

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 80 OF 2018

STATE

v

VILIMONE MATEIWAI

**Counsel: Ms A.Vavadakua for State
Mr J. Korotini for Accused**

Dates of Trial: 7, 8May 2019

Date of Summing Up: 8 May, 2019

SUMMING UP

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the counsel. You are not bound to accept their arguments. However you may properly take into account their submissions

when evaluating the evidence. It is a matter for you to decide which version of the facts to accept, or reject.

6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law that accused person is innocent until he is proved guilty. The burden of proving guilt of the accused person rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find an accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial. This summing-up is not evidence. Statements, arguments, questions and comments by the counsel are not evidence either.

10. As assessors you were chosen from the community. You, individually and collectively represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in a trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
11. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.
12. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth.
13. The agreed facts of this case are that:

1. **COMPLAINANT AND ACCUSED**

- 1.1 **Complainant:** Tavenisa Druma, 39 years, Domestic worker. Her husband is a fisherman and was away at sea.
- 1.2 **Accused:** Vilimone Mateiwai, 27 years, fisherman. He is a cousin of the complainant's husband.
2. The complainant and the accused live in the same neighbourhood within walking distance at Cawaira, Labasa.

3. FACTS

- 3.1 On 21 August 2018 at about 5pm the complainant went to her brother-in-law, Isikeli's house where Isikeli's wife was present with other family members.
- 3.2 They began drinking alcohol at about 5pm and continued until about 5.30am.
- 3.3 In between, Isikeli called the accused to assist in purchasing more alcohol by the use of his car. After the purchase, the accused joined them in drinking alcohol.
- 3.4 At about 5.30am, the complainant left and walked home which was close by. She was very drunk.

4. RECORD OF INTERVIEW

- 4.1 The accused was interviewed under caution on 27 August 2018 and released. On 24 October 2018 he was charged. He denied the allegation.

14. The accused is charged with two counts of Rape. The Information reads as follows:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

VILIMONE MATEIWA on 22nd day of August, 2018, at Labasa in the Northern Division, penetrated the vagina of **TAVENISA DRUMA** with his fingers without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

VILIMONE MATEIWA on 22nd day of August, 2018, at Labasa in the Northern Division, penetrated the vagina of **TAVENISA DRUMA** with his penis without her consent.

15. I will now deal with the elements of the offence of Rape. A person rapes another person if:
- (a) The person has carnal knowledge with or of the other person without other person's consent; or
 - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
 - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

- (d) The person knew or believed that the complainant was not consenting, or he was reckless as to whether or not she was consenting.
16. To prove the first count in this case, the Prosecution must establish that the accused Vilimone Mateiwai penetrated the vagina of the complainant Tavenisa Druma with his finger without her consent.
 17. To prove the 2nd count, the Prosecution must establish that the accused Vilimone Mateiwai penetrated the vagina of the complainant Tavenisa Druma with his penis without her consent.
 18. Insertion of penis or finger fully into vagina is not necessary. Slightest penetration is sufficient to satisfy this element.
 19. Consent as defined in Section 206 of the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.
 20. If you accept that the complainant was not consenting you must ask yourself did the accused know that she was not consenting, and if not, was the accused reckless in going on knowing that she might not be consenting. In the circumstances of this case you consider whether the accused knew or it was reasonable for him to believe that she was consenting.

21. If you believe the version of the complainant to be true but you are not sure if the accused had penetrated her vagina at least slightly with his finger, you should consider whether the elements of lesser offence of Sexual Assault have been satisfied, although the accused has not been charged with Sexual Assault in the information.
22. To make out the offence of Sexual Assault, the Prosecution must prove beyond reasonable doubt that the accused unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. The assault becomes indecent when it is committed in circumstances of indecency. A circumstance of indecency is what right minded people would consider indecent. Assault can be defined as an application of unlawful force on another’s body.
23. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important in this case. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offences that he is alleged to have committed.
24. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who have given evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.

25. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witnesses' demeanor in the witness box when answering questions. How did they conduct themselves in court? In general, what was their demeanor in court? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
26. Proof can be established only through evidence. Evidence can be direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. In this case, for example, the complainant was a witness who offered direct evidence as to what she saw, heard or felt.
27. You are also free to draw reasonable inferences if such inferences are based on facts proved by evidence and those inferences are reasonable in the circumstances of this case.
28. In testing the credibility of a witness, you can consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

29. You heard the complainant say that she relayed the incident to her husband, Kelei. Kelei gave evidence and said that he received the complaint from the complainant on the same day of the alleged incident.

30. Kelei had gone fishing and was not present when the alleged incident happened and therefore, he is not in a position to give evidence as to what actually happened between the complainant and the accused. What he heard from the complainant is not evidence as to what actually happened between the complainant and the accused. Recent complaint evidence is led to show consistency in the conduct of the complainant and is relevant in assessing her credibility.

31. If you find that the complainant had made a recent complaint in this case and her husband to be a credible witness, than you may use the complaint the complainant had made after the alleged incident to test the consistency and credibility of the conduct of the complainant.

32. You may also see whether there is a motive or obvious reason on the part of the complainant to fabricate a false allegation against the accused. If there is an obvious reason to make up a case, then you may think that these allegations have been fabricated.

33. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature.

The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.

34. I will now deal with the summary of evidence in this case. In doing this, I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision in this case.

Case for Prosecution

PW.1 Tavenisa Druma (The Complainant)

35. Tavenisa said that she is married to Kelei Lalagavesi and was living in Cawaira with her husband in 2018.
36. On 21st August, 2018, in the afternoon, her husband went fishing. After her husband left home, she went to her brother-in-law Isikeli's house at around 5 pm.. She started drinking beer with Isikeli, his wife Anaseini, Bale and Josaia. Later, early hours of the following morning Vilimone also joined the drinking party. She finished drinking at around 5 a.m. and went home to sleep. When she left the drinking party, the house was empty and Vilimone was not there.

37. Tavenisa further said that when she reached home, she entered the house and knocked out. She could hear the sound of the louvers and Vilimone calling her twice. At that time she was still knocked out and was dizzy and spinning. She was unconscious. Tavenisa said that he opened her wrap around *sulu*, removed her panty and started touching her. He was touching her female private part. She described female private part as vagina. He gave his male private part inside her private part and had sex with her. That was the 2nd time he did it to her. She described his private part as the part they used to reproduce. She was really drunk at that time. When her husband arrived home, the door was open. She said she could not yell, scream or follow him as she was too drunk.
38. Tavenisa said that she knew it was Vilimone who did it. She knew Vilimone very well. He was residing about 10 meters away from her house. She said she blames only Vilimone because he is the one who did the prohibited thing. What he did to her and her door was not right. She did not like it.
39. When she became sober she confronted Vilimone in the same morning at around 7 a.m. when her husband was back. Vilimone apologised to her and said '*I will not repeat what I have done*'. He came to apologise with his family members with a bar of washing soap. The apology was not accepted and she went to police to report the matter.
40. Under cross- examination, Tavenisa said that she was knocked out and fully unconscious. Tavenisa admitted that she was not able to figure out anything because she was unconscious. She could not see, hear or feel who entered the house. She admitted that in this state of drunkenness and

unconsciousness she could not feel what was happening to her. She admitted that Vilimone and his family members came to seek her forgiveness because Vilimone's wife Ema had sworn at her.

41. Under re-examination, Tavenisa explained why she is blaming Vilimone. She said that, about two months before this incident happened, Vilimone came to her house and asked for some Fijian tobacco and he did it to her inside the house and then he went out. She said that she is just blaming Vilimone. She said that in a drunken state, she was not able to feel something being done to her in that morning. She said that Ema came and shouted at her because they had a quarrel and she had told Ema to tell her husband what he did to her, she did not like it. She also said that he removed her undergarments, lay on top of her and he was using his finger in her.
42. Tavenisa identified the accused in court as Vilimone who committed all those acts on her.

PW.2 Kelei Lalagavesi

43. Kelei said he goes out fishing in the afternoon and returns home in the morning. On the day of the alleged incident, he returned home at around 8 in the morning. When he reached home the door was open and her wife Tavenisa was not feeling well. She smelled of liquor. She told him about the incident that had happened.

44. Tavenisa told him that a person came and tried to open the louvers and the door and he managed to get into the house and he had sexual intercourse with her. She said that the person who did that was Vilimone. When he heard about the incident he was sad. Kelei said that he and his wife knew Vilimone because Vilimone is his cousin.

45. In the same night, Vilimone, came to his house with his sister-in-law and other family members and created a nuisance. They had heard that the matter is going to be reported to police. On the following day, Vilimone and his sister Diana came with a bar of soap to apologized for the 'accident' that had happened inside the house. Vilimone had come after driving and told them that he will not repeat what he had done. Kelei said that what he could gather from the phrase 'he will not repeat what he had done' was that Vilimone was referring to the accident that had happened inside the house.

46. That is the case for Prosecution.

47. At the close of the Prosecution's case, you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.

48. The accused elected to remain silent. That is his right under the Constitution. You must not hold against him for his silence. You must not conclude that the

accused remained silent because he is guilty. He does not have to prove anything at all. The Burden of proof remains with the prosecution throughout.

Analysis

49. Ladies and Gentleman assessor, the accused is charged with two counts of rape. To find the accused guilty of rape on the first count, the Prosecution must prove that the accused Vilimone Mateiwaion the 22nd August 2018 penetrated the vagina of the complainant Tavenisa Druma with his finger without her consent. On the second count, the Prosecution must prove that accused Vilimone Mateiwaion the 22nd August 2018 penetrated the vagina of the complainant with his penis without her consent.
50. There are two counts and you have to consider evidence against each count separately for you to be satisfied that each count has been proved beyond a reasonable doubt.
51. The resolution of the dispute in this case depends on whether you accept the complainant as a truthful witness and whether her evidence had proved all the elements of each count. The Prosecution says that the complainant told the truth in court and her evidence has satisfied all the elements of each count to the requisite standards. To support complainant's version, Prosecution relies on evidence of complainant's subsequent conduct, recent complaint and the alleged admission made by the accused soon after the alleged incident.

52. The Prosecution called two witnesses and based its case substantially on the evidence of the complainant. If you are satisfied that the evidence she gave in court is truthful and believable, you can safely act upon her evidence in coming to your conclusion. No corroboration is required. However, you may consider the recent complaint evidence to test the consistency of the complainant, if you believe that such a complaint was made at the first available opportunity to her husband.
53. The case for the Defence is that of complete denial. The Defence says that these offences have never occurred and the complainant has fabricated this allegation. The accused exercised his right to remain silent. Defence Counsel cross-examined prosecution's witnesses to challenge their credibility. You have to consider the version of the Defence as well before coming to your conclusion whether the complainant had told the truth in court.
54. First of all, you must be satisfied beyond reasonable doubt that it was the accused and nobody else that had committed the alleged offences. The alleged incident had occurred inside complainant's house during day break at around 5.30 am when the complainant was in a state of drunkenness. Under cross examination, the complainant admitted that she was heavily drunk and did not see the accused coming into or going out of her house. She however insisted that it was the accused and nobody else that had committed these offences. However, she did not describe how he managed to recognize the perpetrator in

the condition she was in. Therefore you have to consider all the circumstantial evidence in coming to your conclusion as to the identity of the offender.

55. The accused is the cousin of her husband and an immediate neighbour. The complainant said that she knew the accused well prior to the incident and that she heard him calling her twice immediately prior to the alleged incident when somebody broke into her house. The accused had been drinking with the complainant early in the morning and had left the drinking party at around 4 am. She said that the accused had done the same thing to her on a previous occasion and she is blaming only the accused and nobody else. She also said that she confronted the accused on the same day when she became sober and the accused came to apologize and told her that he will not repeat what he had done to her. Having considered all these circumstantial evidence, you decide whether you are sure it was the accused and nobody else that had committed these alleged offences.
56. Secondly, you must be satisfied that the accused had penetrated complainant's vagina, on the first count, with his finger and, on the second count, with his penis. The complainant said that 'he' was touching her female private part and was using his finger in her. She described female private part as vagina. She described his private part as the 'part they use to reproduce'.
57. If you find the complainant to be a reliable witness and you are satisfied that the accused had penetrated complainant's vagina with his finger without her consent, you should find the accused guilty of rape on the first count. If you find the complainant to be a reliable witness and you are satisfied that the accused

had penetrated complainant's vagina with his penis without her consent, you should find the accused guilty of rape on the second count. If you are not sure that the accused had penetrated or not then you must find the accused not guilty of rape. If you are sure that the complainant told the truth and you are not sure whether the accused had penetrated her vagina but he had only touched it, you should find the accused guilty only of the lesser offence of Sexual Assault.

58. Thirdly, you must be satisfied that the accused penetrated the complainant without her consent. The complainant said that she had been drinking alcohol from 5 pm the previous day till 5 a.m., and was in a state of drunkenness and she knocked out and was unconscious at the time of the alleged rapes. If you are satisfied that she was unconscious due to heavy drinking, then she was not in a position to give her consent to the alleged sexual acts. In such a scenario, you may find that the complainant had not given her consent to the alleged sexual acts.

59. Fourthly, you should be satisfied that the accused knew or believed that the complainant was not consenting, or he was reckless as to whether or not she was consenting. It is admitted by the accused that the complainant was drinking alcohol with him that morning and that she left the drinking party very drunk at about 5.30 am.. If you are satisfied that the accused knew that the complainant was not in a position to give her consent due to drunkenness or he did not care if she was in a state to give her consent nevertheless proceeded to commit the alleged acts, then you can be satisfied that the 4th element of rape is made out.

60. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

61. Your opinions should be

1st count-

Is the accused guilty or not guilty of rape?

If you find the accused not guilty of rape, is the accused guilty or not guilty of Sexual Assault?

2nd count - is the accused guilty or not guilty of rape?

62. Any re-directions?



Aruna Aluthge

Judge



AT LABASA

8th May, 2019

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