

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 117 of 2016

STATE

V

- 1. RUPENI VULI SUGUTURAGA**
- 2. JOSAIAS RASIGA TAWAKE**

Counsel : Mr. J.B. Niudamu for the State.
: Ms. K. Vulimainadave [LAC] for the First Accused.
: Mr. K. Tunidau for the Second Accused.
Dates of Hearing : 30, 31 October, 01, 04 November, 2019
Closing Speeches : 05 November, 2019
Date of Summing Up : 06 November, 2019

SUMMING UP

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 persons are 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. 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.
6. 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

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused persons. There is no obligation on the accused persons to prove their innocence. Under our system of

criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

8. 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 person'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.
9. 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 court room.
10. You must decide the facts without prejudice or sympathy for either the accused persons or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. 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

12. The accused persons are charged with the following offences: (a copy of the information is with you).

COUNT ONE

Statement of Offence

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

Particulars of Offence

RUPENI VULI SUGUTURAGA, on the 1st day of June, 2016 at Lautoka in the Western Division, penetrated the vagina of **LUISA WATI SOKILAU** with his penis, without the consent of the said **LUISA WATI SOKILAU**.

COUNT TWO
Statement of Offence

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

Particulars of Offence

JOSAIA RASIGA TAWAKE, on the 1st day of June, 2016 at Lautoka in the Western Division penetrated the vagina of **LUISA WATI SOKILAU** with his penis, without the consent of the said **LUISA WATI SOKILAU**.

13. To prove counts one and two the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused persons;
 - (b) Penetrated the vagina of the complainant with their penis;
 - (c) Without her consent;
 - (d) The accused persons knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

14. In this trial both the accused persons have denied committing the offence of rape they are charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused persons who had penetrated the vagina of the complainant with their penis without her consent and the accused persons knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

15. The first element of the offence is concerned with the identity of the persons who allegedly committed the offence.

16. The second element is the penetration the complainant's vagina by the penis. 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 is sufficient to satisfy the act of penetration.
17. This leaves you to consider the third element 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. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
18. In this case the complainant told the court that she was really drunk and had blacked out on both the occasions of the alleged incidents, in respect of the first alleged incident she regained consciousness at the Saweni Beach when her head hit the root of a tree. At this time she saw the first accused having sexual intercourse with her.
19. In respect of the second alleged incident the complainant stated that she regained consciousness when the other man was on top of her having sexual intercourse at a different location. The prosecution submits that the complainant was so intoxicated that she had no capacity to agree to have sexual intercourse with both the accused persons hence she did not consent.
20. It is for you to decide considering the circumstances of the complainant on both the occasions whether she had the capacity to consent freely and voluntarily and out of her own freewill to have sexual intercourse with both the accused persons at different locations considering her state of intoxication.

21. If you are satisfied that both the accused persons had penetrated the vagina of the complainant with their penis on each of the occasion mentioned by the complainant and she had not consented, you are then required to consider whether the accused persons knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
22. You will have to look at the conduct of both the complainant and the accused persons at the time and the surrounding circumstances to decide this issue.
23. You must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for you to find both or either of the accused persons guilty of the offence of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused persons not guilty.
24. 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.
25. In this case, both the accused persons are charged with one count of rape each, you should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. You must not assume that because one accused is guilty of a count that the other must be guilty as well.

ADMITTED FACTS

26. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final amended admitted facts.
27. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
28. I will now remind you of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. 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 not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

29. The prosecution called four witnesses to prove the charges against both the accused persons.
30. The complainant informed the court that on 31st May, 2016 after work she went to a grog shop in Nadi Town where her two friends drank grog, from there she went to the Deep Sea Night Club. After having some drinks the complainant went to the White House Night Club where she met her two school mates, by this time it was 1am the next day.

31. The complainant and her two school mates continued drinking till 5 am when the complainant came out of the night club to go home there was only one taxi parked outside. Her friends boarded this taxi and left at this time a car came driven by the first accused. The first accused called out "taxi" the complainant responded by saying Saunaka and then she boarded the car.
32. In the car she sat in the front passenger seat fastened her seat belt and fell asleep when she woke up she saw the sea and some trees, her seat belt was still fastened. The driver was not in the car, he was drinking at the back of the car with three boys and a girl. The complainant whilst seated in the car thought she was at the Waialoa Beach.
33. After some time the complainant got out of the car she was offered a bottle of beer to drink. After drinking, she became unconscious only to regain consciousness when her head hit the root of a tree. She saw the first accused was having sexual intercourse with her since the complainant was feeling weak she did not do anything.
34. The complainant felt pain on her vagina and her thighs she "blacked out" again. When she regained consciousness another man was having sexual intercourse with her at a different location. She was not wearing her panty and this person was on top of her, again the complainant fell asleep.
35. After sometime, a lady came and woke the complainant when she sat she noticed that she was without her shoes and panty. The complainant was told that she was in Waiyavi, Lautoka.
36. The complainant saw there were people gathered around her, at this time she realized something had happened. When she stood up she felt pain in her vagina.

37. The complainant was taken to a house where she was given a cup of tea, "Sulu" and panty to wear, on the same day the complainant reported the matter to the police.
38. The complainant identified the first accused in court as the person who had sexual intercourse with her at the Saweni beach. As for the second man the complainant only remembered this person had sexual intercourse with her.
39. When cross examined by the counsel for the first accused the complainant stated that before boarding the car outside the White House Night Club it was the first accused the driver of the car who had called out "taxi".
40. The complainant denied that when she was sitting in the car, she was conversing, laughing and leaning on the first accused and even kissing him on his cheeks while he was driving. She also denied that she was attracted to the first accused and that when she got out of the car at the beach, she had immediately pulled the first accused out of the car and walked with him for about 10 meters away from the others.
41. The complainant denied taking out a cloth and laying it on the sand, kissing the accused, removing her own skirt and lying on the cloth she had spread. She stated that when the first accused was on top of her, it was at this time she realized that someone was on top of her and she felt the first accused penis in her vagina having sexual intercourse with her.
42. The complainant maintained that the first accused had inserted his penis into her vagina because she had felt it. When the accused was on top of her, she had become conscious and that she did not consent for the first accused to have sexual intercourse with her. The complainant also stated that because of shame and embarrassment she blamed the first accused

because she did not give her consent to the first accused to have sex with her.

43. When cross examined by the counsel for the second accused the complainant agreed that on 1st June, 2016 she was medically examined by a doctor at the Lautoka Hospital and that she had told the doctor that she had been sexually assaulted. When suggested by counsel for the second accused that sexually assaulted meant having sexual intercourse the complainant agreed.
44. The second witness Otto Delana informed the court that on 1st June, 2016 he was at work at about 7.30am renovating the roof of a customer at Vesi Crescent, Waiyavi, Lautoka. The witness was on the roof top when he saw two ITaukei boys and two ITaukei girls standing under a Vaivai tree.
45. After a while all of them moved to the volleyball court, he then saw one female move further into the grass and was having sexual intercourse, both the man and the girl were “fully drunk” while another man was taking pictures of them.
46. The witness came down the roof and went near the scene, the young man was still on top of the girl when this man saw the witness he pulled up his pants and ran away.
47. The witness was able to recognize this man as the second accused since he knew the second accused from his earlier employment. He used to call the second accused “*tau*” meaning they were from the same ancestry. The witness saw the girl was naked and was “blacked out”.
48. When cross examined by the first accused’s counsel the witness stated that from the roof top he was able to see whatever was happening at the

volleyball court and that he had gone to the volleyball court which was at a short distance from where he was.

49. The third witness Sgt. Silio Finau informed the court that he had caution interviewed the first accused in the English language at the crime office of the Lautoka Police Station. The first accused was given all his rights.
50. The interview commenced on 2nd June, 2016 at 09.00 hours which ended the following day at 13.30 hours. Before or during the interview, the accused was not induced, threatened, intimidated, promised, coerced or oppressed to make a statement.
51. The caution interview was signed by the accused, the witness and the witnessing officer. The caution interview was marked and tendered as prosecution exhibit No. 1.
52. When cross examined by the counsel for the first accused, the witness denied fabricating some of the answers stated in the caution interview. He maintained that he was the one doing the typing and that all the answers were given by first accused. Some of the answers which counsel stated were fabricated by the witness was:

Answer to Q.46 It was put to the witness the accused had said: "She did not take it off".

Answer to Q.47 It was put to the witness the accused had said: "I was still wearing my pants."

Answer to Q.48 It was put to the witness the accused had said "he did not have sex with Luisa."

53. The witness also denied that he had not asked questions 49, 50 to 52, 66 to 68, 75, 88, 92, to 98, 101 to 102 and he also denied fabricating the answers to these questions.
54. In respect of question 83 it was suggested that the witness had asked the accused *"to show where they had laid down"* the witness denied asking this question and he also denied fabricating the question to read as *"where they had sex with Luisa"*.
55. In respect of question 95, it was suggested that the witness had asked the accused *"what clothes was Luisa wearing at Saweni"* the witness denied asking this question and he also denied fabricating the question to read as *"what clothes Luisa was wearing when you had sex with her at Saweni"*.
56. The witness denied that the first accused was simply given the caution interview to sign after it was printed.
57. The final witness Detective Sgt. Salen Kumar informed the court that on 2nd June, 2016 he had interviewed the second accused in the English language. The interview was signed by the accused, the witness and the witnessing officer.
58. The caution interview of the second accused was marked and tendered as prosecution exhibit no. 2.
59. When cross examined by the counsel for the second accused, the witness stated that during the interview when the accused had given his answer that he had "blacked out" the witness did not ask the accused to elaborate or explain what the accused had meant by saying "black out". The witness stated the answer given was *"I was drunk which led to blackout"*. The witness agreed the accused had answered that he had "blacked out" twice in answer to questions 50 and 75 in his caution interview.

60. The witness agreed the accused did not tell him how he had ended up at Waiyavi from Saweni Beach. When the witness was asked to explain the reason why he had asked Q. 77 in the manner it was mentioned in the caution interview namely "*How many times you had sexual intercourse with Luisa*" the witness stated the accused was not sure whether he had sex or not in answer to an earlier question so according to the witness it could be that the accused had sex or did not have sex, so on this basis he had asked Q.77.

Madam and Gentlemen Assessors

61. The caution interview of both the accused persons is before you, the answers in the caution interviews are for you to consider as evidence not the questions asked but before you accept the answers, you must be satisfied that the answers were given by the accused persons and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview. If in a caution interview the name of the other accused person is mentioned that is not evidence against the other accused which should be disregarded by you.
62. Furthermore, in the caution interviews you will find certain parts have been inked. You are not to speculate about the missing words or sentences just concentrate on what is legible.
63. The counsel for the first accused during the cross examination of the interviewing officer Sgt. Silio Finau had asked questions suggesting that some answers attributed to the accused in the caution interview was fabricated or made up by the interviewing officer. Also some questions were not asked by the interviewing officer in the manner it is mentioned in the interview the officer had said one thing but typed something else in the caution interview.

64. This means counsel was putting to this witness that the admissions made by the first accused in his caution interview was fabricated by the interviewing officer hence those answers were not voluntarily given by the first accused and therefore you should disregard those admissions.
65. The counsel for the second accused during the cross examination of the interviewing officer Detective Sgt. Salen Kumar had suggested that the interviewing officer ought to have asked the accused to explain what he had meant when he had said in his caution interview that he had “blacked out.”
66. It is for you to decide whether both the accused persons made those admissions in their respective caution interviews and whether those admissions were the truth. If you are not sure whether the accused persons made those admissions in their caution interviews then you should disregard them. If you are sure that those admissions were made by the accused persons, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.
67. This was the prosecution case.

DEFENCE CASE

Madam and Gentlemen Assessors

68. At the end of the prosecution case you heard me explain options to both the accused persons. They have those options because they do not have to prove anything. The burden of proving all the accused persons guilt beyond reasonable doubt remains on the prosecution at all times.

69. The first accused gave evidence and called one witness whereas the second accused gave evidence and did not call any witness. You must consider their evidence and give such weight as you think fit.
70. The first accused Rupeni informed the court that on 31st May, 2016 at around 10 to 11pm he drove Susana and another guy from Lautoka to White House Night Club in Nadi. At the night club the accused drank about four cans of rum and cola till 5am. By this time the second accused had joined them and all of them were drinking.
71. When the night club closed, all went to the car the accused was driving with Susana sitting in the front passenger seat whereas the second accused and the other boy sat at the back seat. At the exit of the car park the second accused called a girl (hereinafter called the complainant) who was standing there. The complainant came and sat in the front passenger seat of the car while Susana went to the back seat.
72. On the way the complainant was laughing about something the accused did not know about. As they went further the complainant put her head on his shoulder and was leaning on his shoulder and kissed his cheek. By this time they reached Waimalika where they bought some beer. On the way the complainant was also asking him questions whether he had a girlfriend or not.
73. It was around 6am when they reached the Saweni Beach here the complainant pulled his hands so both went for a walk on the beach about 10 meters away from the others. At the beach, both started kissing each other.
74. At this time the complainant put a cloth on the sand and took off her skirt. The complainant asked the accused to lie down so he lay on top of her and both started kissing each other. The accused had not taken off his clothes

and the kissing had continued for 10 minutes until Susana and the second accused called him so both left. The complainant put on her skirt and both left by holding each other's hand.

75. From the Saweni Beach, the accused drove everyone to Kaleli Settlement, in Waiyavi. Here the accused went to open the door for the complainant to come out of the car, however, she had already left the car so he took out the left over drinks from the car and sat down to drink.
76. After a while he took Susana and dropped her at Jinnu Road, Waiyavi and then went to Kaleli Settlement to pick the second accused. At Kaleli Settlement the second accused was already at the road side the second accused got into the car and told the first accused to leave the place. He was arrested the same afternoon, at the Lautoka Police Station he was interviewed by Police Officer Tobia and not by Police Officer Silio Finau.
77. The first accused stated that during his caution interview he was asked about three times whether he had sexual intercourse with the complainant. The accused said he had answered "no" and he doesn't know why it was written that he had answered "yes".
78. The accused denied the allegation saying that he did not penetrate the vagina of the complainant the allegation was all wrong and he never gave his statement to the police admitting the allegation.
79. When cross examined by the state counsel the first accused stated that the second accused was also known as Josh and they were best friends knowing each other from a long time. The accused denied he had offered to drop the complainant at Saunaka but agreed that she had come and sat on the front passenger seat, fastened the seat belt but did not sleep on the way. According to the accused it was a lie that the complainant had slept in the car she was awake all the way to the Saweni Beach.

80. The accused could not recall if at Saweni Beach one of his friend's had offered the complainant a drink and it was a lie that after drinking she was unconscious. The accused maintained that he did not have sex with the complainant at the Saweni Beach and that the complainant had lied about it. He was only kissing the complainant for about 10 minutes.
81. The accused stated that at Kaleli Settlement the complainant walked away with his best friend the second accused. The complainant was not unconscious since he remembers that morning well and that he was video shooting what was happening that morning. After dropping Susana he returned to pick the second accused. He was told by the second accused that the complainant was left behind because he was chased by some boys.
82. The accused agreed that he had signed the caution interview willingly but disagreed that the police had not fabricated the answers because he was not given the opportunity to go through his interview for the second time. He signed because he was told to sign.
83. When cross examined by the counsel for the second accused, the first accused stated that the second accused was really, really drunk when leaving Saweni Beach.
84. The second witness called by the first accused was Dr. Lusiana Ravea who is currently based at the Emergency Department of the CWM Hospital. She graduated with MBBS degree and also has completed her Post Graduate Diploma in Emergency Medicine. She is a medical practitioner of 9 year's experience.
85. The doctor recalled examining the complainant Luisa Wati Saukilau on 1st June, 2016 at the Lautoka Hospital. The Fiji Police Medical

Examination Form of Luisa Saukilau was marked and tendered as first accused defence exhibit no. 1.

86. After examining the complainant the following specific medical findings were recorded by the doctor:
- a) There were multiple small bruises over the anterior neck and on her right breast. The doctor saw small discoloration of the skin over the front of the patient's neck. The small bruises looked like they were caused by small trauma such as kissing or sucking on the skin namely love bites;
 - b) There was mild tenderness over patient's lower abdomen. The doctor explained mild tenderness meant pain upon touch it was painful to the patient on the lower abdomen below the umbilicus near to the private region;
 - c) Petechial rash was seen over left inner thigh. The doctor explained that such bruises can be caused by blood sipping out of the capillaries under the skin there was an area of rash like small dots smaller than 2mm. This rash is usually caused by blunt force trauma like someone is hit by something hard such as a blunt object. The doctor also stated that such rashes can also be caused by medications, which will be in a lot of places in the body or by blood disorders.
- The hymen was intact but had a small bruise at 2 o'clock position. The doctor explained the hymen was a thin mucosal membrane that covered the vaginal opening. Furthermore, the doctor had noted a bluish discoloration of the hymen at 2 o'clock position; and
- d) Discharge was noted at posterior forchette, pus and dirt. The doctor explained the posterior forchette was part of the labia minora being the external genitalia of the female reproductive organ. The discharge

was seen where the vulva was when a female was in a lying down position towards the bottom. It was here the doctor had seen the discharge of pus and dirt.

87. In the professional opinion of the doctor her findings suggested sexual intercourse and tenderness over lower abdomen which could suggest trauma. The doctor further stated that the patient's hymen being intact did not rule out sexual intercourse and the bruise noted on the hymen may suggest forceful entry.
88. When cross examined by the state counsel the doctor stated that trauma to the hymen could be caused by a lot of things but a small bruise like the one noted in the patient as well as her other findings suggested that there was sexual intercourse. The doctor agreed that the collection of discharge at the posterior forchette may have been caused by sexual intercourse.
89. When cross examined by the counsel for the second accused the doctor agreed that in her 9 years she has only examined 2 cases of sexual assault, however the doctor considered herself an expert in any examination of female genitalia especially for paediatrics. When it was put to the doctor that the history noted in the medical examination form did not give details of the specific type of sexual assault the doctor stated when she had asked the patient whether it was vaginal penetration or anal penetration, the patient had pointed to her front.
90. The doctor stated that her opinion that an intact hymen did not rule out sexual intercourse was from medical journals and her education where they are taught on specific anatomy for children and specifically about hymen and that she only stated what she had seen.
91. The doctor agreed that there can be other causes for the bruise seen on the hymen at 2 o'clock position.

Madam and Gentlemen Assessors

92. You have heard the evidence of Dr. Ravea who had been called as an expert on behalf of the first accused. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.
93. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
94. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
95. This was the first accused case.
96. The second accused Josaia informed the court that at around 11pm, he went to the White House Night Club in Nadi where he drank a lot of alcohol till the night club closed. By this time he was heavily intoxicated.
97. After the night club closed he joined the first accused and his friends, as they were leaving the car park the complainant was waving for a transport. When the car was stopped the complainant spoke to Ben the first accused

who was driving the car and then sat in the front passenger seat, from there all went to Waimalika to buy more drinks.

98. From Waimalika they went to the Saweni Beach. At the Saweni Beach all started drinking when he went to sit in the car he “blacked out” since he was heavily intoxicated he does not know where the car went to. By “black out” the accused meant his mind and his whole body was not functioning, he does not know if he was talking or saw anyone. When he regained from his “black out”, he stood up from beside the complainant, his pants were up to his knees.
99. The accused denied that he had sexual intercourse with the complainant as alleged by her because he had “blacked out”. The accused further explained that when he “blacked out” his penis and his feelings were “off”, he does not know whether his penis was erect or not or if he had urinated in his pants or had shit in his pants.
100. When Q & A 76 of the caution interview was shown to the accused he stated that the answer given by him was just a guess because of the situation he was in when he had woken up.
101. When cross examined by the state counsel, the accused agreed that the complainant had requested the first accused to drop her at Saunaka but the first accused did not do so. At the Saweni Beach the complainant had joined them in drinking.
102. The accused denied the allegation he maintained that from the Saweni Beach he does not know what happened because he had “blacked out”. When Otto Delana (PW2) had arrived he was waking up the complainant and not having sex with her when she did not wake up he stood up and walked away.

103. When cross examined by the counsel for the first accused, the second accused said that he did not speak to the complainant when she was outside the night club.

104. This was the second accused's case.

ANALYSIS

105. The prosecution alleges that during the early hours of the morning of 1st June, 2016 the complainant came out of a night club to go home the first accused who was in a car called out "taxi" the complainant responded by saying Saunaka and then boarded the car.
106. In the car she sat in the front passenger seat, fastened her seat belt and fell asleep. When she woke up she saw the sea and some trees, her seat belt was still fastened.
107. After some time the complainant got out of the car she was offered a bottle of beer to drink. After drinking, she was unconscious only to regain consciousness when her head hit the root of a tree. Here she saw the first accused was having sexual intercourse with her since the complainant was feeling weak she did not do anything.
108. The complainant felt pain on her vagina and her thighs she "blacked out" again. Later when she regained consciousness she saw another man having sexual intercourse with her at a different place. She was not wearing her panty and this person was on top of her, again the complainant fell asleep.
109. The prosecution says that the complainant was so intoxicated that she did not consent to have sexual intercourse with both the accused persons because she did not have the capacity to consent. The prosecution also says Otto Delana had seen the second accused having sexual intercourse

with the complainant when Otto went to the scene where the second accused and the complainant were and as soon as the accused saw Otto he pulled his pants up and ran away. Furthermore, the prosecution also says that you should rely on the caution interviews of both the accused persons which were given by them voluntarily.

110. On the other hand both the accused persons deny committing the offence as alleged. The first accused says that the complainant was attracted to him and at the Saweni Beach it was the complainant who had pulled his hand towards the beach away from the others. The complainant had voluntarily taken off her skirt on the beach but the accused did not have sexual intercourse as alleged. The first accused is asking you to disregard his caution interview since it was fabricated by the interviewing officer.
111. The second accused says that he was heavily intoxicated that he had “blacked out” at the Saweni Beach and that when he woke up at Waiyavi he was lying next to the complainant. He had told the interviewing officer twice that he had “blacked out” during his caution interview but the interviewing officer had not asked for an explanation about what he had meant by the phrase “blacked out”.
112. The second accused is asking you to consider his state of intoxication which did not make it possible for him to engage in sexual intercourse as alleged. In respect of his answer mentioned at Q. 76 of his caution interview the accused says that the answer given by him was just a guess because of the situation he was in when he had woken up and that you should not give any weight to this answer.
113. The accused persons are asking you not to believe the complainant and the other prosecution witnesses since they did not commit the offences as alleged.

114. Both the accused persons also rely on the medical report of the complainant which states that the complainant's hymen was intact.

Madam and Gentlemen Assessors

115. 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 give 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.
116. 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.
117. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against both the accused persons have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was

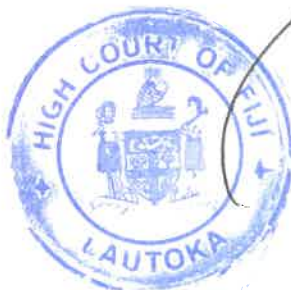
called for the prosecution or the defence. You must apply the same test and standards in applying that.

118. 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.
119. If you accept the version of the defence you must find the accused persons 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 both the accused persons guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused persons at any stage of the trial.
120. The accused persons are not required to prove their innocence or prove anything at all. They are presumed innocent until proven guilty.
121. In this case, both the accused persons are charged with one count of rape each, as mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. You must not assume that because one accused is guilty of a count that the other must be guilty as well.
122. Your possible opinions are:-
 1. FIRST ACCUSED - **RAPE**: GUILTY OR NOT GUILTY.
 2. SECOND ACCUSED - **RAPE**: GUILTY OR NOT GUILTY.

Madam and Gentlemen Assessors

123. 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.

124. 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

06 November, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the First Accused.

Messrs. K. Tunidau Lawyers for the Second Accused.