

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 136 of 2015

STATE

V

SAINIVALATI SENILEBA

Counsel : Mr. J. Niudamu for the State.
: Ms. V. Diroi with Ms. J. Raman for the Accused.

Dates of Hearing : 29 and 30 July, 2019
Closing Speeches : 31 July, 2019
Date of Summing Up : 01 August, 2019

SUMMING UP

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

Madam and Gentlemen Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable,

what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy to either the accused or the 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 two representative counts of rape and one count of attempted rape. (A copy of the information is with you).

COUNT ONE

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

SAINIVALATI SENILEBA, between the 1st day of January, 2014 and 31st day of December, 2014 at Vatusesekiyasawa Village, Rakiraki, Ra in the Western Division, penetrated the vagina of “**TR**” with his penis without the consent of the said “**TR**”.

COUNT TWO

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

SAINIVALATI SENILEBA, between the 1st day of January, 2015 and 30th day of June, 2015 at Vatusesekiyasawa Village, Rakiraki, Ra in the Western Division, penetrated the vagina of “**TR**” with his penis without the consent of the said “**TR**”.

COUNT THREE

Statement of Offence

ATTEMPTED RAPE: Contrary to section 208 of the Crimes Act No. 44 of 2009.

Particulars of Offence

SAINIVALATI SENILEBA, on the 26th day of June, 2015 at Vatusesekiyasawa Village, Rakiraki, Ra in the Western Division, attempted to penetrate the vagina of “**TR**” with his penis without the consent of the said “**TR**”.

REPRESENTATIVE COUNTS

Madam and Gentlemen Assessors

14. You will note that counts one and two are representative counts, which cover a period between the 1st of January, 2014 and 31st of December, 2014

and 1st of January, 2015 and 30th of June, 2015 respectively. By a representative count the prosecution alleges that more than one offence as described in the information were committed during the period specified in the counts. The law says that it shall be sufficient for the prosecution to prove that between the specified dates in the counts at least one offence was committed.

15. To prove counts one and two, 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 “TR” 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.
17. The slightest of penetration of the complainant’s vagina by the accused penis is sufficient to satisfy the act of penetration.
18. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
19. The second element is the act of penetration of the complainant’s vagina by the penis.
20. The third element is that 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.

21. 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.
22. 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.
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 the accused 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 not guilty.
24. To prove count three the offence of attempt to commit rape the prosecution must prove the following elements of the offence beyond reasonable doubt:
 - (a) The accused;
 - (b) Attempted to penetrate the vagina of the complainant "TR" 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.
25. In this trial the accused has denied committing the offence of attempt to commit rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had attempted to penetrate 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.

26. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
27. The second element is the attempt to penetrate the complainant's vagina by the penis. This element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental.
28. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental. For the accused to be guilty of attempted rape, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.
29. 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.
30. If you are satisfied that the accused had attempted to penetrate the vagina of the complainant with his penis and she had not consented, you are then required to consider whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.

31. 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.
32. Before you can find the accused guilty you must be satisfied beyond reasonable doubt of two things:-
 - (a) Firstly that the accused intended to penetrate the vagina of the complainant with his penis.
 - (b) Secondly with that intention the accused did something which was more than mere preparation for committing that offence.
33. In this case the prosecution is alleging that the accused intended to penetrate the vagina of the complainant with his penis without her consent.
34. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. You decide intention by considering what the accused did, you should look at his actions before, at the time of, and after the act.
35. The accused has denied committing the offence of attempted rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to penetrate the complainant's vagina and with that intention he did something which was more than merely preparatory.
36. The prosecution says the accused went into the bedroom of the complainant pulled her blanket away, pulled down the complainant's skirt and went on top of her.
37. If you accept the accused did this, then it is for you to decide whether what he did went beyond mere preparation. In other words, did he actually intend to commit the offence of rape, in which case he is guilty of

attempting to commit rape, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.

38. If you are satisfied that the prosecution has proved all the above elements beyond reasonable doubt then you must find the accused guilty of attempt to commit rape.
39. If on the other hand, you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused not guilty of attempt to commit rape.
40. 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.
41. In this case, the accused is charged with two representative counts of rape and one count of attempted rape, you should bear in mind that you are to consider the evidence in respect of each count separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.

ADMITTED FACTS

42. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final admitted facts.
43. 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.

44. 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

45. The prosecution called three witnesses to prove the charges against the accused.
46. The complainant informed the court that after the death of her father in 2004 her mother sent her to Rakiraki to live with her elder sister Mereani. Mereani lived at Vatusekiyasawa Village with her husband, their children and her mother-in-law. In 2014 the complainant was 15 years of age and a Form 5 (year 11) student.
47. In January, 2014 at around 9 pm the complainant was having a conversation with one Emosi who had come to the village to attend a function. On this night the complainant was to sleep at the house of Bu Alumeci.
48. After Emosi left, when the complainant was at Alumeci's house Makelesi the wife of the accused came and told her that the accused was calling her. The accused is the pastor of their church and the cousin brother of her brother-in-law Eremasi who is married to her sister Mereani.
49. The accused followed Makelesi to the house of the accused beside the house was a shed, Makelesi told the complainant to wait for the accused in the shed. After a while the accused came into the shed and asked her why she

was talking to Emosi. The complainant told the accused that Emosi wanted to have a relationship with her but she had refused.

50. Upon hearing this, the accused told the complainant that he wanted to have a relationship with her she refused and said that he was her pastor, married with 3 children and many years older than her. The accused then took the complainant to Bu Alumecci's compound again he told the complainant that he wanted to have a relationship with her and he also wanted to have sexual intercourse with her.
51. When the complainant did not agree the accused threatened her by saying *"if we don't have sex, I am going to tell Eremasi that you talking to Emosi and when you go I will kill you."* Upon hearing this, the complainant got scared and as a result of this threat she agreed to have sex with the accused.
53. The accused made the complainant lie on the ground pulled down her skirt and her panty then removed his pants and went on top of the complainant and inserted his penis into her vagina and had sexual intercourse for about 5 minutes.
54. The complainant felt pain in her vagina, after this she wore her panty and skirt and went into Bu Alumecci's house. The complainant did not tell anyone about what the accused had done to her since she was scared the accused will come and kill her. The accused had sexual intercourse with her on many occasions.
55. The complainant and the accused used to have sexual intercourse in the accused's house when his family members were not at home and sometimes beside the house of the accused. During her 16th birthday in 2014 the accused had organized her birthday party on 12th February, 2014. After the birthday party had finished the accused told the complainant if her sister cannot afford to buy her things he will give it to her. The last time she had sexual intercourse with the accused was in June, 2015.

56. From January, 2014 till June, 2015 the complainant agreed to have sexual intercourse with the accused because the accused had threatened her. On 24th June, 2015 her sister Mereani asked her why the accused kept on calling her. The complainant did not tell her sister anything. Shortly after the complainant went to her sister and told her the accused was having sexual intercourse with her. Upon hearing this, Mereani told the complainant that she was going to inform her husband Eremasi.
57. On 26th June, 2015 the complainant was sleeping in her bedroom with her niece when the accused came into the bedroom, he pulled her blanket away, pulled down her skirt and went on top of the complainant. The accused said this was a good time to have sexual intercourse since Eremasi and Mereani were sleeping.
58. After the complainant refused the accused pulled her skirt up, also pulled her hand and slapped her mouth. When the accused went away the complainant went to her sister's room and informed her about what the accused had done to her. This was the second time the complainant had told her sister about what the accused had done to her at this time, Mereani told her husband, Eremasi. After what the accused had done she felt hurt, embarrassed and scared since the accused had threatened her. The complainant identified the accused in court.
59. In cross examination the complainant agreed she would talk to the accused almost everyday reason being he kept on coming to call her or he would call her to go to his house. The complainant also agreed that she would sit on the bench with the accused outside his house. The house of the accused was near to where the complainant used to live.
60. In 2014, both the complainant and the accused entered into a relationship she would accompany the accused to Suva to sell mangoes, but did not go with him to the cassava plantation or for fish diving. She would also go with

the accused to the Ra Sports ground where she got a chance to be at the ticket booth and also they would go to town together.

61. The complainant disagreed that she did not have sex with the accused in 2014 but only in January, 2015. She maintained first time she had sexual intercourse with the accused was in 2014. The complainant agreed at one time while talking to the accused she had become emotional this is when the accused came and embraced her and both kissed each other. She disagreed it was her idea to go behind Alumeci's house to have sexual intercourse, according to her this was the accused's idea.
62. The complainant also disagreed, she had consensual sex behind Alumeci's house the reason why she did not scream for help was because the accused had threatened her. When it was suggested that there was no reason to be afraid of the accused since she used to accompany him to the sports ground and for fish diving the complainant denied this she maintained the accused had threatened her.
63. The complainant agreed in 2014 the accused used to buy her clothes, sanitary needs and also gave her some money. On 24th June, 2015 the complainant agreed her sister had asked her about her involvement with the accused.
64. The complainant disagreed on 26th June, 2015 she had planned to meet the accused in her bedroom at 4 am so she had kept the door open. When the accused had come into her bedroom he wanted to have sexual intercourse with her the complainant disagreed her response was "*not tonight another night*". The complainant also did not agree the accused had left after this conversation she maintained the accused had pulled her hair and also slapped her and had come on top of her and pulled down her skirt.

65. When it was put to the complainant the accused did not attempt to have sexual intercourse with her on 26th June, 2015 the complainant stated she did not consent to have sexual intercourse with the accused.
66. Before this incident the complainant had already told her sister what the accused was doing to her. She did not agree that the only reason she reported the matter against the accused was to save herself because her affair had come to light and that the accused was a married man. She denied Makelesi had confronted her in 2015 about her affair with the accused.
67. The complainant agreed after 26th June, 2015 the affair became known so she went to the house of the accused with her sister and brother-in-law. At the house of the accused, the complainant disagreed her sister had scolded and slapped her. She admitted having an affair with the accused and also both the complainant and the accused admitted that they will end their affair.
68. The complainant also agreed during this meeting she had sought forgiveness from the wife of the accused together with the accused. The complainant also agreed the accused was serious about the relationship but she was not. It was only when her sister became suspicious about her relationship with the accused that she cried rape.
69. In re-examination the complainant stated that by the phrase relationship she meant boyfriend and girlfriend relationship and that she did not agree to be in this relationship. What she meant by having an affair was to have sexual intercourse the complainant admitted she had sexual intercourse with the accused.
70. The second witness the sister of the complainant, Mereani Kanadroka informed the court one afternoon she was at home when the complainant

came back from school and sat down. She asked the complainant what happened the complainant did not say anything.

71. After having her shower the complainant came to the witness and said that she wanted to say something. The complainant told the witness that it has been for a long time now that she has been having sexual intercourse with the accused. The witness asked the complainant why she did not tell her first time it had happened. The complainant replied she was afraid of the witness and the accused because he had threatened her that if she told anyone he will kill her.
72. In cross examination the witness agreed in June, 2015 during the night time the witness with her husband and the complainant went to the house of the accused. The reason for this was the witness had told the wife of the accused about what the accused was doing to the complainant.
73. During the discussions about the affair between the accused and the complainant the accused did not say anything but the complainant admitted having an affair with the accused. The witness denied scolding and slapping the complainant. It was in June, 2015 after seeing the behaviour of the accused and the complainant the witness became suspicious that something was going on between the two so she questioned the complainant about her relationship with the accused.

Madam and Gentlemen Assessors

74. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

75. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant who was 15 years at the time had told her sister in June, 2015 that it has been from a long time that she has been having sexual intercourse with the accused because she was afraid of her sister and the accused had threatened her that if she told anyone he will kill her.
76. This is commonly known as recent complaint evidence. The evidence given by Mereani is not evidence of what actually happened between the complainant and the accused since Mereani was not present and did not see what had happened between the complainant and the accused.
77. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told her sister about what the accused had done to her she did not complain earlier because she was afraid of her sister and also the accused had threatened her if she told anyone he will kill her and therefore she is more likely to be truthful.
78. On the other hand, the defence says the complainant did not tell anything to her sister, it was only in June, 2015 after Mereani became suspicious that something was going on between the complainant and the accused that she questioned the complainant about her relationship with the accused. The complainant did not complain about anything it was Mereani's suspicion that got the complainant to cry rape so she should not be believed.
79. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as

reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.

80. The final prosecution witness Constable Sailosi Bawaqa informed the court that on 7th August, 2015 he had caution interviewed the accused at the Rakiraki Police Station, Crime Office Sgt. Aminiasi Tuvura the Crime Officer was the witnessing officer. The accused was interviewed in the iTaukei language before the commencement of the interview the accused did not complain about anything, he was given the opportunity to consult a lawyer. The interview commenced at 1105hrs and ended at 1705hrs the witness confirmed his signature and that of the accused which was present throughout the interview.
81. Before and during the interview the accused was not intimidated, threatened, promised or any inducement made to the accused he was also not oppressed or coerced in any way to give a statement.
82. According to the witness the accused was confident with his answers and he was normal. After the interview ended it was read back to the accused the accused was also asked whether he wished to add, delete or alter anything in the interview. The caution interview was not signed by the witnessing officer because this officer was moving in and out of the office due to shortage of man power.
83. The caution interview of the accused in the iTaukei language dated 7th August, 2015 and the English translation were marked and tendered as prosecution exhibit Nos. 1 and 2.
84. In cross examination the witness agreed that prior to the interview he had read the complainant's statement and on the day of the interview the Crime Officer had told him to match the complainant's statement with the accused's interview. The witness could not recall if the accused had stated that he had threatened the complainant during the interview. He further

stated the accused was given a chance to speak to a lawyer from the Legal Aid Commission before the interview was conducted.

85. When it was suggested to the witness that if the accused had spoken to a lawyer it would have been recorded in the interview the witness stated that since the communication between a lawyer and client is confidential the accused did not inform him anything about this conversation.

Madam and Gentlemen Assessors

86. The caution interview of the accused is before you, the answers in the caution interview are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview.
87. During the cross examination of the interviewing officer the counsel for the accused had asked questions suggesting that the answers given by the accused were obtained as a result of the accused not being able to obtain legal advice and that the interviewing officer was instructed by the Crime Officer to match the interview with the police statement of the complainant hence the caution interview did not contain the truth of what the accused told the interviewing officer.
88. This meant counsel had put to the witness that the admissions made by the accused particularly the answer contained at Q. 40 in the caution interview was not given voluntarily by him and therefore you should disregard those admissions.
89. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his caution interview then you should disregard them. If you are sure that those admissions were made by the

accused, 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.

90. This was the prosecution case.

DEFENCE CASE

Madam and Gentlemen Assessors

91. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused remained silent and called a witness. You must consider this evidence and give such weight as you think fit. The accused chose to remain silent that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent.
92. Makelesi Tuvou the wife of the accused informed the court that she has been married to the accused from 1995. In 2015 the witness resided at Vatusekiyasawa Village with her husband and family. The witness knew the complainant who lived two steps away from her house. In February, 2015 the witness had a discussion with the complainant where she asked her about her behaviour towards her husband.
93. The witness explained whenever the complainant would come to her house she would stand on the doorway and look at her husband and shortly after her husband would go outside to meet the complainant. The witness was observing this behaviour of the complainant for some time when she had met the complainant she asked her, "*Are you having a relationship with my husband, an affair?*" The complainant denied this.

94. The witness would also see the complainant and the accused sitting very close to each other on the bench outside their house. This made her suspicious about what they were doing. The following day after she had confronted the complainant, Mereani, Eremasi and the complainant came to her house.
95. During the discussions the accused admitted he was having an affair with the complainant and he asked for forgiveness. The complainant also agreed that she was having an affair with the accused. At this time Mereani stood up and slapped the complainant forcefully held her hand and both went outside the house.
96. In cross examination by the state counsel the witness agreed she did not know anything about what had happened in 2014 between the complainant and the accused but was able to recall in January 2014 when she had gone to Bu Alumecci's house to call the complainant. The witness had brought the complainant to the shed, left her in the dark for the accused to come and talk to her. After a while when she came out of the house, she did not know whether her husband had met the complainant and she did not know anything that happened between the complainant and the accused that night.
97. The witness did not discuss about her earlier conversation with the complainant or about the complainant's behaviour with Mereani. The witness agreed that she had come to court to give evidence about the affair between the complainant and the accused she loved her husband and will always stand by him.
98. This was the defence case.

ANALYSIS

99. The prosecution alleges that the accused from 1st January, 2014 to 30th June, 2015 on numerous occasions had sexual intercourse with the complainant without her consent. When the complainant did not agree the accused threatened her by saying that he will kill her. Upon hearing this, the complainant got scared and she agreed to have sex with the accused.
100. On the first occasion the accused made the complainant lie on the ground, pulled down her skirt and her panty then removed his pants and went on top of the complainant and inserted his penis into her vagina and had sexual intercourse for about 5 minutes. Thereafter the accused had sexual intercourse with the complainant on many occasions that the complainant lost count
101. The complainant did not tell anyone about what the accused had done to her since she was scared the accused will come and kill her. The last time they had sexual intercourse was in June, 2015.
102. On 24th June, 2015 the complainant told her sister that the accused was having sexual intercourse with her. On 26th June, 2015 the complainant was sleeping in her bedroom with her niece when the accused came into the bedroom, pulled the blanket away, pulled down her skirt and went on top of the complainant. The accused said this was a good time to have sexual intercourse since Eremasi and Mereani were sleeping.
103. After the complainant refused the accused pulled her skirt up, and also pulled her hand and slapped her mouth. When the accused went away the complainant went to her sister's room and informed her about what the accused had done to her. This was the second time the complainant had told her sister about what the accused had done to her. The complainant did not consent to what the accused had done to her on all the occasions.

104. Furthermore, the prosecution also relies on the caution interview of the accused which contains the answers given by the accused when he was interviewed by the police on 7th August 2015. The prosecution also submits that the accused had voluntarily given the answers in the caution interview which are the truth.
105. On the other hand the defence says the accused and the complainant were in a relationship from 2014 both had admitted to having sexual intercourse. The defence further says the accused and the complainant had lots in common they used to talk to each other almost every day. The complainant would accompany the accused to Suva, to the Ra Sports ground and they would go to town together.
106. The accused had consensual sex with the complainant on all occasions and it is untruthful of the complainant to say that the accused had threatened her when she was a willing partner from the beginning the accused also supported the complainant financially. Moreover the accused was serious about the relationship, whereas she was not it was only when her sister became suspicious about the complainant's behaviour towards the accused that the complainant cried rape.
107. In respect of the admissions in the caution interview that the accused had threatened the complainant to have sex with him the defence submits that when you take into account the evidence of the complainant about the relationship between the complainant and the accused the admissions in the caution interview cannot be the truth.
108. The relationship had developed over the months and there was no way the accused would have threatened the complainant to force her to have sex with him. The complainant was in a position to complain against the accused, but she did not this affair only came to light after Mereani suspected there was something going on between the complainant and the accused.

Madam and Gentlemen Assessors

109. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
110. 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.
111. 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.
112. 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 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.

113. 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.
114. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
115. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
116. In this case, the accused is charged with two representative counts of rape and one count of attempted rape and as mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count separately from the other. You must not assume that because the accused is guilty for one count that he must be guilty of the other as well.
117. Your possible opinions are:-

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

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

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

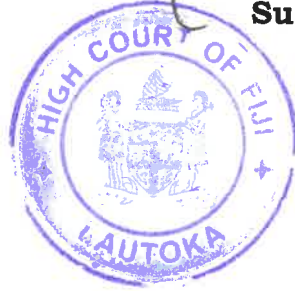
Madam and Gentleman Assessors

118. 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.

119. 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
01 August, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.