

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No: HAC 217 of 2016**

**STATE**

**V**

**AVENAI RAKULANAWA**

**Counsel** : Mr. J. B. Niudamu for the State.  
: Ms. V. Diroiroi and Ms. P. Reddy [LAC] for the  
Accused.

**Dates of Hearing** : 13 & 14 November, 2019

**Closing Speeches** : 15 November, 2019

**Date of Summing Up** : 15 November, 2019

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**SUMMING UP**

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

**Ladies and Gentleman 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 complainant. 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 three counts of rape and one count of indecent assault (a copy of the information is with you).

### **FIRST COUNT**

**RAPE:** Contrary to section 207 (1) and 2 (a) of the Crimes Act 2009.

#### *Particulars of Offence*

**AVENAI RAKULANAWA** on the 21<sup>st</sup> day of November, 2016 at Balekinaga, Nakorotubu, Ra in the Western Division, penetrated the vagina of "**LT**" without the consent of the said "**LT**".

## **SECOND COUNT**

**RAPE**: Contrary to section 207 (1) and 2 (a) of the Crimes Act 2009.

### *Particulars of Offence*

**AVENAI RAKULANAWA** on the 23<sup>rd</sup> day of November, 2016 at Balekinaga, Nakorotubu, Ra in the Western Division, penetrated the vagina of “**LT**” without the consent of the said “**LT**”.

## **THIRD COUNT**

**RAPE**: Contrary to section 207 (1) and 2 (a) of the Crimes Act 2009.

### *Particulars of Offence*

**AVENAI RAKULANAWA** on the 25<sup>th</sup> day of November, 2016 at Balekinaga, Nakorotubu, Ra in the Western Division, penetrated the vagina of “**LT**” without the consent of the said “**LT**”.

## **FOURTH COUNT**

**INDECENT ASSAULT**: Contrary to section 207 (1) and 2 (a) of the Crimes Act 2009.

### *Particulars of Offence*

**AVENAI RAKULANAWA** on the 25<sup>th</sup> day of November, 2016 at Balekinaga, Nakorotubu, Ra in the Western Division, unlawfully and indecently assaulted “**LT**”.

14. After the prosecution closed its case this court had ruled that the accused had a case to answer in respect of the three counts of rape only therefore you are to concentrate on the evidence in respect of these counts only.
15. To prove counts one, two and three 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 "ST" with his penis;
- (c) Without her consent;
- (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

16. In this trial the accused has denied committing the offence of rape. 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 on the 21<sup>st</sup>, 23<sup>rd</sup> and 25<sup>th</sup> day of November, 2015.
17. The first element of the offence is concerned with the identity of the person who allegedly committed these offences. In this case the identity of the accused is not disputed you can therefore accept this element of the offence as proven beyond reasonable doubt.
18. The second element is the act of penetration of the complainant's vagina by the accused penis. Like the first element this element of the offence is not disputed by the accused you can also accept this element of the offence as proven beyond reasonable doubt as well.
19. The third element is that of consent, this element of the offence is being disputed by the accused. The accused says on all the three occasions he had sexual intercourse with the complainant she had consented 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.

20. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
21. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
22. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
23. 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 of the offence he is charged with.
24. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
25. 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.
26. You must be satisfied that the prosecution has proved all the elements of all the offences beyond reasonable doubt in order for you to find the accused guilty of either or all the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or all the offences, then you must find the accused not guilty.

27. In this case, the accused is charged with three offences, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
28. Furthermore the law provides that when a person is charged with rape and the court is of the opinion that he is not guilty of rape but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard I direct you that if you find the accused not guilty of the offence of rape that is you are not sure whether the accused had penetrated the vagina of the complainant with his penis without her consent then you should consider the lesser offence of defilement.
29. The elements of the offence of defilement of a young person between 13 years and 16 years are:
- (a) The accused;
  - (b) Had unlawful sexual intercourse;
  - (c) With the complainant who was above the age of 13 years and under the age of 16 years.
30. The legal definition of the offence of defilement is to have sexual intercourse with someone who is over the age of 13 years but under the age of 16 years. It is not a defence to the offence of defilement to say that the complainant consented to the sexual intercourse.
31. In this case there is no dispute that the complainant was 15 years of age at the material time. This means the complainant was between 13 and 16 years of age at that time.
32. It is also an admitted fact that the accused inserted his penis into the vagina of the complainant and had sexual intercourse with her on three occasions.

33. The law provides a defence to the offence of defilement if it is made to appear to the court that the accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years.
34. You must be satisfied that the prosecution has proved all the elements of the offence of defilement beyond reasonable doubt in order for you to find the accused guilty of this offence. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or all the offences, then you must find the accused not guilty.
35. There is evidence before the court that the complainant was 15 years of age and in class 7 in the year 2015 and it is for you to consider whether the accused who was the cousin of the complainant had reasonable cause to believe, and did in fact believe, that the complainant was or above the age of 16 years when he was having sexual intercourse with the complainant.

#### **ADMITTED FACTS**

36. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.
37. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
38. 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**

39. The prosecution called the complainant to prove the charges against the accused.
40. The complainant informed the court that in 2015 she was 15 years of age and a class 7 student. On 21<sup>st</sup> November, 2015 at about 8pm, she was in her bedroom, whilst her mother was asleep and her father had gone to drink grog.
41. At this time she saw the accused enter her bedroom with a pillow in his hand he came and laid down. The accused called the complainant to come and lie beside him she went and laid beside the accused. The accused removed her t-shirt and her shorts and both had sexual intercourse. The complainant further explained that the accused lay on top of her and penetrated her vagina with his penis.
42. The complainant did not push the accused since she was afraid of him and also she did not want to shout. The complainant stated that she did not like what the accused had done to her because they are cousins, she also did not tell her parents about what the accused had done to her because she was afraid of her parents.
43. On 23<sup>rd</sup> November, 2015 at around 7pm the complainant was alone at home cooking when she saw the accused coming towards her house. At this time she was in the kitchen, the accused came and stood at the door and was calling the complainant to go to him. The accused was watching a movie on his phone and the complainant saw it was a movie where a man and a woman were having sexual intercourse. After a while the accused came, pulled her hand and took her into the bedroom. In the bedroom the accused took off his pants, made her lie down on the floor, took off her shorts and then laid on top of her and had sexual intercourse. The complainant did not

like what the accused was doing to her she could not shout because the accused was blocking her mouth. The complainant told her teacher about what the accused had done to her.

44. On 25<sup>th</sup> November, 2015 the complainant was playing cards at one of her cousin's house. After the game ended the other children left, the accused stopped her from leaving the house, pulled her hand into the house, made her lie down, took off his pants and also her skirt and had sexual intercourse with her by penetrating her vagina with his penis. She did not like what he was doing to her.
45. The complainant identified the accused in court.
46. In cross examination by the defence counsel the complainant agreed on the 21<sup>st</sup> of November, 2015 the accused was sleeping at her house with her brother in the living room. She denied entering Tevita's room with the accused she also denied that both had undressed and had sexual intercourse.
47. In respect of 23<sup>rd</sup> November, the complainant stated she did not run away from her house because she was cooking and that she did not run away for her own safety.
48. The complainant was again referred to her police statement page 1, lines 46 to 49 as follows:  
  
*"Also on the 23<sup>rd</sup> November, 2015 I was at home. Both my parents went to the farm. It was after lunch Rakula came home. He told me to accompany him to the nearby bush beside our house."*
49. When the complainant was asked to explain what had actually happened she stated that the incident happened at 7pm. When it was put to the complainant that she had not informed the police that the second incident

of 23<sup>rd</sup> November had happened at 7pm, the complainant stated that she had told the police. The complainant said that she did not know that she was making up the time to be 7pm.

#### Ladies and Gentleman Assessors

50. 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 immediately after the incidents 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. However, the police statement itself is not evidence of the truth of its contents.
51. 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.
52. 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 about the reliability of the witness.
53. In respect of the sexual intercourse on 23<sup>rd</sup> November, the complainant maintained that the accused had forced her. She also denied making up stories against the accused because her police statement did not match with her evidence in court. In respect of the movie seen by the complainant on

the accused's phone, the complainant stated that she did not know why it was not in her police statement including the fact that the accused was blocking her mouth but she had told the police about this.

54. In respect of 25<sup>th</sup> November, 2015 the complainant denied having sexual intercourse with the accused or touching the private part of the accused or undressing before having sex with the accused. However, after a while of questioning the complainant changed her position and admitted having sexual intercourse with the accused on 25<sup>th</sup> November in her house.
55. When it was put to the complainant that on 21<sup>st</sup>, 23<sup>rd</sup> and 25<sup>th</sup> November she was having sexual intercourse with the accused when her parents were not around, the complainant responded by saying she did not know the answer to this question.
56. This was the prosecution case.

#### Ladies and Gentleman Assessors

57. 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.
58. The accused could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also opted not to call any witnesses.

#### **DEFENCE CASE**

59. I will 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. You must then take into account what the accused adduced in evidence when considering the issues of fact which you are determining.

60. The accused informed the court that he was residing at the Balekinaga Village for the past three years in 2015 with his uncle from his mother's side. The accused used to sleep at the house of the complainant which was bigger than his uncle's house, the complainant was his cousin.
61. On 21<sup>st</sup> November, 2015 the accused went to the house of the complainant, she was alone they were chatting, laughing and telling jokes to each other for about three hours from 1pm onwards. During this time the accused asked the complainant what was on her mind to which she laughed. There was no one else in the house apart from the two. The accused told the complainant to go first into the bedroom when she went, the accused followed. In the bedroom the accused drew the curtains and told the complainant to lie down which she did and took off her clothes. At this time the complainant touched his penis and then both had sexual intercourse.
62. On 23<sup>rd</sup> November there was a function in the village. The accused had sexual intercourse with the complainant at about 1am inside Tevita's bedroom.
63. On 25<sup>th</sup> November the accused was lying down in the living room when the complainant approached him he was sleeping with the complainant's brother in the living room. The complainant came and sat by his side when he saw her, he held her hand and both went into Tevita's bedroom since Tevita was sleeping in the living room.
64. In the bedroom the accused told the complainant to lay down which she did after this, both had sexual intercourse which lasted for about 10 minutes. The allegation of rape came about in October, 2016 and the accused was waiting for the police to come so that he can give his answers.

65. The accused maintained that on all three occasions he did not force the complainant to have sexual intercourse with him.
66. In cross examination by the state counsel the accused stated that on all three occasions he had sexual intercourse with the complainant who was not forced by him. In respect of the incident on the 21<sup>st</sup> the accused said they had sexual intercourse at 1pm and not 8pm as mentioned by the complainant since during the day time the complainant's parents and her brother Tevita were in the farm, and her younger brothers were at school. On this day the complainant did not go to school.
67. In respect of sexual intercourse on the 23<sup>rd</sup> the accused maintained he had sexual intercourse at 1 am and not at 7pm as mentioned by the complainant. The floor of the house was wooden so both the complainant and the accused had walked softly so as not to disturb anyone particularly the complainant's mother and her brother who were sleeping in the house as well.
68. This was the defence case.

### **ANALYSIS**

69. The prosecution alleges that the accused had forcefully penetrated the vagina of the complainant on the 21<sup>st</sup>, 23<sup>rd</sup> and the 25<sup>th</sup> November, 2015 in her house without her consent. The prosecution also says that the complainant was afraid of the accused so she did not raise any alarm or tell her parents since she was afraid of her parents.
70. The accused on the other hand denies the allegations of rape he says that he and the complainant had consensual sexual intercourse in the house of

the complainant and at no time did he force the complainant to have sexual intercourse with him.

### Ladies and Gentleman Assessors

71. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
72. 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.
73. 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.
74. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with 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.

75. 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.
76. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt for all the counts. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
77. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
78. In this case, the accused is charged with three counts of rape, as mentioned earlier you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
79. Your possible opinions are:-

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

If you find the accused not guilty of rape then you are to consider if the accused is guilty or not guilty of the lesser count of Defilement.

Count Two:           **RAPE:**           GUILTY OR NOT GUILTY;

If you find the accused not guilty of rape then you are to consider if the accused is guilty or not guilty of the lesser count of Defilement.

Count Three:         **RAPE:**           GUILTY OR NOT GUILTY;



If you find the accused not guilty of rape then you are to consider if the accused is guilty or not guilty of the lesser count of Defilement.

Ladies and Gentleman Assessors

80. 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 the staff so that the court can be reconvened.
81. 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**

15 November, 2019

Solicitors

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**