

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 106 of 2015

STATE

V

PAULIASI RAISELE

Counsel : Ms. S. Kiran for the State.
: Mr. K. Tunidau for the Accused.

Dates of Hearing : 23, 24, 31 July, 6, 7, 8, August, 2018
Closing Speeches : 09 August, 2018
Date of Summing Up : 10 August, 2018

SUMMING UP

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

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. (A copy of the information is with you).

Statement of Offence

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

Particulars of Offence

PAULIASI RAISELE between the 1st day of January 2015 and 31st day of January 2015 at Nadi in the Western Division, penetrated the vagina of "PD" with his penis without the consent of the said "PD".

14. To prove the above 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 **“PD”** with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant **“PD”** was not consenting or didn’t care if she was not consenting at the time.
15. 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 penis is sufficient to satisfy the act of penetration.
16. The first element of the offence of rape is concerned with the identity of the person who allegedly committed the offence. There is a dispute in respect of this element of the offence. The complainant says it was the accused and the accused says it was not him.
17. The second element is the act of penetration of the complainant’s vagina by the penis. Like the first element this element of the offence is also in dispute.
18. 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.
19. 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.

20. 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.
21. 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.
22. 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.
23. In this trial the accused has denied all the elements of the offence of rape he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time that is between 1st day of January, 2015 to 31st January, 2015.
24. 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 trial that lasted for a number of days but I am sure things are still fresh in your mind. I will refresh your memory and summarize the important 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

25. The prosecution called four (4) witnesses to prove the charge against the accused.
26. The first prosecution witness was the complainant "PD". In January, 2015 the complainant was 17 years of age and a school student. She was living with the accused and his wife at Malawai, Nadi. The wife of the accused is the complainant's cousin sister.
27. The complainant recalled on a Sunday in January, 2015 she was alone at home since the other family members had gone to church. After cooking, the complainant went to have a shower in the bathroom. Whilst having her shower the accused came and opened the bathroom door. The bathroom did not have a lock, when the accused opened the bathroom door she was wearing her bra and panty, she screamed and told the accused that he is not supposed to do this and he is not to come inside the bathroom.
28. The accused told the complainant that he wanted to have a relationship with her. The complainant replied that this cannot be because he was her brother in law. The accused wanted to have sexual intercourse with her and said that he was the boss of the house and he is the one who looks after everyone in the house.
29. The accused pushed the complainant on the floor removed her panty and inserted his penis into her vagina. After having sexual intercourse with the complainant he told her not to tell his wife about what had happened.
30. Furthermore, when the accused inserted his penis into her vagina she was scared and she did not know what to do. She did not allow the accused to insert his penis into her vagina. Thereafter, the accused stood up got dressed and went back to work. The complainant was scared and frightened she felt numbness from her hip downwards.

31. On Monday the complainant went to school and from there she went to the house of her aunt Taina Ragatu and told her about the incident. Her aunt did not believe her so she reported the matter to the police. The complainant recognized the accused in court.
32. In cross examination the complainant stated that when she went to her aunt's house she told her what the accused had done to her. To the suggestion that when she was asked by her aunt whether the accused had sexual intercourse with her she had said no, the complainant answered that she told her aunt they had sexual intercourse.
33. The complainant agreed that she had given a police statement on 20 June, 2015, 6 months after the alleged incident and that she had refreshed her memory a month ago with her police statement before coming to court to give evidence.
34. The complainant was referred to her police statement which was read as follows:

"It was in January, 2015 on one Saturday morning for just when the school has started. I was alone at home that day, the children were at Valenimasima with my grandparents (Pauliasi uncle) Varanisesese was at work with the Evergreen Security. Also Pauliasi went to work at the ATS Airport Terminal Services. At about 12 – 1pm while I was just about to scrub the bathroom suddenly someone pushed the door of the bathroom and it fly open and I saw Pauliasi my brother in law standing outside the bathroom."

35. The complainant agreed that the incident happened in January, 2015 but disagreed it was a Saturday as mentioned in her police statement. According to the complainant the incident happened on a Sunday, however, it was written in the police statement as Saturday. She agreed the police statement was read back to her in English and that she was told to correct

anything in the statement. She did not tell the police officer that it was not a Saturday but a Sunday she only came to know after reading it in court.

36. The complainant stated that although it was written in her police statement as Saturday the accused had sexual intercourse with her on Sunday because everyone had gone to church and she was alone at home. The accused had taken everyone to church in his car and then went to work.
37. The complainant maintained that she told the police officer who was writing her police statement that it was Sunday and that she did not write the police statement she was told to sign which she did and the statement was never read back to her before signing.
38. The complainant agreed that Saturday was very clear in her mind and not Sunday and that the incident happened after the school had started in January, 2015. The 2015 Calendar was marked and tendered as defence exhibit no. 1.
39. The complainant agreed that the school term for 2015 started on 19 January, 2015 and after this date there were two Saturdays namely 24th and 31st January. The school term 2015 was marked and tendered as defence exhibit no. 2.
40. The complainant was again referred to her police statement where she had stated “...*the children were at Valenimasima with my grandparents...*” when questioned which version was correct whether her police statement or the evidence she gave in court that the children had gone to church. The complainant stated the version given in court was correct. She explained that she did not correct what was mentioned in the police statement because she just saw it when she read it in court. The complainant agreed that when she read her police statement a month ago she had seen what was written in her police statement yet she did not get it corrected.

Madam and Gentlemen Assessors

41. The learned counsel for the accused in this regard was cross examining the complainant about some inconsistencies in the statement she gave to the police after the incident when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant with her evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.
42. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
43. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of the witness.
44. The police statement of the complainant dated 20 June, 2015 was marked and tendered as defence exhibit no. 3.
45. When it was suggested to the complainant that on Sunday 25 January, 2015 the accused was at work from 4.00am in the morning to 1.00pm in the afternoon the complainant stated that the accused came home at about 11.30am and then went back to work at about 12 midday. The complainant

also stated that the accused came home and took Nadababa and others to church at around 11am.

46. The complainant denied she was lying in court and maintained that the accused had left home between 12pm to 1.00pm. She also denied disliking the accused and his wife for disciplining her since she used to come home late after school and was disobedient to them. The complainant denied making up a story against the accused.
47. In re-examination the complainant clarified that the accused had come home to take Nadababa to church at around 11.00am and after church had gone to Valenimasima.
48. The second prosecution witness was Taina Ragatu the complainant's aunt she informed the court that the complainant was staying with the accused and his wife at Malawai.
49. In early 2015 after school the complainant came to her home and told her that the accused was touching her and she did not like it, also when she visited the bathroom he used to push open the door and that the accused had been doing this for a long time.
50. After the witness informed the wife of the accused of what the complainant had told her, both the accused and his wife came to her house. During discussions the accused sought forgiveness. The accused said that he will not do that act again that is he will not touch the complainant again.
51. In cross examination the witness stated that the complainant had come to her house at around 5.00pm to 6.00pm she asked the complainant why she had come. The complainant was quiet for a long time then started crying. The complainant told her that the accused had touched her and she did not like it and whenever she would go to the bathroom the accused would open the door.

52. When the witness was referred to her police statement dated 21 June, 2015 she agreed that there was nothing mentioned in her police statement that the accused was touching the complainant and opening the bathroom door. The witness stated that she had told the police officer but it was not recorded in her police statement.
53. The witness agreed the police statement was read to her before she signed, but since the writing was done she did not tell the police officer that some important things had been missed.
54. The police statement of Taina Ragatu was marked and tendered as defence exhibit No.4. The witness mentioned that the accused had told her that he would not do the act he had done to the complainant again but did not explain the act he was referring to.
55. The witness did not hear the accused and his wife say that the complainant was uncontrollable.
56. In re-examination the witness clarified that the accused and his wife had not complained about the complainant not behaving at home but they did say she was always coming home late. When the accused asked for forgiveness the witness realized that whatever the complainant had told her was the truth.

Madam and Gentlemen Assessors

57. 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 17 years not to complain in detail to her aunt 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.

58. 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 her aunt in detail about what had happened to her on 25 January, 2015.
59. This is commonly known as recent complaint evidence. The evidence given by Taina is not evidence as to what actually happened between the complainant and the accused since Taina was not present and did not see what had happened between them.
60. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant complained to her aunt about what the accused had done to her although not in detail a few days after the alleged incident and therefore is more likely to be truthful. On the other hand, the defence says that the complainant did not complain to her aunt that the accused had forceful sexual intercourse with her without her consent and therefore she should not be believed.
61. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.

62. The third prosecution witness was the mother of the complainant who informed the court that the reason her daughter was sent to live with the accused and his wife was to look after their son in 2013. The wife of the accused had undertaken to get the complainant into a school in Nadi.
63. At no time the accused or his wife had made any complaints about her daughter to her. The accused was her sister's son in law.
64. In cross examination the witness denied she was unable to control her daughter when she was at Rampur College.
65. The final prosecution witness was Raj Deo the Catering Supervisor employed by Air Terminal Services Ltd. He has been employed by ATS for the past 34 years. The witness explained to the court about the shift work and the workers entitlement to breaks within their shift. A shift worker was entitled to take 15 minutes for tea breaks and 30 minutes for lunch breaks. The breaks can be taken separately and also jointly depending upon the flight movement. The leading hand that is his assistant decides who takes the break. Furthermore, a shift worker was allowed to leave the work premises during the breaks as long as he or she comes back to work within time.
66. In January 2015 the accused was working under his supervision. This witness had visited the house of the accused some 10 years ago at Kartaram Road, Votualevu, Nadi. In his estimation it would take about 15 to 20 minutes by vehicle from ATS to Kartaram Road at an average speed of 40 to 50 km/h.
67. In cross examination the witness stated that the accused was a shift worker and all the shift workers were entitled to receive meal and tea allowances, payment of overtime and so on as per the collective master agreement between Air Terminal Services Ltd and Fiji Airline Staff Association. The

collective master agreement pages 5 to 7 was marked and tendered as defence exhibit no. 5.

68. The witness was at work on Sunday 25 January 2015 and a time sheet is prepared for each shift worker.
69. The accused was on a day off on this day, however, due to lack of manpower the accused was asked to do overtime from 4am to 1pm. The time sheet was prepared by the witness who was the supervisor of the day on a 9 hours shift. During the overtime the accused was entitled to 2 meal breaks and 1 tea break. In respect of meal break a worker was given 30 minutes break and 15 minutes for tea break.
70. According to the witness it was upon an individual worker whether he or she wanted to take his or her meal breaks within or outside the work premises. This movement of workers was not recorded anywhere it was upon the worker whether he wanted to leave the premises or to stay on the premises and utilize the breaks. The signing "on" and signing "off" in the timesheet did not reflect the going out of the work premises for breaks. The timesheet of the accused dated 25 January, 2015 was marked and tendered as defence exhibit no.6.
71. The witness also stated that the flight movement summary records the flight coming in and going out of Fiji. The Air Terminal Services Movement Summary of January, 2015 was marked and tendered as defence exhibit no.7.
72. In re-examination the witness agreed that for the 12.45 pm flight by the time the workers would have gone on the aircraft the time would be 1pm. The witness could not say that the accused would have been working on this flight because he had knocked off at 1pm.

73. The witness further stated that 25 January, 2015 was a busy morning and in his estimation taking into account the flight movement summary the accused would have most likely taken his break between 11am and 12 midday. The accused had 2 meal breaks and 1 tea break due, so he was entitled to one hour break and it was possible the accused could have taken his break from 12 midday to 1pm.
74. This was the prosecution case.

Madam and Gentlemen Assessors

75. 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.
76. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination and he called two witnesses.

DEFENCE CASE

77. 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 call witnesses. 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.
78. The accused informed the court that he was employed by the Air Terminal Services Limited since 1997. At the present time he is employed as a Storeman in the cabin section. Upon perusing the time sheet of 25 January, 2015 the accused informed the court that he started overtime at 4 am in the morning till 1pm in the afternoon.

79. The accused also informed the court that he was entitled to receive meal breaks and after every 2 hours he was given a 10 minutes meal break because he was doing overtime. On this day he received 2 meal vouchers and one tea voucher.
80. According to the accused the meal vouchers are to be used for 15 to 20 minutes which can be utilized for breakfast at 10am and the other for lunch from 12 to 1pm. Due to the busy schedule of 25 January it was not possible to have the meal times spent outside the work premises without the approval of the leading hand or the senior catering services attendant. On this day the accused had breakfast after 10 am after a flight departed at 9:45 am. The next flight was due to arrive at 12.25pm so he had his lunch around 12 midday.
81. The accused stated that on 25 January, 2015 from 4am to 1pm he did not leave the premises of the Air Terminal Services. He also denied the allegation that between 1st January, 2015 to 31st January, 2015 he had sexual intercourse with the complainant without her consent.
82. The accused told the court when the complainant started living in his house he had told her of the house rules such as no visitors were allowed in the house without his consent and children were not to come home late from school. The complainant was not complying, she used to come home late from school around 5.10pm or 5.30pm when he asked for a reason why she was coming late the complainant would say that she had some projects to do. She usually came home with a boy named John.
83. In 2014 at about 6pm the accused spoke loudly and harshly to the complainant for arriving late from school. The accused knows Taina Ragatu, he went to Taina's house for a discussion with Taina in respect of the complainant's complaint about him. At Taina's house he saw the complainant inside a room during discussions with Taina he sought forgiveness for raising his voice and offending the complainant in any way since he was reminding the complainant of the household rules. He denied touching the complainant as mentioned by Taina.

84. The accused does not know why the complainant had made such serious allegation against him since he treated the complainant like his eldest daughter.
85. In cross examination the accused agreed that he did not inform the complainant's parents or her aunt that she was coming home late from school. The accused was concerned about this and that he had spoken harshly to the complainant. He did not inform her parents or her aunt because her parents were not reachable at that time. He also did not inform Taina since his wife communicated with her families. To the suggestion that he did not inform anyone because the complainant was not late from school and there was nothing of concern, the accused stated that he had told this to his wife to remind her family of the situation.
86. The accused agreed that meal breaks was for 30 minutes which was taken at the discretion of the supervisor which could be increased to 45 minutes by the supervisor. As for the tea breaks 10 minutes was allowed.
87. The accused agreed that he was able to take his 2 meal breaks and tea break all together but a worker can only leave the premises with the supervisor and the leading hand's permission.
88. On 25th January, 2015 Raj Deo (PW4) was the accused supervisor and any leave to go out of the premises was recorded by the supervisor in his diary. When it was put to the accused that his supervisor told the court that there was no such recording done the accused stated that as a supervisor records were important.
89. The accused explained that records were kept for a worker going out of the work premises because the worker was still within working hours. The accused agreed that he can leave the premises during the breaks but with the permission of the supervisor or the leading hand.
90. The accused had attended to all the flights on 25 January, 2015 because he was driving the cabin cleaning truck during his shift.

91. Due to a busy schedule and bearing in mind the movement of aircrafts into and out of Nadi Airport the accused was able to have his breakfast for 30 minutes from 10am to 10.30am as for his lunch he took only 5 minutes lunch break around midday due to operational demand.
92. When it was put to the accused that he had left the premises at midday he stated that he was at work serving a flight that had arrived at 12.25pm since he was driving the cabin cleaning truck. He maintained that he worked from 4am to 1pm. To reach his home in a car from his work premises it would take about 20 to 22 minutes.
93. The accused denied he had committed the offence according to him it was a lie since he was at work. The reason why he had asked for forgiveness from Taina was because Taina had relayed the complainant's message.
94. The accused disagreed that Taina had told him during the discussions that he had touched the complainant according to him the only issue raised was that he had raised his voice when talking to the complainant.
95. In re-examination the accused stated that he sought forgiveness from Taina because Taina was doing all the talking so he sought forgiveness from her.
96. The second defence witness was Ratu Joni Madraiwiwi he knows the complainant since they went to the same secondary school both had a boyfriend and girlfriend relationship. This relationship came to an end in 2015.
97. The witness had created a Facebook profile for the complainant on 8 January, 2015 and had uploaded some photos of the complainant and himself on the Facebook profile. The photos were marked and tendered as defence exhibit no. 8, 9 and 10.
98. The witness had been informed by the complainant that she was staying at the house of the accused. On one occasion in 2015 the witness went to the house of the accused for a grog session at the request of the complainant.

99. In cross examination the witness stated that a few months after he created the complainant's Facebook profile the boyfriend and girlfriend relationship ended. He came to know the accused from the complainant.
100. The final defence witness was Meredani Sorby the baby sitter employed by the accused for the past 20 years. The witness was a live-in baby sitter, in 2013 the complainant joined the family of the accused and was attending Maha Rishi Sanatan College. The witness is also related to the accused he is her nephew.
101. The complainant used to come home late from school sometimes at 6.30pm and sometimes at 9pm. She used to ask the complainant about her lateness but the complainant never replied to her. The witness goes to church on Sundays, the church service starts at 10 am and ends at 12 midday.
102. In cross examination the witness stated the complainant used to come home late from school sometimes on Tuesdays, Wednesdays and Fridays. She agreed that she was staying with the accused and his family for the past 20 years and was like a family member. The witness was not aware whether the accused or his wife had spoken to the complainant about her lateness in coming home from school. The witness stated that the complainant always goes to church with her.

DEFENCE OF ALIBI

Madam and Gentlemen Assessors

103. The accused person has put forward the defence of alibi. He says that he were not at home where the alleged rape was committed. As the prosecution has to prove the guilt of the accused so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that the alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence.

104. Even if you conclude that the defence put forward by the accused has not been made out that does not of itself entitle you to convict the accused? The prosecution must still satisfy you beyond reasonable doubt of his guilt.
105. The accused has denied any wrong doing his defence is he did not commit the offence of rape as alleged since he was not at home but at work.

ANALYSIS

106. The prosecution alleges that the accused between the 1st day of January, 2015 and 31st January, 2015 penetrated the vagina of the complainant "PD" with his penis without her consent.
107. The complainant was alone at home on a Sunday in January, 2015 after the school term started the other family members had gone to church. The complainant went to have a shower in the bathroom. Whilst having her shower the accused came and opened the bathroom door.
108. The bathroom did not have a lock, when the accused opened the door she was wearing her bra and panty, she screamed and told the accused that he is not supposed to do this and he is not to come inside the bathroom.
109. The accused pushed the complainant on the floor removed her panty and inserted his penis into her vagina. After having sexual intercourse with the complainant he told her not to tell his wife about what had happened.
110. When the accused inserted his penis into her vagina she was scared and she did not know what to do. She did not allow the accused to insert his penis into her vagina.
111. Thereafter the accused stood up got dressed and went back to work. On Monday the complainant went to school and from there she went to the house of her aunt Taina Ragatu and told her about the incident.

112. Taina Ragatu the complainant's aunt informed the court in early 2015 after school the complainant came to her home and told her upon her questioning that the accused was touching her and she did not like it, also when she visited the bathroom he used to push open the door and that the accused had been doing this for a long time.
113. After the witness informed the wife of the accused both the accused and his wife came. The accused sought forgiveness from the witness. The accused said that he will not do that act again that is he will not touch the complainant again.
114. Raj Deo the Catering Supervisor employed by the Air Terminal Services Ltd informed the court in January 2015 the accused was working overtime under his supervision as a shift worker. The accused was entitled to take tea breaks and lunch breaks. The breaks could be taken separately and also jointly depending upon the flight movement. Furthermore, a worker was allowed to leave the work premises during the breaks as long as he comes back to work within time.
115. On Sunday 25 January 2015, the accused was on a day off, however, due to lack of manpower he was asked to do overtime from 4am to 1pm. During the overtime the accused was entitled to 2 meal breaks and 1 tea break.
116. According to Raj it was upon an individual worker where that worker wanted to utilize his or her meal breaks that is whether inside or outside the work premises. There was no recording of this anywhere it depended upon the worker whether to go outside the work premises or to stay on the premises and utilize the breaks. The signing "on" and signing "off" in the timesheet did not reflect the going out of the work premises during breaks.
117. According to Raj it was a busy morning and by taking into account the flight movement summary the accused would have most likely taken his break

between 11am and 12 midday. The accused had 2 meal breaks and 1 tea break due so he was entitled to one hour break and it was possible the accused could have taken his break from 12 midday to 1pm.

118. The prosecution says the evidence of alibi adduced in court is unreliable and should be rejected and further submits that the evidence of Raj Deo who was the supervisor of the accused should be believed that there was no restriction on the accused to leave the work premises during his meal break which was for one hour. According to Raj there was no recording which would show that the accused was not at the work premises during his meal break.

119. The accused on the other hand says that you should not believe the prosecution witnesses in particular the complainant whose evidence in court was inconsistent with her police statement and that she had made up a story to implicate the accused. The aunt to whom the complainant had supposedly complained did not say that the accused had forceful sexual intercourse with her. Taina the complainant's aunt told the court that the only thing she was told by the complainant was that the accused was touching her and opening the bathroom when she was in the bathroom which she did not like. The accused is asking you to believe him and his witnesses.

CONCLUSION

Madam and Gentlemen Assessors

120. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.

121. 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 forthright 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.

122. 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.
123. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge 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 his or her previous statement 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.
124. 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.
125. 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. 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.

126. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

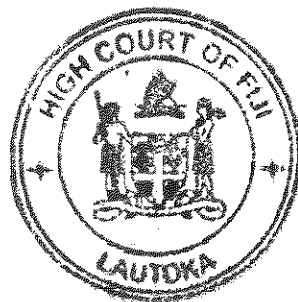
127. Your possible opinions are:-


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

Madam and Gentlemen Assessors

128. 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.

129. 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
10 August, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.
Kevueli Tunidau Lawyers, Lautoka for the Accused.