

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

**CRIMINAL CASE NO.: HAC 85 of 2018**

**BETWEEN:** STATE

**PROSECUTION**

**AND:** IOWANI MARIA VIANI

**ACCUSED PERSON**

**Counsel:** Ms. A. Vavadakua for State  
Mr. E. Radio for Accused

**Summing Up:** 21<sup>st</sup> May 2019

**SUMMING UP**

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any

comment I make about the facts of this case, unless it coincides with your own independent opinion.

4. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

### **Burden and Standard of Proof**

7. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused guilty for the offence.
8. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
9. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

### **Information and elements of the offences**

10. The accused is charged with one count of Attempt to Commit Rape, contrary to Section 208 of the Crimes Act and one alternative count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The particulars of the offences are before you, hence I do not wish to reproduce them in my summing up.
11. The main elements of the offence of attempt to commit rape are that;
  - i) The accused,
  - ii) Attempted to penetrate the vagina of the complainant with his fingers,

iii) Without her consent,

iv) He knew, at the time, that the complainant was not consenting to (i) and (ii) above,

### **Agreed Facts**

12. I now take your attention to the agreed facts, which are before you. They are the facts that the prosecution and the defence have agreed without any disputes. Therefore, you are entitled to take them into consideration as proven facts beyond reasonable doubt.

### **Accused**

13. It is the onus of the prosecution to prove beyond reasonable doubt that it was the accused who committed this offence to the complainant. In this case, the accused in his evidence admitted that he was present at the scene of this alleged incident. Hence, the identity of the accused is not disputed by the defence.

### **Attempt**

14. The word “attempt” means to make an effort or try to do something. In the context of attempt to commit rape, the accused must make an effort or try to insert his fingers into the complainant’s vagina, without her consent. He must also know at the time that the complainant was not consenting to his attempt to insert his fingers into her vagina. The accused’s conduct must be more than merely preparatory to the commission of rape and such an issue is a question of fact for you.

15. In determining the element of attempt, first you have to satisfy that the accused had an intention to commit the offence of rape. Then you have to satisfy with that intention, the accused had done something which was more than mere preparation for committing that offence. Accordingly, you have to determine whether the accused had an intention to insert his fingers into the vagina of the complainant. He then with that intention, had done

something that is more than preparatory to insert his fingers into her vagina, though he had not eventually succeeded in it.

### **Consent**

16. Let me now draw your attention to the issue of consent. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offences of this nature, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.

### **Alternative Count**

17. If you find the accused not guilty to the offence of Attempt to Commit Rape, then you are allowed to consider the alternative count, that is Sexual Assault as charged in the information. The main elements of the offence of Sexual Assault are that:
- (i) The accused,
  - (ii) Unlawfully and Indecently,
  - (iii) Assault the complainant.
18. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded person would consider the act as indecent. It is your duty as Assessors to consider and decide whether the act of putting his hands inside the undergarment of the complainant is an indecent act amounting to sexual assault.

### **Corroboration**

19. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable, credible and truthful; you are not required to look for any other evidence to corroborate the account given by the complainant.

### **Evidence of the Prosecution**

20. Let me now remind you briefly the summary of the evidence presented by the prosecution and the defence during the course of the hearing. I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
21. The complainant had gone to Mereti's house to weave mats in the afternoon of the 1st of December 2018. After weaving the mats, she had consumed grog with them until 1 o'clock in the night. The complainant had then went home. On her way home, she met Iowani, the accused. Iowani is her nephew as he is the son of her cousin. Iowani had asked her that he wants her. The complainant had then told him that she will report it. Iowani replied to her saying that he does not care about the police.
22. She had then walked towards her home taking a short cut through the school. When she went to the school compound, she had found Iowani was waiting under the breadfruit tree. Iowani had pulled her hand, for which she fell down facing her face downwards. Iowani then laid on her. She managed to turn back and lay on her back facing up. She tried to get herself free from him. Iowani covered her mouth from one of his hands and put the other hand inside her underwear and tried to touch her vagina. She managed to bite his hand which he used to cover her mouth and then scream for help. After she screamed, Alosio and Alesi came and Iowani ran away. She told them what Iowani had tried to do to her.

23. During the cross examination, the learned counsel for the defence suggested to the complainant that this incident never happened, for which she said that it happened as she stated.
24. The second witness of the prosecution is Alesi Daulali. She is a teacher and was living in Kanakana village in the month of December 2018. She could recall that at the early hours of morning of the 2nd of December 2018, she heard a sound of scream while she was sleeping. In a while she heard the same scream again and realised that it was the voice of the complainant. She then told her husband to accompany her to go and see what was happening.
25. When she came out from the house with her husband, she found the complainant and the brother of Iowani. His name is Talemo. He just went away. The complainant was crying and had some injuries on her face. The complainant had explained to them that Iowani wanted to rape her. Alesi's husband then went to look for Iowani and found him in the school compound. Alesi knows both the complainant and Iowani.
26. The last witness of the prosecution is Alosio Modo, who is the husband of Alesi. According to his evidence that he heard a sound of scream at the early hours of the 2nd of December 2018. He had gone out to inquire about it. He saw the complainant was standing outside. She had told him that Iowani had tried to force her. He then went to look for Iowani and found him sitting inside the school compound.

### **Evidence of Defence**

27. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted to give evidence on oath.
28. According to the evidence given by the accused, he had been drinking brew and grog in the night of 1st of December 2018. Having finished his drinking session, he had then went home. On his way home, he met the complainant. He was standing under the breadfruit tree of the school compound. He had told her that he wanted to kiss her. She

then screamed. Then he heard the sound that someone was coming. He then went home. He denies that he put his hand inside the undergarment and tried to touch the vagina of the complainant.

29. I have summarised the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and recall yourselves on all of them. What I did only was to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

### **Analysis and Directions**

30. The prosecution alleges that the accused had forcefully attempted to insert his fingers into the vagina of the complainant while she was walking back home of the early hours of morning of the 2nd of December 2018. The defence denies the allegation and said that the accused was present at the scene during the time material to this incident, but he only wanted to kiss the complainant. He had asked her that he wanted to kiss her, but he left the scene after the complainant started to scream. Accordingly the main issue in this matter is whether the accused attempted to insert his finger into the vagina of the complainant as claimed.

### **Reliability of Evidence**

31. In order to do that, you have to evaluate the evidence presented by the prosecution and defence and determine the reliability and credibility of evidence given by the witnesses. You must be satisfied that you can rely on the evidence as the true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.



### **Credibility of Evidence**

32. The assessment of credibility of evidence does not concern with unintended inaccuracy, mistakes or errors. It is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his or her motivations, his or her relationship to and the reaction to the particular situation.
33. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to decide whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
34. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
35. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.
36. Moreover, you must bear in your mind that 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 accurate in another thing.

### **Defence's Case**

37. Let me now take your attention to the defence of the accused. The accused is not obliged to prove his innocence and also not required to give evidence. However, in this hearing, the accused elected to give evidence on oath. Therefore, you have to take into consideration the evidence adduced by the accused when you determine the issues of fact of this case.
38. Accordingly, it is for you to decide whether you believe the evidence given by the defence. If you consider that the account given by the defence is or may be true, you must find accused not guilty.
39. If you neither believe nor disbelieve the version of the defence, yet, it creates a reasonable doubt in your mind about the prosecution's case. You must find the accused not guilty.
40. Even if you reject the version of the defence that does not mean that the prosecution has established that the accused guilty to this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.

### **Final Directions**


41. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Attempt to Commit Rape as charged, you can find the accused guilty to the said offence.
42. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Attempt to Commit Rape as charged, you must find the accused not guilty to the said count.

43. If you find the accused not guilty for the offence of Attempt to Commit Rape, you are then allowed to consider the alternative count of Sexual Assault. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you can find him guilty of the alternative count of Sexual Assault.
44. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you must find the accused not guilty for the said count of Sexual Assault.

**Conclusion**

45. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
46. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



  
R.D.R.T. Rajasinghe  
Judge

**At Labasa**  
21<sup>st</sup> May 2019

**Solicitors**  
Office of the Director of Public Prosecutions for the State  
Office of the Legal Aid Commission for the Accused

