

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASES NO. HAC 338 OF 2017S

STATE

VS

NIKO ROKARA LEVULA

Counsels : Ms. L.Bogitini for State
Accused in Person

Hearings : 11 to 14 February, 2019

Summing Up : 18 February, 2019

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentleman Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my 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 fact.
2. State Counsel and the accused have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State Counsel and the accused, in

this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest 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 is proved guilty.

5. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means that 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 so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.

6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, I will now read the same to you:

"...[read from the information]..."

D. THE MAIN ISSUES

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:

- (i) On count no. 1, did the accused break into the complainant's residence, at Nasinu in the Central Division, on 5 November 2017, with intent to commit theft?

- (ii) On count no. 2, did the accused, on 5 November 2017, at Nasinu in the Central Division, rape the complainant?
- (iii) On count no. 4, did the accused, on 5 November 2017, at Nasinu in the Central Division, being armed with a knife, forcefully stole the complainant's properties, as itemised in the count?

E. THE OFFENCES AND THEIR ELEMENTS

- 9. Of the three counts, the most serious offence is "rape", followed by "aggravated robbery", then "burglary". We will therefore discuss the offences in the above order, that is, first "rape", then "aggravated robbery", then "burglary".
- 10. Count no. 2 involved the offence of "rape", contrary to section 207 (1) and (2)(a) of the Crimes Act 2009. It was alleged that the accused, on 5 November 2017, at Nasinu in the Central Division, raped the complainant (PW1). For the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) The accused's penis penetrated the complainant's vagina;
 - (ii) Without her consent; and
 - (iii) The accused knew she was not consenting to 10 (i) above, at the time.
- 11. The slightest penetration of the complainant's vagina by the accused's penis, is sufficient to satisfy element 10 (i) above, and it's irrelevant whether or not the accused ejaculated.
- 12. "Consent" is to "agree freely and voluntarily and out of her own freewill". If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant.
- 13. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to 10(i) above, at the time. You will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue.

14. Count No. 4 involved the offence of the "aggravated robbery", contrary to section 311 (1) (b) of the Crimes Act 2009. It was alleged that the accused, on 5 November 2017, at Nasinu in the Central Division, armed with a knife, forcefully stole the complainant's properties, as itemised in count no. 4. For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused;
 - (ii) armed with an offensive weapon;
 - (iii) steals;
 - (iv) the complainant's property of properties, and
 - (v) before the theft
 - (vi) uses force or threatens to use force;
 - (vii) on another person;
 - (viii) with intent to commit theft.
15. "Stealing" is the act of taking away someone's property or properties without his permission, and with an intention to permanently deprive him of the ownership of that property or properties. "Force" means "any type of force, whether or not done physically or verbally, for example, beating someone with a stick or threatening to do the same." An offensive weapon must be used to subdue a person to the will of the accused. An offensive weapon could include a stick, iron rod, gun etc.
16. Before stealing the complainant's properties, the accused, must be armed with an offensive weapon, which he uses to force or to subdue the complainant or others' resistance, and at the time, had the intention to steal. For example, I and my friend saw you withdrawing \$1,000 cash from an ANZ Bank ATM machine. We were armed with an iron rod. I and my friend immediately came to you, told you to hand over the \$1,000 cash to me or I will hit you with the iron rod. You refused, I hit your face with the iron rod and stole your \$1,000 cash. That was "aggravated robbery".
17. Count No. 1 involved the offence of "burglary", contrary to section 312 (1) of the Crimes Act 2009. It was alleged that the accused, on 5 November 2017, at Nasinu in the Central Division, broke into the complainant's property, as a trespasser, with intent to commit theft. For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused
- (ii) enters or remains
- (iii) in a building
- (iv) as a trespasser
- (v) with intent to commit theft.

18. A person's residence or house is a "building". To "enter or remain" in a building is basically to get or walk into a building, and to remain there, is to stay in the building. A "trespasser" is a person who enters or remains in a building, without the owner's consent. To be liable for burglary, you must, when you enter or remain in the building, you are doing so as a trespasser and you must also have the intention to steal anything therefrom.
19. There are three counts in the information. You must consider them separately, and come to a considered opinion on each of them separately, in the light of the whole evidence tendered in the trial.

F. THE PROSECUTION'S CASE

20. The prosecution's case were as follows. The female complainant PW1) was 39 years old. She lived with her three young children and two nieces at Nasinu in the Central Division. She works as a conference co-ordinator. On 4 November 2017, a Saturday, she went out to a nightclub with friends. Liquor was consumed. She was there from 8 pm to 12 am. After 12 am, she went with friends to Nabua and had a few more drinks. At about 3 am, she returned home in a taxi. She slept alone in a bedroom, while her children and nieces slept in the sitting room.
21. At about 5 am, she was awoken by a man standing in her bedroom. The man had his face and head covered with a piece of cloth. He had a kitchen knife in his hand. The man allegedly closed the bedroom door. PW1 allegedly tried to take the knife away from him, but he allegedly stabbed her lip and chin. He later forcefully took her jeans and panty off. He allegedly parted her legs and inserted his penis into her vagina, without her consent. He then allegedly had sex with her for about 5 minutes, while holding a knife to her face. PW1 had her bag with her at the time. The items mentioned in count no. 4 were in her bag at the time.
22. After having sex with her, the man allegedly stole PW1's bag, and fled the crime scene. He also stole the items in the bag. The complainant later reported the matter to her relatives. The

police were called. An investigation was carried out. The accused was arrested from Makoi. PW1's mobile phone was recovered from the accused's wife. He was caution interviewed by police. He allegedly admitted the offences. He later appeared at Nasinu Magistrate's Court on 9 November 2017 charged with burglary, rape and aggravated robbery against the complainant.

23. Because of the above, the prosecution is asking you as assessors and judges of fact, to find the accused guilty as charged on all counts. That was the case for the prosecution.

G. THE ACCUSED'S CASE

24. On 12 February 2019, the information was put to the accused. He was previously represented by legal aid counsels from 12 February 2018 until 5 July 2018, when he voluntarily chose to waive his right to counsel and represent himself. He pleaded not guilty to all the charges. In other words, he denied all the allegations against him. When a prime facie case was found against him at the end of the prosecution's case, wherein he was called upon to make his defence, he chose to give sworn evidence and called no witness, in his defence. That was his right.

25. The accused's case was very simple. On oath, he denied all the allegations against him. He admitted he was cautioned interviewed by police on 7 and 8 November 2017. He admitted he signed the interview notes. He also admitted that he admitted the allegations to the police, but said, he was forced to do so by police. He said, the police threw 30 heavy punches at his ribs, however, he said, he suffered no injuries. He asked you to disregard his alleged confession to police, because the police forced the same out of him.

26. Because of the above, he asks you as assessors and judges of fact, to disregard his alleged confession to the police and find him not guilty as charged, on all counts. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

27. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in

mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discuss the State's case against the accused. Then, we will discuss the accused's case. Then we will consider the need to look at all the evidence.

(b) **The State's Case Against the Accused:**

28. The State's case against the accused was based on three types of evidence. First, the direct verbal evidence of the complainant (PW1). Second, the accused's alleged confession to the police when he was caution interviewed. Third, the alleged recovery of the complainant's stolen mobile phone, bag, purse and knife from the accused's wife and their quarters at Makoi. We will discuss the above evidence in that order.

29. **The complainant's (PW1) direct verbal evidence**

You heard the complainant give her sworn evidence in court on 12 and 13 February 2019. You observed the way she answered questions from the prosecution and the accused. You observed her demeanour in court. You listened very carefully on what she was telling you on those days. I am sure her evidence is still fresh in your mind, and I will not bore you with the details. However, I will summarize to you the salient points as far as the elements of the offences are concerned.

30. We will begin with the most serious offence of "rape". The complainant said, after having a night out on Saturday 4 November 2017, she was fast asleep in her mother's bedroom early Sunday morning on 5 November 2017. It was after 5 am. She said, she was awoken by a man, whose face and head were covered by a piece of cloth. She said, she could not identify the man's face, as it was also dark. She said, the man had a knife in his hand. She struggled to get the knife off him, but in the process, he stabbed her lip and chin. She said, the man threatened her with death, if she resisted. She said, she was frightened and felt hopeless. She said, the man forcefully took her jeans and panty off. She said, he separated her legs and inserted his penis into her vagina, without her consent. She said, he had sex with her for about 3 to 5 minutes. While having sex with her, she said, he held the knife to her face.

31. She said, she didn't know how the man came into the bedroom. She said, she had her bag with her, which contained the items mentioned in count no. 4. She said, the man later stole her bag and the items therein, and fled the crime scene. She said, she later reported the matter to

her relatives, and later to police. She said, she could not identify the face of the person who attacked her on that early morning on 5 November 2017.

32. **The Accused's Alleged Confession to the Police.** To connect the accused to the crimes committed against the complainant, the prosecution relied on the accused's alleged confession to the police. DC 4581 Varinava Sabua (PW4) caution interviewed the accused on 7 and 8 November 2017. This was about 2 to 3 days after the alleged incident. On 7 November 2017, PW4 began the interview at 5.30 pm and finished at 7.30 pm. He allegedly asked 49 questions and the accused allegedly answered 49 questions. On 8 November 2017, the interview recommenced at 8 am and concluded at 12.30 pm. PW4 allegedly asked questions 50 to 117, and the accused allegedly answered questions 50 to 117. Detective Corporal 1853 Luke Lewabeci (PW5) witnessed the whole interview. According to PW4 and PW5, the accused was formally cautioned, and given his legal rights. PW4 and PW5 said, they did not assault, threaten or make promises to the accused, to give his statements. They said, the accused gave his statements voluntarily and out of his own free will. The caution interview statements were tendered in evidence as Prosecution Exhibit No. 7.
33. After question and answer 5, the allegations was put to the accused. From questions and answers 30 to 46, 63 to 82, 91 to 100 and 105 to 111, the accused allegedly admitted count no. 1, 2 and 4. He basically admitted that he burgled the complainant's residence at the material time. He also allegedly admitted that he raped and robbed the complainant as alleged in count no. 2 and 4. If you accept the above alleged confessions, then you must find the accused guilty as charged on all counts. If otherwise, you must find the accused not guilty as charged on all counts. It is a matter entirely for you.
34. In any event, when considering the above alleged confession by the accused, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the

statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If its otherwise, you may give it less weight and value. It is a matter entirely for you.

35. On how the above alleged confessions were obtained, the prosecution and the accused had different versions. The police witnesses, that is PW3, PW4 and PW5 said, they did not assault, threaten or made false promises to the accused while he was in their custody. They said the accused co-operated with them during the interview and he gave his caution interview statements voluntarily and out of his free will. The accused, on the other hand, said the police gave 30 hard punches to his ribs, while he was in their custody. However, he said, he was not injured. He said, he was frightened and that's why he admitted the offence. He said, he didn't give his caution interview statements voluntarily, and they were not given with his own free will. You have heard and watched the witnesses during the trial. Which version of events to accept is entirely a matter for you.

36. **The Complainant's Brown Bag (Prosecution Exhibit No. 1); Complainant's Mobile Phone (Prosecution Exhibit No. 2); Complainant's Roxy Purse (Prosecution Exhibit No. 3) and Complainant's Knife (Prosecution Exhibit No. 4)**

In her oral sworn evidence, the complainant said, the above properties belonged to her, and at the material time, it was stolen from her by the man who attacked her on 5 November 2017. The complainant said, all the above properties were brought to her by the police on 8 November 2017 to identify. This was 3 days after the alleged incident. She identified them to the police as hers. The police later took the properties back to Valelevu Police Station. Corporal 3573 (PW3) said, the complainant's above mobile phone was given to him by the accused's wife, in the course of police investigation, on 7 November 2017 - two days after the alleged incident. The mobile phone was in the complainant's bag which was stolen by her attacker, at the material time. In question and answer 91 of the accused's caution interview statement (Prosecution Exhibit No. 7), the accused admitted he stole the bag (Prosecution Exhibit No. 2) from the complainant at the material time. In question and answer 95 of his caution interview statement, the accused admitted he stole the complainant's mobile phone, at the material time. In question and answer 93 of his caution interview statement, the accused admitted he stole the burnt purse from the complainant, at the material time. In question and

answer 97 of his caution interview statements, the accused admitted the above knife was what he used on the complainant, at the material time. What do the above evidence tell you.

37. If you accept the prosecution's evidence, as mentioned above, you must find the accused guilty as charged on all counts. If otherwise, you must find the accused not guilty as charged on all counts. It is a matter entirely for you.

(c) **The Accused's Case:**

38. I had summarized to you the accused's case from paragraphs 24 to 26. He had pleaded not guilty to all the counts on 12 February 2019. He denied all the allegations against him when he gave sworn evidence on 14 February 2019. He said, the police gave 30 hard punches to his ribs when he was in their custody. As a result, he was frightened and scared and that's why he allegedly confessed to the police. He said, he did not give his caution interview statements voluntarily. If you accept the accused's above evidence, you must find him not guilty as charged. If otherwise, you must assess the strength of the prosecution's case, and decide accordingly.

(d) **The Need to Look At All the Evidence:**

39. Five witnesses gave evidence for the prosecution:
- (i) the complainant (Pw1);
 - (ii) Doctor Alanieta Waqanicagica (PW2);
 - (iii) Corporal 3573 Daniele Turaga (PW3);
 - (iv) Detective Constable 4581 Varinava Sabua (PW4); and
 - (v) Detective Corporal 1853 Luke Lewabeci (PW5).

The accused (DW1) was the only defence witness. Seven Exhibits were tendered by the prosecution. Altogether, there are six witnesses, on whose evidence, you will have to make a decision. If I have not mentioned a piece of evidence you consider important, please take it onboard in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his/her evidence, in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his/her evidence, in your deliberation. You are the judges of fact.

I. **SUMMARY**

40. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

41. Your possible opinion are as follows:

- | | | | | |
|-------|--------------|--------------------|---|----------------------|
| (i) | Count No. 1: | Burglary | : | Guilty or Not Guilty |
| (ii) | Count No. 2: | Rape | : | Guilty or Not Guilty |
| (iii) | Count No. 4 | Aggravated Robbery | : | Guilty or Not Guilty |

42. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions.




Salesi Temo
JUDGE

Solicitor for State	:	Office of the Director of Public Prosecution, Suva.
Solicitor for Accused	:	Accused in Person.