations and contradictions. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another, for example by a police officer, in recording the statement where the witness is alleged to have given that version.
24. You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the

witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.

25. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers or were they evasive? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
26. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.
27. In testing the credibility of a witness, you may consider whether there is delay in making a prompt 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 there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.
28. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. There can be a reasonable explanation for the delay. It is a matter for you to determine whether, in this case, the lateness of the complaint and what weight you attach to it. It is also for you to decide, when complainant did eventually complain, whether it was genuine.
29. You may also consider whether there is a reason or motive on the part of the witness to make up an allegation against the accused. If he or she had such a motive, then you may think that this allegation has been fabricated.
30. 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. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response by victims of Rape.

31. We all know that alcohol and atmosphere a woman is exposed to in such a situation can lead to disinhibited behavior including sexual behavior. You must not assume that young women, because they are behaving in an uninhibited manner during a social gathering, would have been prepared to engage in sexual activity with the opposite sex. A woman may or may not be prepared to engage in sexual activity with a particular man, depending upon the circumstances of the encounter and the mutual feelings between them. What you should not do is judge the intentions or inclinations of the Complainant on this occasion by the application of generalised assumption about people's behavior. What you should do is reach conclusions based upon evidence.
32. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
33. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the Accused-person that connects him to the offence that he is alleged to have committed.
34. I will now remind you evidence led in the trial. I will only summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant.

Case for Prosecution

PW 1 Adi Lusia (Complainant)

35. Adi Lusia has been residing at Namatakula since birth. She is employed at Warwick Fiji Resort as a house-keeper.

36. On 15th of October, 2014, after drinking grog at home till 10.00 p.m., she boarded a Viti minibus to go to the nearby club to have some liquor. Some passengers in the minivan were known to her. Amongst them were her cousin namely, Loqorio Domedome, Bolo, Koroi and Aminio. In the bus, they were already drinking.
37. On the way, they went to a black market and bought two cartons of beer. Then the van was parked in an isolated place near Naviti Resort and they started drinking. It was after 12 midnight. She drank only three bottles of beer. Then they went to the Vila Del Corrie night club. She went straight to the bar and had a nip of rum. She then felt dizzy and went straight outside near the pool side to vomit. While she was vomiting, she saw Aminio standing at the back. She asked him, what he wanted to do. Without saying anything Aminio started to pull her hand and forced her to go inside the van that was parked near the poolside. She tried to move out but could not come out from that van.
38. Then he started to push her down so that she could lie down on the seats of the van. She tried to push him away but could not because he is too big and broad. Then he started to undress her. She was trying her best to protect herself. He tore her t-shirt. At the same time he removed her t-shirt and forced to remove her shorts. He also removed her panty. His pants were half way down. Then he forced her to stay with him. Aminio did bite her neck and inserted his penis into her vagina. He had sexual intercourse for about 10 minutes. She tried her best to stop and push him, but she could not. She screamed and banged the side of the van but no one came to assist her. She did not like what he did. He had sexual intercourse without her consent.
39. Then she could hear the engine of the van starting. Aminio started to move away from her. She tried her best to look for her clothes but she could not find her shorts and the t-shirt. She just picked a *sulu* from that van to cover herself. When she came out of the van she saw her cousin, Loqorio Domedome and Bolo beside the door. She did not tell Loqorio and Bolo what had happened inside the van because, at that time, she was only covering herself with a *sulu* and was not wearing any other clothes. She also thought it was not proper for her to tell them as they were drunk.

40. Then she managed to come out from the van and looked for a taxi. She found a taxi that was parked beside that night club. It was driven by her uncle, Alivereti. Her cousin, Loqorio Domedome and an iTaukei girl also boarded the taxi.
41. They headed to the village, his cousin Loqorio Domedome and the lady got off at Naqwali Settlement. She headed to the police station to lodge a report. Before lodging the report, she thought it proper to relay the incident to her uncle Alivereti, when uncle saw her crying. She told uncle what had happened when her cousin and the iTaukei girl got off from the van.
42. Under cross examination, Adi Lusia said that Aminio is her cousin brother from her father's side. She admitted giving a statement to police on the 16th of October 2014, a day after the incident. She said that her statement to police is not properly recorded when it states that she went to the road side and not pool side. She admitted having told police that he tried to get rid of her t-shirt, rather than him pulling and tearing it in the process. She also admitted that what she told police is correct. Adi Luisa admitted that she had not told police about Aminio trying to remove her panty.
43. She admitted going to the nightclub with Aminio's team. However she denied that, after having nip of rum, she joined Aminio and his team in drinking at the nightclub. She also denied sitting on Aminio's lap and kissing him on his cheek and inviting him to go outside. She also denied kissing Aminio on his neck and pulling him towards the van when she came outside the club. She said that she was pushed inside the van till she reached the back seat and was forced to have sexual intercourse. She admitted that two gentlemen standing beside the van when she came out of the van, but denied that one of them was Koroi.
44. She said she did not see it fit to get off at Korolevu Police Post to lodge a complaint although the van went past police post because at that time her top part of the body was not properly covered with the sulu.

PW 2 Alivereti Nigiri

45. On 16th of October 2014, Alivereti was at Del Corrie Night Club in his car. Around 3.00 am, Lusia came to him and boarded the car. She was crying. She was not wearing anything other than a sulu. At that time it was only Adi and

another lady that were inside the car. He drove them to Namatakula Village. On the way, he picked Adi's cousin just a few metres away from the club. When they reached Korolevu, she told Alivereti that Aminio raped her. At that time the other girl and her cousin were inside the car. Then he dropped Adi's cousin and the girl and went to Adi's place at Namatakula Village so that she could dress herself up. Then they came to Korolevu Police Post.

46. At the police post, Adi told him to go back to Namatakula village and bring her purse. On the way to Namatakula, he saw a pair of shorts and a panty on road. Having picked them up, he came back to Korolevu. When he showed the shorts and the panty Adi confirmed that it was her shorts and panty.
47. Under cross-examination, the witness said that his car was parked at Del Corrie car park. Jone's 15 seater van was parked about 50m away from the road where he had parked his car. Van was not parked at the car park. The pool was surrounded by the Hotel. He did not see Adi and Aminio standing near the van. He saw about five people drinking close to Jone's van around 1 to 2 a.m. Adi Lusia was one of them.
48. That is the case for the Prosecution. At the close of the Prosecution case, you heard me explain to the Accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
49. As you are aware, Accused elected to exercise his right to remain silent. That is his right under the Constitution. He does not have to prove his innocence or prove anything at all. Now you must not draw an inference that Accused remained silent and did not choose to give evidence in his own defence because he is guilty. Burden of proof remains with the Prosecution throughout. Defence called two witnesses. You must consider evidence adduced for Defence and attach such weight as you wish.

DW1 Aminiasi Koroi

50. On 15th October, 2014, around 11.00 p.m., Koroi started drinking in the village with Aminio, Loqorio and Jone. Then they came to Maui Bay in a minivan

driven by Jone, and went to Del Corrie Club and started drinking. His cousin, Suliano Drotini also joined at the club.

51. The van was parked beside the "pool" facing the sea. While they were drinking at the club, 3 girls including Adi Lusia came inside the Club. These 3 girls did not come in the minivan with them. 3 Girls came and joined them at the table and started drinking together. While they were drinking, Aminio and Adi Lusia went on the dancing floor and started dancing. All of them were drunk. They all went and danced on the dancing floor. Once they came back from the dancing floor, Adi Lusia sat on Aminio's lap and started kissing Aminio's ears. Once they finished dancing, he saw Adi Lusia and Aminio's going outside holding hands.
52. Under cross examination, the witness admitted that when they boarded the van to leave for Maui Bay, they started drinking a 40 oz whiskey. He denied picking 3 ladies including Adi Lusia from Namatakula on their way. He denied going to a black market to buy two cartons of beer and having a stop-over to drink beer before going to the club.
53. Witness admitted that in her^y statement to police he had never told that Adi Lusia joined them at the table or that he saw Adi dancing with Aminio or that he saw them leaving the Club, holding hands. In his explanation, the witness said that when police came to him he was scared and confused.

DW 2 Suliano Drotini (Bolo)

54. On the 15th of October 2014, at about 11.00 p.m, Suliano was drinking beer with Loqo, Jone, Aminio and Koroi in Del Corrie Night Club. Three girls including his cousin Adi came and joined them in drinking. After a while they went to dance on the dancing floor. When they came back to the table, Adi sat on Aminio's lap. She also started kissing Aminio on his cheek. After dancing, he saw Adi and Aminio going out of the club together, holding hands.
55. They came straight to the van. While standing beside the van for about 5 minutes, he saw Aminio and Adi coming out of the van. She exchanged good byes and went away. She was okay; nothing unusual was seen in her.
56. Under cross examination, witness admitted that before going to Del Corrie he was having grog with Aminio, Koroi and Loqo at the village and, while inside

the van, he and the group consumed a 40 oz whiskey. He also admitted that they had bought two cartons of Fiji Gold from a black market at Naqwali and drank beer before proceeding to Del Corrie. He denied that, along the way, Adi Lusia and two other women boarded the van from Namatakula Village.

57. Suliasi said he could not recall what Lusia was wearing when she came out of the van. However he could recall that Lusia was wearing the same dress which she was wearing in the Night Club.

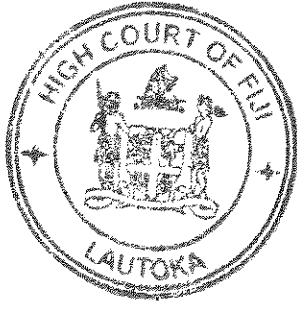
Analysis

58. Lady and gentlemen Assessors, the Accused is charged with one count of Rape. You should be fully satisfied that Accused penetrated Adi Lusia's vagina without her consent before you can find him guilty of Rape in this case.
59. There is no dispute as to the identity of the Accused. It is also agreed that the Accused and the Complainant had sexual intercourse inside the van.
60. Only dispute that needs to be determined is whether the said sexual intercourse between the Accused and Complainant was consensual or not. Prosecution says the sexual intercourse took place without Complainant's consent. Defence denies the allegation and takes up the position that the sexual intercourse was consensual.
61. Prosecution called two witnesses and based their case substantially on the evidence of the Complainant. If you are satisfied that the evidence Complainant gave in court is truthful and trustworthy, then you can safely act upon her evidence in coming to your conclusion. No corroboration is required.
62. Prosecution says that Adi Lusia is a trustworthy witness and that Aminio used force and the sexual intercourse took place without Adi Lusia's consent. You must decide whether Adi Lusia is a credible witness and she did not consent to sexual intercourse with Aminio as alleged in the Information. That will require an assessment by you of the Complainant's evidence.
63. Prosecution relies on recent complaint evidence to prove consistency of Prosecution's version of events. They say that Complainant's version is credible and consistent because she relayed the incident to her uncle, Alivereti, and went

with him to the police station and made a prompt complaint within hours. Alivereti came and gave evidence to say that he received such a complaint. If you believe Alivereti's evidence, then you can use his evidence to test Complainant's consistency and credibility. However, Alivereti was not there at the alleged crime scene to witness what actually was happening between Adi Lusia and Aminio in the minibus. Therefore, you can't use his evidence to corroborate the evidence of the Complainant.

64. Defence on the other hand argues that Complainant had an ample opportunity to complain to her cousin Loqorio and Bolo, the first persons she saw immediately after the alleged incident, and her failure to complain shows that she was not consistent in her version and therefore not credible. Complainant explained why she did not complain in the first place to her cousin but to her uncle. If you are satisfied with her explanation, then you may think she is consistent in her version. You decide whether her complaint made to her uncle and police boosted the credibility and consistency of her version.
65. Prosecution also relies on Complainant's evidence that she struggled, raised alarm, banged the van and screamed in order to prove lack of consent on her part. On the other hand, Defence argues that she should have received injuries if she had struggled and somebody must have heard if she screamed and banged. In light of directions I have given, you decide what weight you should attach to those arguments.
66. Counsel for Defence argues that Complainant is not credible because her evidence is not consistent with her previous statement to police and also with evidence of her uncle Alivereti. Counsel for Defence, in the course of her cross examination and closing address, drew your attention to what she calls inconsistencies in Complainant's evidence. Bearing in mind the directions I have given, you decide whether those so called contradictions and omissions are material enough to discredit the version of the Prosecution or whether they only relate to insignificant or peripheral matters.
67. You may also take into account Complainant's demeanor in court and decide if she is an honest and credible witness and what weight should be attached to her evidence.

68. You watched witnesses called on behalf of Defence giving evidence. They were called to show that Complainant was in an intimate relationship with the Accused in the run up to the alleged sexual intercourse and therefore you should draw the inference that the sexual intercourse was consensual.
69. Both witnesses called by Defence said that Adi Lusia came to their table, danced with Aminio, sat on Aminio's lap, started kissing him and, after dancing, Adi Lusia and Aminio exited the club together, holding hands.
70. Counsel for Prosecution argues that both witnesses called by Defence are not credible firstly because they contradicted each other and secondly that the evidence they gave is inconsistent even with his Accused's own admissions in the agreed facts, particularly that they picked Adi Lusia from Namatakula and stopped off and consumed beer before proceeding to Del Currie. In the course of cross-examination and closing address, the Counsel for Prosecution drew your attention to what she calls contradictions in their evidence. She also drew your attention to inconsistencies between Koroi's witness statement to police and his evidence in Court.
71. It is up to you to decide which version is to believe and whether you could accept the version of the Defence. Even if you reject the version of the Defence still the Prosecution should prove their case beyond reasonable doubt. Remember, the burden to prove the Accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the Accused, at any stage of the trial.
72. If you accept the Prosecution's version of events, and you are satisfied that the Prosecution has proven the case beyond reasonable doubt, so that you are sure of Accused's guilt you must find him guilty.
73. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
74. Any re-directions?



Aruna Aluthge

Judge

AT LAUTOKA

15th March, 2018

Solicitors: **Office of the Director of Public Prosecution for State**
Office of the Legal Aid Commission for Defence