

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 74 of 2016

STATE

V

- 1. TOMASI VAKALOLOMA**
- 2. SAVENACA VALU**
- 3. WATISONI BARO**
- 4. TEVITA GUSUDRADRA**

Counsel : Ms. L. Bogitini for the State.
: Mr. T. Varinava for the first Accused.
Ms. V. Narara for the second Accused.
Ms. J. Manueli for the third Accused.
Ms. E. Radrole for the fourth Accused.

Dates of Hearing : 16, 17, 18 March, 2020
Closing Speeches : 18 March, 2020
Date of Summing Up : 19 March, 2020

SUMMING UP

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

Ladies and Gentleman 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 persons are 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. 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.
6. 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

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused persons. There is no obligation on the accused persons to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
8. 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 all the accused persons guilt, before you can express an opinion that they are guilty. If you have any reasonable doubt about their guilt, then you must express an opinion that they are not guilty.
9. 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 court room.
10. You must decide the facts without prejudice or sympathy for either the accused persons or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. 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

12. The accused persons are charged with the following offences: (a copy of the information is with you).

COUNT ONE

Statement of Offence

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

Particulars of Offence

TOMASI VAKALOLOMA, on the 4th day of March, 2016, at Sigatoka in the Western Division penetrated the vagina of “DV” with his penis without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SAVENACA VALU, on the 4th day of March, 2016, at Sigatoka in the Western Division penetrated the vagina of “DV” with his penis without her consent.

COUNT THREE

Statement of Offence

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

Particulars of Offence

WATISONI BARO, on the 4th day of March, 2016, at Sigatoka in the Western Division penetrated the vagina of “DV” with his penis without her consent.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

TEVITA GUSUDRADRA, on the 4th day of March, 2016, at Sigatoka in the Western Division penetrated the vagina of “DV” with his penis without her consent.

COUNT FIVE

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to section 209 of the Crimes Act 2009.

Particulars of Offence

TOMASI VAKALOLOMA, on the 4th day of March, 2016, at Sigatoka in the Western Division assaulted “DV” by pushing her on her chest with intent to commit rape.

COUNT SIX

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to section 209 of the Crimes Act 2009.

Particulars of Offence

SAVENACA VALU, on the 4th day of March, 2016, at Sigatoka in the Western Division assaulted “DV” by punching her on her right chin with intent to commit rape.

COUNT SEVEN

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to section 275 of the Crimes Act 2009.

Particulars of Offence

SAVENACA VALU, on the 4th day of March, 2016, at Sigatoka in the Western Division assaulted “DV” by twisting her right ankle thereby causing her actual bodily harm.

Ladies and Gentleman Assessors

13. As you are aware after the prosecution closed its case, this court had ruled that the second accused Savenaca Valu had a case to answer in respect of count two and count six being for the offence of rape and assault with intent to commit rape only. You are to disregard count seven completely.
14. In respect of the fourth accused Tevita Gusudradra this court had ruled that this accused had a case to answer for the lesser offence of attempt to commit rape instead of the offence of rape. You are to only concentrate on this lesser offence of attempt to commit rape for this accused only.
15. To prove counts one, two and three the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused persons;
 - (b) Penetrated the vagina of the complainant "DV" with their penis;
 - (c) Without her consent;
 - (d) The accused persons knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
16. In this trial all the accused persons have denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused persons who had penetrated the vagina of the complainant with their 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 persons who allegedly committed this 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 persons had penetrated the vagina of the complainant with their penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused persons 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 persons 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 persons 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 persons not guilty.
24. To prove the offence of attempt to commit rape against the fourth accused 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 "DV" 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 fourth 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 fourth 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 fourth 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 fourth 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 fourth accused at the time and the surrounding circumstances to decide this issue.
32. Before you can find the fourth 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. Furthermore, 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 cause 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 with his penis and with that intention he did something which was more than merely preparatory.
36. The prosecution says the fourth accused went to where the complainant was lying down half naked he removed his pants before going on top of the complainant and tried to penetrate her vagina with his penis. The accused could not succeed because the complainant was moving and twisting as a result the fourth accused was unable to insert his penis into her vagina.
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. The first and the second accused are also charged with one count each of assault with intent to commit rape. To prove counts five and six the prosecution must prove the following elements of the offence of assault with intent to commit rape beyond reasonable doubt:

- (a) The first and the second accused persons;
- (b) Assaulted the complainant "DV";
- (c) With intent to commit rape.

41. Assault is the unlawful use of force on the complainant "DV" by any form of hostile or adverse act done towards her with the intent to commit rape. In respect of what is meant by intention I shall not repeat what I have just said a while ago. The explanation given earlier on what is intention will apply to this offence as well.
42. If you are satisfied that the prosecution has proved all the above elements beyond reasonable doubt then you must find the first and the second accused or either of them guilty of the offence of assault with intent to commit rape.
43. 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 both or either of the accused persons not guilty of the offence of assault with intent to commit rape.
44. 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.
45. In this case, the first, second and third accused persons are charged with one count of rape each, the fourth accused faces a count of attempted rape and the first and the second accused are also charged with a count each of assault with intent to commit rape.

46. You should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. If you find an accused guilty of one count that does not automatically make him guilty for the remaining counts. You must also not assume that because one accused is guilty of a count the other must be guilty as well.

ADMITTED FACTS

47. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
48. 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.
49. 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. 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

50. The complainant informed the court that in March, 2016 she was residing at Laselase Village, Nadroga with one of her cousin sister. On 3rd March, 2016 at around 3.00 pm to 4.00 pm, she went to the Sigatoka Market to see her cousin sister who was a market vendor.

51. At about 7.00 pm the complainant went to the Deep Sea Nightclub to listen to music, here she met her nephew who was drinking with some of his friends. The complainant joined them they were six of them and they all shared six bottles of beer.
52. The complainant saw all the four accused persons drinking in the same nightclub but at a different table, she knows all the accused persons since she was living in their village.
53. The drinking ended when the nightclub closed at 1.00 am the next day. The complainant was not drunk whilst standing outside the nightclub the first accused Tomasi came in a 7 seater van and asked the complainant to get in and that they will drop her home.
54. The first accused was with Watisoni Baro, Tevita Gusudradra and Tevita's cousin Namoumou. While the van was moving, Savenaca Valu also got in. The van was driven past the Sigatoka Hospital into a gravel road and up a hill. The complainant had boarded the van because she had trusted all the accused persons who were her friends. When the van went into the gravel road, she asked Tomasi where they were going to. Tomasi replied that they were going to drink half bottle of gin before going home the complainant accepted the explanation so she went with them.
55. At the hill, Tomasi, Watisoni, Tevita and Namoumou started drinking the half bottle of gin, Savenaca joined the group as well, by this time it was about 2.30 am. The complainant drank three nips in the bottle cap.
56. The complainant was sitting in between Tomasi and Savenaca after a while Namoumou stood up and left. The complainant was okay and she was able to recognize everyone sitting. After a while Tomasi and the complainant left the group and walked down the road as they were walking Tomasi told the complainant to hide since Namoumou was coming.

57. After sometime Savenaca came to where the complainant and Tomasi were hiding. When Savenaca came, he started yelling and asking Tomasi if he had sex with the complainant. Upon hearing this, the complainant thought they were crazy so she sat down. At this time, Tomasi pushed the complainant on the grass with both his hands making her lie on her back.
58. The complainant tried to push Tomasi back and was struggling with him at this time Savenaca said "we won't kill you, you won't be dead, we just have sex with you that's it". At this time, complainant was concerned since she realized they wanted to have sex with her.
59. Savenaca started to pull both her legs, her right ankle was swollen since she had sprained her ankle at home. Savenaca held the complainant tight while Tomasi removed his $\frac{3}{4}$ pants and his undergarment. The complainant continued to fight back at this time Savenaca punched her on her right chin and removed her $\frac{3}{4}$ pants and underwear.
60. Tomasi then came on top of the complainant and inserted his penis into her vagina and had sexual intercourse with her for 2 to 3 minutes. By this time it was early morning around 4am the complainant was able to see clearly that it was Tomasi who was having sex with her. The complainant did not consent to have sexual intercourse with Tomasi.
61. After Tomasi had finished, Watisoni came and removed his pants the complainant tried to stop Watisoni by screaming at him to stop and was trying to fight back and get up, however, Watisoni came on top of her and was able to insert his penis into her vagina and have sexual intercourse with her for about 3 minutes. The complainant did not consent to have sexual intercourse with Watisoni.
62. After Watisoni had finished, Savenaca came on top of the complainant after removing his pants and undergarments he inserted his penis into the complainant's vagina and had sexual intercourse for 2 to 3 minutes. The

complainant did not consent to have sexual intercourse with Savenaca. The complainant was crying and lying down but the accused did not care and had sexual intercourse with her.

63. Savenaca then called out to Tevita who was standing at a short distance to come over. According to the complainant Tevita looked confused and was undecided whether to come or not. Savenaca called Tevita two times, it was on the third call that Tevita came, removed his pants came on top of the complainant and tried to have sexual intercourse with her. The complainant was crying and telling Tevita to stop otherwise she will tell the police. The complainant also stated that Tevita was trying to insert his penis into her vagina for a few seconds but could not since she was moving and twisting.
64. After Tevita stood up, the complainant stood up wore her pants and told Tevita that she was going to the police station to report the matter. Tevita replied "how much money you want" the complainant refused the offer, she was crying and hurt, as she started walking she met Tevita's cousin Namoumou who had woken up by now. The complainant walked with Namoumou to the Sigatoka Police Station. It was early in the morning that the complainant reported the matter to the police thereafter the complainant was medically examined. She was accompanied by a female police officer to the Sigatoka Hospital. The complainant recognized all the accused persons in court.
65. In cross examination by counsel for the first accused the complainant agreed that she used to be good friends with Tomasi. When she was outside the nightclub after its closure she had accompanied Tomasi and Watisoni so that she could go home. At the hill when Savenaca punched her chin Tomasi was standing beside Savenaca.
66. The complainant maintained that Tomasi was trying to push her down with both his hands and had sexual intercourse with her.

67. In cross examination by the counsel for the second accused, the complainant stated that Savenaca was at the hill and had sexual intercourse with her that day.
68. When cross examined by counsel for the third accused, the complainant disagreed that Watisoni had stood up and left with Tomasi. The complainant stated that Watisoni had sexual intercourse with her that morning without her consent.
69. When cross examined by the counsel for the fourth accused, the complainant stated that all the accused persons were at the hill and that Tevita was part of the group. The complainant agreed that Tevita did not penetrate her vagina with his penis.
70. In re-examination the complainant stated that the reason she reported the matter to the police was because she was hurt and that they knew each other and she could not believe what the accused persons had done to her. The complainant also stated that she was able to remember everything the accused persons had done to her because they had forced her.
71. The second witness Dr. Taina Ravasua informed the court that she graduated with an MBBS degree from the University of Fiji in 2013, currently she is based at the Lautoka Hospital.
72. The doctor recalled in the year 2016 she was based at the Sigatoka Hospital. On 4th March, 2016 the doctor had examined the complainant. The Fiji Police Medical Examination Form of Dite Tukana was marked and tendered as prosecution exhibit no. 1.
73. The specific medical findings were:
 - (a) No pallor meaning the patient was not anaemic;

- (b) Moist oral mucosa meaning the patient was well hydrated;
- (c) Chest was clear;
- (d) Heart was normal;
- (e) Abdomen was soft.
- (f) Right ankle was painful and swollen.

The doctor had also noted her observations on the diagram at appendix 1 as follows:

- (a) Bruise on the right chin of the patient;
- (b) Some bruise on the ankle, incision of the right toe less than 0.5cm.

Vaginal Examination

- (a) Speculum examination opening the vagina and visualizing the inside of the vagina. The cervix was normal including the vagina, there was no bleeding noted in the cervix or the vaginal walls. The doctor also did not see any vaginal laceration or any discharge, however, there were 1 or 2 grass particles noted on the side of the vaginal wall.
- (b) There was a minor laceration less than 0.5cm at 5 o'clock position and there was no active bleeding. According to the doctor the injuries noted were less than 24 hours ago since the injuries looked fresh. The possible causes of the bruise/ laceration on the right cheek could be by blunt trauma or hitting something hard or a punch.

74. The doctor stated that with the history given by the patient it was possible that the patient could have been assaulted or punched or forced to do something she did not want to do. As for the grass particles seen in the vaginal walls the doctor stated that it could have been due to sex on the grass. The doctor had also observed that the back and front of the patient's pants were dirty with mud stain on it.

75. In cross examination by the counsel for the first accused the doctor agreed that she did not write anything under D14 of the medical examination form of the patient under the heading of “professional opinion” because she had documented her opinion at appendix 1 of the form.
76. In cross examination by the counsel for the second accused the doctor stated that there was still a possibility that penetration by three men could leave a minor laceration as she had noted at appendix 1. The doctor had not seen any whitish discharge from the patient’s vagina when suggested that the patient did not have sexual intercourse since there was no whitish discharge seen, the doctor stated that one could not tell if there was any whitish discharge after sexual intercourse.

Ladies and Gentleman Assessors

77. You have heard the evidence of Dr. Ravasua who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.
78. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.

79. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
80. The final prosecution witness WPC Akisi informed the court that on 4th March, 2016 she was at the Sigatoka Police Station and she had completed the medical examination form for Dite Tukana in particular the first page and had also accompanied Dite to the Sigatoka Hospital. The witness recognized her writing in prosecution exhibit no. 1. At the hospital Dite was attended by Dr. Taina. This was the only report of rape received that morning.
81. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

82. At the end of the prosecution case you heard me explain options to all the accused persons. They have those options because they do not have to prove anything. The burden of proving all the accused persons guilt beyond reasonable doubt remains on the prosecution at all times.
83. The accused persons chose to remain silent and did not call any witness that is their right and you should not draw any adverse inference from the fact that the accused persons decided to remain silent and not call any witness.
84. From the line of cross examination the defence takes the position that all the accused persons did not commit the offences as alleged. None of the accused persons penetrated the vagina of the complainant with their penis

without her consent or attempted to rape the complainant or assault the complainant with intent to commit rape.

85. The defence is also saying that the evidence of the complainant is not probable in the circumstances as narrated by her and therefore she should not be believed. The medical report also does not connect any of the accused persons to the allegations.
86. This was the defence case.

ANALYSIS

87. The prosecution alleges that during the early hours of 4th March, 2016 the first, second and third accused persons one after the other had forcefully penetrated the vagina of the complainant without her consent.
88. The first accused had also assaulted the complainant by pushing her on the chest with his both hands making the complainant to fall backwards on the grass. Thereafter, the first accused had forceful sexual intercourse with the complainant without her consent and despite her efforts to fend off the first accused. When the complainant was resisting the second accused punched her on her right chin so that she surrenders to both the accused persons.
89. After the first accused had finished it was the third accused who then had forceful sexual intercourse with complainant without her consent. The second accused then followed the third accused. After the second accused had forceful sexual intercourse with the complainant without her consent he called out to the fourth accused to come to the spot where the complainant was lying on the grass half naked.
90. The fourth accused after removing his pants went on top of the complainant and wanted to penetrate her vagina without her consent with

his penis. The only reason why the fourth accused was unable to penetrate the vagina of the complainant was because the complainant was moving and twisting. The prosecution submits that the conduct of the fourth accused points to the fact that this accused wanted to rape the complainant and what he did was more than mere preparation.

91. Finally, the prosecution is asking you to consider the promptness with which the complainant reported the matter to the police and the medical findings of the doctor which is prosecution exhibit no.1 including the observations made by the doctor about the dirty clothes of the complainant.
92. On the other hand, the first accused says that he did not have sexual intercourse with the complainant and he did not assault her with intent to commit rape. The complainant had boarded the van on her own freewill and inside the van she had sat beside the first accused and also during the drinking session on the hill she was sitting with the first accused and drinking. The behaviour of the complainant towards the first accused shows that she had an interest in this accused.
93. The first accused is also asking you not to give much weight to the medical report of the complainant because the doctor did not state anything at D14 of the report under the heading "professional opinion" suggesting that the doctor was unable to ascertain the cause and age of the injuries. Also the doctor did not see any discharge in the complainant's vagina which suggests that there was no sexual intercourse at all.
94. The second accused says he did not rape or assault the complainant with intent to commit rape as alleged. This accused is saying that the medical report is not conclusive since no vaginal discharge was noted by the doctor which was natural of a female who had sexual intercourse. The manner in which the complainant had described the alleged rape, a minor laceration to the vagina was not possible.

95. The third accused says that he did not rape the complainant as alleged after drinking at the hill he had left. The accused and the complainant were neighbours in the village they had a formal relationship and there was no way the accused had raped the complainant.
96. The fourth accused says that he did not at any time attempt to have forceful sexual intercourse and neither did he have any intention to rape the complainant. This is supported by the complainant's evidence that the accused was standing at a distance looking confused. According to the accused he was forced to have sexual intercourse with the complainant but he did not.

Ladies and Gentleman Assessors

97. 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 give 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.
98. 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.

99. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against all the accused persons 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.
100. 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.
101. If you accept the version of the defence you must find the accused persons 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 all the accused persons guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
102. The accused persons are not required to prove their innocence or prove anything at all. They are presumed innocent until proven guilty.
103. In this case, the first, second and third accused persons are charged with one count of rape each, the fourth accused faces a count of attempted rape and the first and the second accused are also charged with a count of assault with intent to commit rape.
104. As mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. If you find an accused guilty of one count that does not

automatically make him guilty for the remaining counts. You must not also assume that because one accused is guilty of a count the other must be guilty as well.

105. Your possible opinions are:-

1. COUNT ONE - **RAPE:** GUILTY OR NOT GUILTY.
2. COUNT TWO - **RAPE:** GUILTY OR NOT GUILTY.
3. COUNT THREE - **RAPE:** GUILTY OR NOT GUILTY.
4. COUNT FOUR - **ATTEMPT TO COMMIT RAPE:** GUILTY OR NOT GUILTY.
5. COUNT FIVE - **ASSAULT WITH INTENT TO COMMIT RAPE:** GUILTY OR NOT GUILTY.
6. COUNT SIX - **ASSAULT WITH INTENT TO COMMIT RAPE:** GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

106. 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.

107. 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
Sunil Sharma
Judge

At Lautoka

19 March, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for all the Accused persons.