

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

**Criminal Case No.: HAC 207 of 2016**

**STATE**

**V**

**SUNIA TUBUNA TUKUTUKU**

**Counsel** : Ms. R. Uce for the State.  
: Ms. V. Diroiroi and Ms. G. Henao [LAC] for the  
Accused.

**Dates of Hearing** : 19, 20 and 23 September, 2019  
**Closing Speeches** : 24 September, 2019  
**Date of Summing Up** : 24 September, 2019

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**SUMMING UP**

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

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 one representative count of 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*

**SUNIA TUBUNA TUKUTUKU**, between the 1<sup>st</sup> day of January, 2016 and 31<sup>st</sup> day of July, 2016 at Nadi in the Western Division, penetrated the vagina of “SJ” with his penis, without her consent.

**REPRESENTATIVE COUNT**

Madam and Gentlemen Assessors

14. You will note that the above count is a representative count, which covers a period between the 1<sup>st</sup> day of January, 2016 and the 31<sup>st</sup> of July, 2016. By a representative count the prosecution alleges that more than one offence as described in the information was committed during the period specified in the count. The law says that it shall be sufficient for the prosecution to prove that between the specified dates in the count at least one offence was committed.
15. To prove the above count, 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 “SJ”;
  - (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 inserted his penis into the vagina of the complainant 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. 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.

### **ADMITTED FACTS**

25. 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.

These are:

1. *THAT the complainant is "SJ", 18 years old student of Solevu Village, Nadi.*
2. *THAT in the year 2016, the complainant was studying in Ratu Lalabalavu Secondary School;*
3. *THAT the accused is Sunia Tubuna Tukutuku, 43 years old, unemployed of Solevu Village, Nadi.*
4. *THAT the complainant and the accused are known to each other.*
5. *THAT the complainant addresses the accused as "Vava Suji".*
6. *THAT between the 1<sup>st</sup> of January, 2016 and 31<sup>st</sup> of July, 2016, the accused resided at Solevu Village.*
7. *THAT whilst in Solevu Village, the accused would send the complainant to the shop to buy items for him.*
8. *THAT in October, 2016, the complainant was about 22 weeks pregnant.*

26. 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.

27. 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**

28. The prosecution called two witnesses to prove the charge against the accused.
29. The complainant informed the court that she was in form 4 in the year 2016 when she was raped by the accused. He would usually remove her panty and put his penis in her "pe" meaning her private part for about 3 hours and she would feel pain.
30. The accused is the complainant's uncle who lives about 12 meters away from her home. When she would return home from school after changing her clothes the accused would send her to the shop to buy biscuits.
31. When she went to the house of the accused to give him the biscuits he would block her mouth with his hand and take her to his bedroom by pulling her hand.
32. In the bedroom the accused would draw the curtains, take off the complainant's clothes and make her lie down on the mattress. After removing his clothes the accused would put his penis in her private part.
33. On all occasions the complainant did not shout or call for help because the accused was blocking her mouth with his hand and she did not push the accused away because he was holding her hands tightly. The accused told the complainant not to tell anyone otherwise he would kill her.
34. After wearing her clothes the complainant went home, at home she did not tell anyone because she was afraid that the accused might kill her. The complainant recalled the accused did this to her on four occasions. The complainant had informed her mother, but her mother did not believe her. She did not tell her father about what the accused had done to her because she was afraid the accused would kill her if she told anyone.

35. Her father reported the matter to the police and she went with her father because the accused had raped her since the complainant was attending school, she told one of her teachers, Mrs. Tawake about what the accused had done to her. Her teacher and her mother took her to the hospital for scanning since she was 5 months pregnant by then. Mrs. Tawake had observed that the complainant was feeling sleepy and vomiting in the classroom. The complainant pointed to the accused in court.
36. When cross examined by the defence counsel the complainant agreed that the accused had come to the living room of her grandmother Paulina and put his private part into her "pe". She maintained that she did not scream when the accused had his penis in her "pe" for 3 hours because he was blocking her mouth.
37. According to the complainant rape was a bad thing meaning sexual intercourse and when the accused was removing her clothes he was also blocking her mouth at the same time.
38. The complainant agreed on a Sunday in February, 2016 after church, she had met the accused after 10pm, however, the complainant denied the accused had told her that he wanted her and liked her or she had gone to the house of the accused and had sexual intercourse with him. However, she agreed that she had laid naked on the bed in the accused bedroom and after removing his clothes the accused had sexual intercourse with her.
39. The complainant further agreed that in March, 2016 she met the accused by the village pond at around 7pm where the accused invited her to his house. In the accused house the complainant waited for the accused to come into his bedroom. In the bedroom the accused came and asked her to remove her clothes, the complainant removed her clothes and lay on the bed naked after the accused removed his clothes both then had sexual intercourse.
40. After having sexual intercourse the complainant went home. On 3<sup>rd</sup> October, 2016 she had vomited in her classroom and at that time she knew that she was pregnant. At the Health Center the complainant was asked by



the doctor if someone had touched her inappropriately, but she did not tell anything to the doctor, it was her teacher who had explained everything to the doctor.

41. The complainant agreed she informed her teacher the next day after going to the Health Centre that the accused had made her pregnant. After her pregnancy became known the complainant was worried since her parents would be angry and upset with her including the shame and dishonour she would bring to her family and because of this she had said the accused had raped her.
42. When it was put to the complainant the accused had never raped her in 2016 she said he did, and the reason why the complainant stated the accused had raped her was because she wanted to save herself since the news of her pregnancy had become known.
43. In re-examination the complainant was asked to clarify how the accused was able to hold her hand tightly with one hand while removing her clothes and with the other hand blocking her mouth. The complainant replied this was after the accused removed his clothes and she removed her clothes. The complainant further stated the reason why she removed her clothes was for the accused to insert his penis into her private part.
44. When the state counsel asked the complainant to show how it was possible for the accused to hold her tightly with one hand and block her mouth with the other hand and then remove her clothes the complainant replied she could not show how this was done. When asked why she had said "yes" under cross examination that she had sexual intercourse in the bedroom of the accused the complainant said she did not go to the house of the accused.
45. In March, 2016 the complainant had removed her clothes because the accused had told her to remove her clothes. The complainant further stated that she had refused to remove her clothes, but the accused had pushed her on the mattress and then told her to remove her clothes. She had sexual

intercourse because the accused had told her to have sexual intercourse with him, but she had refused. The accused had held her hand tightly and forced her on the mattress she did not shout for help because the accused was blocking her mouth with his hand.

46. When asked to explain why she had said the accused had raped her when it was put to her in cross examination that the accused never raped her, the complainant stated because her parents did not buy her baby's clothes and the villagers had started asking whose baby she was carrying.
47. The final prosecution witness was the father of the complainant Eroni Bativunilagi who informed the court that in 2016 the complainant was in Form 4 and was 18 years of age. The complainant was intellectually slow meaning she was slow in grasping things and had a low I.Q., according to the witness he had asked the teachers to keep the complainant in school so that she could learn.
48. The accused was the cousin brother of the witness, in 2016 the accused used to send the complainant to the shop many times. He came to know about the pregnancy of the complainant from the village nurse and the village headman and he reported the matter to the police.
49. In cross examination the witness stated that the complainant shared with him or her mother anything that happened to her and he had a good relationship with her. On 7<sup>th</sup> October, 2016 the witness came to know that the complainant was pregnant and he got hurt and ashamed as a result he cried.
50. This was the prosecution case.

### **DEFENCE CASE**

51. 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 guilt beyond reasonable doubt remains

on the prosecution at all times. The accused chose to remain silent and not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent.

52. The accused denies committing the offence as alleged. According to the line of cross examination defence takes the position that the accused and the complainant had consensual sexual intercourse at the house of the accused. The defence says to avoid shame in the village and the anger of her parents the complainant cried rape after she became pregnant.
53. The defence also says whatever the complainant said in her evidence is not possible since the accused could not have sexual intercourse with the complainant for three hours with his hand blocking her mouth at the same time. Furthermore, the defence also says it is improbable for the accused to block the mouth of the complainant, remove her clothes and also hold her hands tightly at the same time. The defence is asking you not to believe the complainant.
54. This was the defence case.

### **ANALYSIS**

55. The prosecution alleges that the complainant who has low I.Q. was often sent to the shop by the accused to buy things for him when the complainant took those items to him at his house the accused would forcefully remove her panty and put his penis into her vagina as a result the complainant would feel pain.
56. The accused would block her mouth with his hand and take her to his bedroom by pulling her hand. In the bedroom the accused would draw the curtains, remove the complainant's clothes and make her lie down on the mattress and have forceful sexual intercourse.

57. The accused told the complainant not to tell anyone about what he was doing to her otherwise he would kill her. On all the four occasions the complainant did not shout or call for help because the accused was blocking her mouth with his hand and she did not push the accused away because he was holding her hands tightly.
58. The defence on the other hand denies the allegation saying the accused had sexual intercourse with the complainant, but with her consent. The complainant cried rape after she became pregnant to avoid the anger of her parents and being shamed by the villagers.
59. The defence says whatever the complainant said in her evidence is not possible since the accused could not have had sexual intercourse with the complainant in the manner narrated by her. The defence also says the accused did not have forceful sexual intercourse with the complainant on any occasion, the complainant made up a story to blame the accused.

Madam and Gentlemen Assessors

60. You have seen all the witnesses give evidence keep in mind that some witness react differently when giving evidence.
61. 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 whether the complainant is reliable or not. You observed the witness give evidence in court. You decide whether they were truthful or not. You may use your common sense when deciding on the facts. Assess the evidence of all witnesses and their demeanour in arriving at your opinions.
62. 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 the witness said, 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

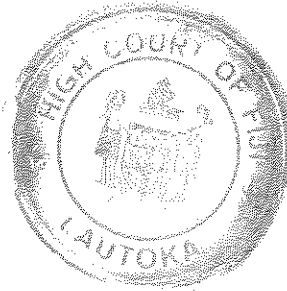
for you to judge whether the witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.


63. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge 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 the other witness. It does not matter whether the evidence was called for the prosecution or the defence put through the defence counsel in cross examination. You must apply the same test and standards in applying that.
64. 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.
65. 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.
66. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
67. Your possible opinions are:-

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

Madam and Gentlemen Assessors

68. 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.
69. 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**

24 September, 2019

Solicitors

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

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