

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 113 OF 2016

STATE

v

JONE TUAGONE

Counsel: Mr A. Datt for State
Ms. J. Singh for Accused

Dates of Trial: 4th, 6th, 7th & 8th June, 2018
Date of Summing Up: 11th June, 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 proven 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. Approach the evidence with detachment and objectivity.
9. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw reasonable inferences from facts proved by evidence. However, the inferences should not be based on mere speculation.
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. 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 agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of time of this Court.
15. The agreed facts of this case are:
 - I. That the victim in this matter is one AKENETA NAILEVU ("the victim").
 - II. That the accused in this matter is one JONE TUAGONE.

- III. That the alleged incident of rape occurred on the 08th day of November, 2015 ("the day of the incident").
- IV. That the victim was medically examined on the 09th day of November, 2015 at Tavua Hospital by Dr. Lanieta Vakarauvanua.
- V. That the accused was taken into custody as the suspect for the alleged incident of rape in this case.
- VI. That during police investigation, photographs of the exterior and interior of the victim's house were taken.
- VII. That the accused was caution interviewed by WDC 3905 Alanieta in the i-Taukei language on 19/04/2016.
- VIII. That the Caution Interview of the accused in i-Taukei language was translated into English by WDC 3905 Alanieta.
- IX. That the accused was formally charged for 1 count or 'Rape' in i-Taukei language on 30/05/2016 by D/Sgt. 1373 Saimone.
- X. That the charge statement of the accused in I-Taukei language was translated into English by D/Sgt. 1373 Saimone.

16. I have given you a copy of the Information which contains one count of Rape. The Information reads as follows:

Statement of Offence

RAPE: Contrary to Section 207 (1) and Section 207 (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

JONE TUAGONE on the 08th day of November 2015, at Tagitagi, Tavua, in the Western Division, had carnal knowledge (penile sex) of **AKENETA NAILEVU** without the said **AKENETA NAILEVU**'s consent.

17. In order to prove the charge, the Prosecution must prove beyond reasonable doubt that the Accused penetrated Complainant's vagina with his penis without her consent. Insertion of penis fully into vagina is not necessary. A slightest penetration is sufficient to satisfy this element.
18. On the issue of consent, it must be proved that the Accused either knew that the Complainant did not consent or was reckless as to whether she consented. The Accused was reckless as to whether the Complainant consented to penetration if you are sure that he realized there was a risk that she was not consenting and

carried on anyway when in the circumstances known to him it was unreasonable to do so.

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.
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. 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.
22. In the circumstance of this case, I must warn you of the special need for caution before convicting the Accused on the correctness of this identification. The reason for this is the danger that a wrong identification will cause a miscarriage of justice and there have been cases where this has happened. It is not a question of a witness being untruthful but mistakenly believing the person seen at the crime scene was the accused. With this genuine belief a mistaken witness can nevertheless be a convincing one. I am not saying that is necessarily the case here. I am explaining the reason for the special care with which you must approach this issue.
23. You must closely examine the circumstances in which the identifications came to be made. Generally, this will include such matters as:
 - How long did the witness have the person under observation? Was it a significant period or just a fleeting glimpse?
 - At what distance?
 - In what light?
 - Was the view impeded or obstructed in any way?

- Was the accused a person known to the witness?
- Had the witness ever seen the accused before and, if so, how often?

24. Documentary evidence is evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time upon examination of the Complainant.
25. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before court on the basis of their learning, skill and experience. In this case, the doctor gave evidence as an expert witness. Doctor's evidence however is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if her opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the case. You have to bear in mind that the expert evidence does not implicate the Accused or link him to the alleged offences even if you decide to rely on it. You can only use doctor's opinion to test the constancy of Complainant's story.
26. 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 have gave evidence in court. 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.
27. While examining witnesses Prosecution and 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.

28. In testing the consistency 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 other person, for example by a police officer, in recording the statement.
29. You must remember that merely because there is a difference, a variation, 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 intellectual capacity the way he/she faced the questions etc. in deciding on a witness's credibility.
30. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witness's 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.
31. 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.
32. 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.

33. 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.
34. I now wish to direct you on recent complaint evidence. You heard Complainant saying that she complained to her boyfriend Rupeni about the alleged rape in the same afternoon the alleged incident happened. Rupeni gave evidence and said that he received a complaint from the Complainant. Please bear in mind that Rupeni was not present during the alleged incident and therefore, he is not capable of giving evidence as to what actually happened between the Complainant and Accused. What she heard from the Complainant is not evidence as to what actually happened between the Complainant and the Accused. Recent complaint evidence is led to show consistency in the conduct of the Complainant and is relevant in assessing her credibility. If you find Rupeni a credible witness than you may use the complaint he received to test the consistency and credibility of the Complainant.
35. Evidence was led through WC Alanieta and Dr Lanieta that the complainant looked distressed shortly after the alleged incident. WC Alanieta said that the Complainant looked scared, talked to herself and most of the time she mumbled. Dr. Lanieta said that the patient looked a bit scared the way she was talking, she was a bit slow, she had to think of what to say and then talked and she was also in pain. This is how you should approach the evidence of distress. You must be satisfied beyond a reasonable doubt that the Complainant's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged sexual offence. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred. The distress evidence must not be used to connect the Accused to the alleged offence. Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause. In deciding these matters, you must take into account all relevant circumstances. If you are so satisfied then you may give such weight to the evidence of distress as is appropriate. But if you are not so satisfied then you must disregard the evidence of distress.
36. Evidence was also led through Rupeni and Dr. Lanieta that the Complainant had injuries on her body in order to prove that the sexual intercourse was not

consensual. If you believe those witnesses, then you may use this evidence to test the consistency and credibility of the Complainant's evidence.

37. You may also consider whether there is a reason or motive on the part of the Complainant and other Prosecution's witnesses to make up an allegation against the Accused. If they had such a motive, then you may think that this allegation has been fabricated.
38. Accused was present in Court on the first day of trial and chose not to attend court thereafter. The Court decided to try the case in the absence of the Accused. The Counsel of the Accused had received instructions to defend him at the trial. Accordingly Ms. Singh cross examined the witnesses of Prosecution and made submissions. I must tell you that you must not hold his absence against him. Accused is not required to prove anything. You must not think that Accused chose not to attend court to face the full trial because he is guilty. His absence will not relieve the burden on the Prosecution to prove their case beyond a reasonable doubt.
39. I must direct you on the defence of alibi taken up by the Defence. The Defence says that the Accused was not present at the crime scene at the material time and that the Complainant was mistaken. Defence called Ropate who said that the Accused was with him at his residing at Vatulaulau, Ba on the 7th and 8th of November, 2015. Accused did not come and give evidence about his *alibi*. That is his right. He does not have to prove that he was elsewhere at the material time. Accused does not have to prove his *alibi* or anything at all in this case. It is the burden of the Prosecution to prove beyond reasonable doubt that it was the Accused who committed the rape.
40. When you consider the evidence led in trial, if you accept that the Accused at the material time was at Vatulaulau, Ba, and not at the place where the alleged rape took place as the Prosecution claims or even if you are not sure of that, you must find the Accused not guilty of the charge of rape. Even if you reject the evidence of the Defence, the Prosecution must prove that the Accused was present at the crime scene with the Complainant. If the Prosecution has failed to prove this fact beyond reasonable doubt, you must find the Accused not guilty of rape.
41. 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.

42. Lady and Gentlemen Assessors, I will now remind you evidence led in the trial. It is a short trial and things should be fresh in your memory. 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- Akeneta Nailevu (Complainant)

43. Prosecution called Akeneta, the Complainant as their first witness. Akeneta said that in 2015 November, Akeneta was living alone at Tagitagi in Tavua, in a house owned by uncle Ilisoni. Ilisoni lived in his house 20 – 30 minute-walk away from her house. Apart from those two houses, there were no other houses around in the village.
44. On Saturday the 07th November, 2015, Akeneta went to uncle Ilisoni's house in the afternoon. Uncle Ilisoni said that Jone came home and asked for her. She then went home and, after having dinner, went to sleep on the bed lighting a kerosene lamp.
45. On the next day, which is 08th, November, 2015, in the early morning around 5.00 – 6.00 am, somebody came home while she was still sleeping. She did not identify the person because his face was covered with a t-shirt. This person jumped through the window and went through on her bed. He came to her bed and forced her to have sex with him. He pulled her clothes, took off her panty and raped her. At that time she did not see his face.
46. She ran outside without her panty, looking for help. He chased her and tied the sulu around her neck and pulled her like a cow and dragged her inside the house. She received injuries when she was being dragged on her back. In the bedroom, he had sex again with her. He came very close to her when she was running outside. When he was tying the sulu on her neck, he removed the cloth that was covering his face. She saw his face for nearly 10 minutes. Sun was shining already. She also saw his face for 10 minutes when he was having sex with her for the second time. She recognized the person who had sex with her as her brother- in- law, Jone. She had seen and talked to Jone earlier. She identified the Accused in Court as Jone who had raped her.
47. Describing the act of having sex, Akeneta said that Jone put his penis onto her vagina. His penis went inside her vagina. She did not want to have sex with this

person. She did not allow this person to have sex with her. After having sex Jone went away. After having a wash, and breakfast she went to see uncle Ilisoni. Ilisoni was not home. She came back and, in the afternoon, she went to see Rupeni, her boyfriend in Tagitagi. She told him everything. She told Rupeni that Jone came home and raped her at home. She also said that she ran outside with no clothes. Rupeni asked her to go and report the matter to police. On Monday morning, she went to Tavua Police Station and reported. Police took her to Tavua Hospital for a medical examination.

48. Under Cross-examination, Akeneta said that she helped farming and admitted that she gets marks on her body when she was pulling the weeds and cutting the sugar cane leaves. She came to know Jone when her brother got married. Jone is her sister-in-law's brother. After she moved to Tagitagi she hardly saw Jone, nearly for about two years.
49. Akeneta had given a statement to police on the 09th of November, 2015. She admitted having stated to police that Jone had told ilisoni that he wanted her to marry him. She said that she came to know from Ilisoni that, after meeting Ilisoni, Jone had gone to his brother's place at Tagitagi that day.
50. Akeneta admitted saying to police that *early in the morning on Sunday the 8th November, 2015 at around 5, am when she was still sleeping, she heard someone knocking on the door, calling her name, and she knew it was Jone, and then she chased him, so he went away. ...Around 6am, she heard him forcing his way inside removing the roofing iron which was used to block the door ... she could not see him...may be he hid somewhere.*
51. Akeneta said that it is the window that she described to police as a door in her statement. She admitted that after hearing the noise she was scared but went back to sleep. She said she knew it was her brother-in-law. She kept the kerosene lamp beside her bed before going to sleep.
52. She said that the sunshine was coming inside through the window. She did not open the door and run away because she was tired and felt like sleeping.
53. When Jone took off her clothes and raped her, he only said "shooo..."(keep quiet). The window through which he jumped into the house was covered with a tin. The window in the bed room was not covered. It only had louvres. At the time she was on the bed, the louvres were open and the curtain was not drawn.

54. Akeneta said that she was raped twice. She said that she told police that she was raped when he came in for the first time. She told police that she was raped twice. She told police that she ran outside fully naked. She denied telling the doctor that the Accused had come back from a grog session.
55. When Jone came inside the house, she told Jone that she got a boyfriend. Then he wanted her to be his wife but she didn't give herself to him. Then he forced her and raped her.
56. When Jone tied the cloth around her neck and pulled it very hard she got injuries on her neck. Those injuries were shown to the doctor. She denied that the marks that she had were received while she was cutting sugar cane and pulling out weeds.
57. When uncle Ilisoni told, she came to know that Jone was going to come through the window, so she kept the lamp away from the bed.

PW 2 Ilisoni Cova

58. Ilisoni said that he had two houses in Tagitagi, approximately 150 steps apart. In 2015, his niece Akeneta lived in one of his houses. There are no other neighbouring houses in the area. The bedroom of Akeneta's house had a window with louvres in the direction of sunrise.
59. On the 7th November, 2015, he was at home. Jone came home and told that he came to see Akeneta. Jone said that he wanted Akeneta to massage him. He had known Jone previously as Jone used to work with him as a sugar cane cutter sometimes ago. Jone is his brother-in-law. He is married to one of his cousins.
60. On Sunday the 8th November 2015, he went to church. After the 8th of November, Akeneta came and stayed in his house because she was scared of what had happened on that day.
61. Under cross-examination, Ilisoni said that he is sure that Jone came on the 07th November 2015. He said that he gave his statement to police on 30th May, 2016, only in regards to the fact that Jone came home on that particular day and nothing about the rape. When he was shown his previous statement, he admitted that, after the incident had happened, Akeneta came home and told what had happened and that he told her to go and report the matter to the Police.

62. Ilisoni denied that he did not have a good relationship with Jone.

PW 3 Rupeni Baleituraga

63. Rupeni said that, in 2015, he was staying at Binesh's house in Qalela, a neighboring village of Tagitagi. Akeneta was his girlfriend during that time. He knew Ilisoni Cova because he used to do cane cutting together. Akaneta's house was about one hour away on foot.
64. On the 8th November, 2015, around 7.00 pm., he was at Binesh's house. Akeneta came and told him that one man raped her. Akeneta said that when she tried to get out of the house, this man pulled her back in the house and hit her. Rupeni said that he could see bruises on her. She did inform the name of the rapist but he could not recall the name. When given an opportunity to peruse his previous statement, he said that one guy by the name of Jone had forcefully had sex with her. Fresh bruises with blood were seen on both elbows and both shoulders. He informed her to go to the police station.
65. Under cross-examination, Rupeni admitted that he did not go to the police station on the same day with Akeneta but gave his statement approximately 6 months later, on the 9th of May, 2016.

PW 4 WC Alanieta

66. Constable Alanieta said that when she was based at Tavua Police Station in November, 2015, she played the role as the Investigating Officer of this case. She recorded witness statements including that of the Complainant Akeneta Nailevu and two *alibi* witnesses. She interviewed the suspect, Jone Tuagone. She took the complainant to the Tavua Hospital for medical examination. She also visited the crime scene at Tagitagi, and took photographs. She tendered the photographs in evidence marked as PE.1-PE3. She said that the Complainant identified the suspect by the name. Suspect was related to the Complainant. Having perused the docket, the officer said that the alleged rape incident had occurred between 0500hrs and 0600 hrs on Sunday, the 8th November, 2015.
67. When the statement was being recorded, the complainant looked scared, talked to herself and most of the time she mumbled. She could see some injury marks on her arms. On DPP's instructions, she recorded statements of two *alibi* witnesses from Vatulaulau in Ba.

68. Under Cross-examination the officer said if the complainant had told that she was raped twice, she would have written that down in the statement.
69. She admitted that she took the statements of Ilisoni and Rupeni approximately 6 months after the incident. Explaining the reasons for the delay, the witness said that Rupeni had moved from Tagitagi to a village in Ra, so it took time to record his statement. Ilisoni also had moved to his another house in Korovou.
70. Witness said that Akeneta was not co-operating with her during the interview. Most of the time, she was telling unfinished stories. She said that there was no need to hold an identification parade because the Accused was related to the Complainant and she had positively identified the Accused by the name.

PW 5 Dr. Lanietia Lutuavatu Vakarauvanua

71. Doctor said that she medically examined Akeneta on the 9th of November 2015, at Tavua Hospital, when she was brought in by a police woman. Doctor tendered in evidence (PE4) the Police Medical Examination Form she had prepared upon examination of Akeneta.
72. Doctor said that the patient looked a bit scared. The way she was talking, she was a bit slow, she had to think of what to say and then talked and she was also in pain.
73. The remarkable medical finding was that the patient had a lot of bruises on her back and also scratches on her joints especially on her elbows and her knees. There was no bruising on the joints but only the scratch marks. The bruises were more on the back of the patient. Near the collar bone, right underneath the chin, she noticed a bruise.
74. Doctor's professional opinion is that the bruises and the scratch marks on the patient most probably could have been caused when being dragged on a hard bumpy surface. When doctor did her vaginal examination, it looked normal. There were no bruising, scratches or bleeding. The bruise near the collar born region could have happened when resisting the pressure if somebody wrapped a piece of cloth around her neck and pulled.
75. Doctor said that even in a forced sexual intercourse scenario, it is possible that there will not necessarily be injuries in the vagina because some of the victims just give in to the rapist, and also in some cases just like Akeneta's, women after

delivering babies find that their vagina has become expandable to some degree so sometimes, even if there is forced penetration, there will be no bruises, injuries or bleeding in vagina.

76. In doctor's estimation, the bruises had been caused about two to three days ago because the bruises had turned a bit purplish color. She said that the additional information in D 15 that the rapist had come back from a grog session was given by the patient. In her final remarks, doctor did not rule out forced sexual intercourse.
77. Under cross-examination doctor agreed that persons who work in a cane field can get scratch marks on their arms and legs if they are exposed to cut sugarcane leaves.
78. Doctor admitted that she made a mistake when she mentioned only scratch marks in D.12 and failed to mention bruises that were observed during examination.
79. She agreed that there were no injuries around her neck, but the bruise on the collar bone. She conceded that if there was nothing obstructing the rope or cloth around the neck, it would have been possible to have bruises or scratches on the neck.
80. Under re-examination, the doctor explained that if the patient had received the scratch marks as a result of her going through a cut sugar cane field, she would have received linear marks on the skin but the scratches she saw on Akeneta were more of an irregular shape patches.
81. Doctor confirmed that the information she had provided in her report is accurate except for D 12 where she had missed out to write down bruises.
82. That is the case for the Prosecution. At the close of the Prosecution case, you heard me explain to the Defence Counsel what rights were in defence.
83. Defence called an alibi witness although it had nothing to prove in this case. Now I must tell you that the fact that Defence presents evidence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the Prosecution throughout. Defence's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

Case for Defence

DW 1 Ropate Rasuaki

84. Ropate Rasuaki is the only witness for Defence. Ropate said that he has been residing at Vatulaulau, Ba from his birth. He had known Jone Tuagone since his marriage. Jone is his wife's uncle.
85. He called Jone on the 1st of November 2015, and asked Jone to come and assist him in building the house at Vatulaulau. Jone came on the 2nd November 2015, and they built the house together for two weeks in Vatulaulau.
86. On the 7th and 8th of November, 2015, Jone was with him at his house. On the 8th of November, 2015, they had breakfast together at 7.00am and Jone accompanied him down to the river to dive for fresh water mussel.
87. After two weeks, upon completion of foundation work, Jone left home informing that he's going to Tuvu.
88. Under cross-examination, Ropate said that he recalls the events that took place on the 7th and the 8th of November, 2015, because he had marked those dates on his calendar being the days doing carpentry work.
89. He denied that Jone left on the 10th of November, 2015. When the *alibi* notice filed by Jone's lawyer was shown to the witness he said that he could not properly recall, whether Jone left on the 10th or not, because it's been quite a long time. He then admitted that the document is true and he is sure Jone left on the 10th of November. He again said that all he could recall is that, they managed to finish work on the foundation on 15th.
90. Ropate said that the day Jone left, Jone met him and informed that he was going. In the statement to police given 9 months later, on the 1st of August, 2016, Ropate had told police that Jone left on a weekend and did not inform him that he was leaving.
91. He admitted that he did not tell police the specific dates (7th and 8th November, 2015) when asked about Jone's whereabouts in August 2015. He had merely stated that it was sometime when the cane crushing season ended in 2015, his wife's uncle namely Jone Tuagone came to stay with him. In his explanation, Ropate said that he was in a shock when the police woman came.

92. That is the case for Defence.

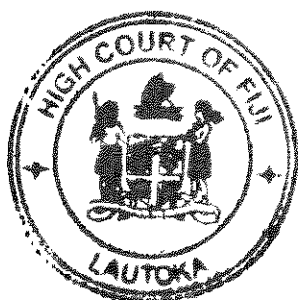
Analysis

93. Lady and gentlemen Assessors, the Accused is charged with one count of Rape. To find the Accused guilty of Rape, you must be satisfied beyond a reasonable doubt that the Accused penetrated Complainant's vagina with his penis without her consent.
94. Defence case is one of denial. They say that the Accused did not commit the alleged Rape. Defence disputes the identity of the Accused and says that the Accused was elsewhere when the alleged rape occurred.
95. Prosecution called five witnesses and based their case substantially on the evidence of the Complainant. The resolution of the dispute depends on whether you accept the Complainant as a truthful witness. If you are satisfied that the evidence she gave in Court is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration is required. However, you can consider other evidence presented by the Prosecution to satisfy yourselves as to the consistency and credibility of the Complainant's version of events.
96. You have to be satisfied beyond reasonable doubt that it is the Accused and nobody else that had committed the alleged rape. Taking into consideration the directions I have given in regards to the identification, you are supposed apply those directions to the facts of this case.
97. Prosecution says that the Complainant is consistent and reliable. They rely on recent complaint evidence to prove Complainant's consistency in her conduct. Prosecution says that soon after the incident, Complainant went to uncle Ilisoni, the only person she knew in the village, and, because Ilisoni was not home, she walked down nearly an hour to her boyfriend Rupeni and relayed the incident. She also made a complaint to police on the following day. Rupeni and WC Alanieta said that they received the complaint of rape from the Complainant. Considering the directions I have given, you decide what weight to be attached to the recent complaint evidence and whether the complaint she ultimately made to police was genuine.
98. Prosecution relies on distress evidence to prove Complainant's consistency in her conduct. I have directed you as to how you should deal with distress evidence. If

you are satisfied that the Complainant was in a distressed condition after the alleged incident and that distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause, then you may give such weight to the evidence of distress as is appropriate, having taken into account all relevant circumstances.

99. Prosecution also relies on doctor's medical evidence and evidence of Rupeni to prove consistency of the Complainant's version. They say that scratches and bruises found on Complainant's body are consistent with Complainant's evidence that she was raped.
100. Defence argues that those injuries would have been received while working in cane fields. They also argue that the doctor had observed no injuries on genitalia of the Complainant because she was never raped. You heard what the doctor had to say about those arguments. Having taken into consideration the directions I have given and other evidence led in the trial, you decide what weight you should attach to doctor's opinion and whether her evidence supported the evidence of the Complainant.
101. You observed Complainant's demeanor in court. You decide if she is an honest and credible witness and what weight should be attached to her evidence.
102. Defence says that the Complainant did not tell the truth in Court. They say that her evidence is not consistent with her previous statement to police and what she had told the doctor soon after the alleged incident. Prosecution says that Complainant was not in a sound mental condition after a traumatic incident of rape and the inconsistencies are not material enough to discredit the version of the Prosecution. You observed the demeanour and intellectual capacity of the Complainant. In light of the directions I have given, you decide if those so called inconsistencies affected the credibility of the version of the Complainant.
103. Version of the Defence is that Accused was in Vatulaulau and the Complainant had mistakenly identified the Accused. Defence called Ropate to show that the Accused was with him at Vatulaulau at the material time and also the day prior to the alleged rape incident. Complainant on the other hand said that she is sure that it was the Accused and she clearly recognized her brother-in-law. Prosecution also called Ilisoni to show that the Accused was seen in the village where the rape took place on the day prior to the incident.

104. Prosecution says that Ropate is not reliable. They say that Ropate is a close relative of the Accused and he is an interested witness as far as the Defence case is concerned. They also say that Ropate is not consistent in his evidence. You decide if Ropate is a reliable witness and what weight should be given to his evidence.
105. You watched Ropate giving evidence in Court. It is up to you to decide which version is to believe and whether you could accept the version of the Defence. 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 should prove their case beyond reasonable doubt.
106. If you believe the Complainant is telling you the truth that the Accused penetrated her vagina with his penis on the 8th of November, 2015, without her consent then you may express an opinion that the Accused is guilty of Rape. But if you do not believe the Complainant's evidence regarding the alleged offence, or if you have a reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty. Your possible opinion is either guilty or not guilty of the offence.
107. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
108. Any re-directions?



AT LAUTOKA
11th June, 2018

Aruna Aluthge
Judge

Solicitors:

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