

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 40 OF 2017

BETWEEN : **STATE**

AND : **LUKE NACUVA**

Counsel : *Ms. S. Naibe for the State*
Ms. Radrole for the Accused

Hearing on : *13th of May 2020 – 14th of May 2020*

Summing up on : *02nd of June 2020*

SUMMING UP

Ladies and gentleman assessors;

1. It is now my duty to sum up the case to you. Your opinion is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the assessors of facts.

2. As the representatives of the society, your duty here is sacred. Your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to you in my opening address, your opinion should be based only on them. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel during the examination of a witness is not evidence unless the witness accepted

that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the available evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe none, a part or all of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his evidence. That is, whether the witness

has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provide for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only a few guidelines. It is up to you, how you assess the evidence and what weight you give to a witnesses' testimony.

12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there more than one reasonable inference to draw, against the accused, as well in his favor, based on the same set of proved facts, then you should not draw the adverse inference.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond a reasonable doubt, in order for you to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.
15. You are not required to decide on every point the Counsels in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against the accused.

16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not a must.
17. Let us look at the Information. The Director of Public Prosecutions has charged the accused of a count of rape.

COUNT 1

Statement of Offence

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

Particulars of Offence

Luke Nacuva, on the 25th day of January 2017, at Navosa, in the Western Division, had carnal knowledge of Vasemaca Ratu, without her consent.

18. Now I will deal with the essential elements of the offence of Rape.
Section 207(1) of the Crimes Act reads as;
207. —(1) Any person who rapes another person commits an indictable offence.
Section 207 (2) (a) of the Crimes Act reads as;
(2) A person rapes another person if —
(a) The person has carnal knowledge with or of the other person without the other person's consent;
19. Accordingly, in this case, to prove the offence of Rape as for the alleged count the prosecution must prove the following elements beyond a reasonable doubt.
 - (i) The accused;
 - (ii) Penetrated the vagina of Vasemaca Ratu with his penis
 - (iii) Without the consent of Vasemaca Ratu; and
 - (iv) Either the accused;
knew or believed that Vasemaca Ratu was not consenting; or
was reckless as to whether or not she was consenting.

20. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence. This element is not contested in this case.
21. In the second element 'carnal knowledge' means having sexual intercourse or in this case, the penetration of Vasemaca Ratu's vagina; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of Vasemaca Ratu with his penis, to any extent. This element too was not contested by the accused in this case.
22. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent.
23. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact, that there was no physical resistance alone, shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
 - i) by force; or
 - ii) by threat or intimidation; or
 - iii) by fear of bodily harm; or
 - iv) by exercise of authority.
24. Apart from proving that the complainant did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either

the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.

25. It is not difficult to understand what is meant by the words “the accused knew or believed”. But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant’s vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
26. Please remember that no witness can look into an accused’s mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused’s state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
27. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the count of Rape.

Summary of Evidence

28. The PW1, Vasemaca Ratu is the main witness for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses’ evidence you must be extremely cautious of the credibility and the dependability of such evidence. Her evidence is that;

- i) Presently, she is self-employed and resides at Korovuto, Nadi.
- ii) In January 2017, she was residing at her uncle Pate's place in Draiba Village, Navosa, with her uncle and aunty.
- iii) On the 25th of January, 2017 she has gone to play volley-ball at around 3.00pm and returned around 6.00pm. Though she went with her cousin sister, she has come back alone.
- iv) On her way back, she has met Luke the accused. He has started to approach her. Later she explains that by the word 'approach' what she meant is that the accused wanted to have sex with her. Then she has told him no and that she has a boy-friend. Then she has kept on walking until he hassled her. By the word 'hassle' she has meant was he has whipped her with the rope and her head has started spinning and she has fallen down.
- v) Thereafter she goes on to give another version, which is much different to the above. From the volley-ball court, while walking home, she has heard Luke calling her and he has wanted to talk to her. She has said no to it. Luke has asked her to get on to the horse, he was on. She has said no to that too. Then Luke has pulled her by the hair and punched her on her thighs and the stomach. She has fallen and smacked her head. He has hassled her while she was lying down. She could not bear the pain and she has given herself to the accused, Luke.
- vi) Once she was fallen on the ground, Luke has wanted to have sex with her. When she cried for help, Luke has lied down on her chest and closed her mouth. Then he has torn her clothes and inserted his penis into her vagina. She did not consent to such.
- vii) After having the sexual intercourse, the accused left her there and she has worn her clothes and went home alone.
- viii) When she went home, all at home, seeing her wet and muddy clothes asked her what happened and she has told them of the incident. She has asked her uncle to call the police and the police was informed and police

came to their house that night itself. They recorded her statement and went in search of Luke but couldn't find him.

- ix) The police came and arrested Luke on the following morning and she was referred for a medical examination. She has sustained injuries on her stomach and the right temple. Those injuries were caused when Luke slapped her with his hands or the rope, while she was running.
- x) The witness identifies the accused as Luke.

29. In answering the cross examination by the counsel for the accused, the witness states;

- i) Pate and Rusila, whom she was staying with in Navosa is not her Brother-in-law and Cousin but her Uncle and Aunty.
- ii) 25th of January 2017, was the first time she went to play volleyball there. She admits of sharing jokes and having conversed with Luke while playing volleyball.
- iii) After playing volleyball, she has gone first and Luke has followed her on his horse. She denies getting on the horse at any time.
- iv) When suggested that at the time of the alleged incident, she voluntarily took off her clothes, the witness denying that states that the accused forced her to do so. You should note that this is somewhat inconsistent with her earlier evidence of the accused tearing her clothes off.
- v) The witness admits that her uncle Pate insisted on reporting this to the police and on that, she reported the matter to the police.
- vi) She admits of informing the police of Luke whipping her with the horse rope, on her back and the head. She states that she had an injury on her back and it is shown in her medical examination form. It should be noted that her medical examination form does not reveal any such injury on her.

30. In answering the re-examination by the prosecuting counsel, the witness states that;

- i) She had injuries on her right cheek, stomach and the back.
- ii) Answering a question by the court, witness states that the injury on her stomach was caused by a piece of wood which poked her while she was laying down.
- iii) The accused's hassling made her dizzy and she fell down. Her clothes got muddy and wet due to that.

31. The PW2 was Dr. Ame Ralulu Nasokia. His evidence was that;

- i) He practices as a General practitioner and was graduated in 2014.
- ii) In the year 2017, he was practicing at the Keiyasi Health center, and recalls examining the patient Vasemaca Ratu.
- iii) He identifies and submits a true copy of the medical examination form filled and completed by him in regards to the said Vasemaca Ratu, as PE 1.
- iv) She was examined on the 26th of January 2017 at 2.55pm at the Keiyasi Health Center.
- v) In PE 1, cage A.4 was filled by the police and it said that the patient was raped by one Luke of Ba settlement.
- vi) She was examined in the presence of a staff nurse and the patient was fully conscious with GCS of 15/15 and her vitals were stable at the time.
- vii) On examination he has observed a tenderness on the left jaw, of the patient but there was no swelling or a bleeding. Further, he has noted a redness on her abdomen just below the ribs. The witness has inquired the patient of the cause and was informed that Luke has kicked her on the left Jaw and punched twice on the stomach, after been raped by him. It should be noted that this is quite inconsistent with the evidence of the PW1. Furthermore, the witness states that though she had bleeding from the vagina, it was due to menses and the vaginal examination revealed that there were no injuries or bruises.
- viii) His professional opinion was that the vaginal examination was inconclusive and fresh blunt trauma was noted on her left face and the abdomen.

- ix) In answering the cross-examination, he states that Vasemaca informed him of Luke having forceful sexual intercourse with her. He further states that he has not mentioned a use of a whip and if informed by the patient, he would have noted it on the examination form.
 - x) In re-examination, the witness clarifies that in case of forceful sexual intercourse, the possibility of having bruises would be more compared to consensual sexual intercourse as consensual sexual intercourse provides more natural lubrication. However, in this case the patient was having menses and it may have provided a certain amount of lubrication.
32. With leading the evidence of PW1 and PW2 and marking and producing the document PE 1, the prosecution closed their case. Court being satisfied that on the face of it, the prosecution has adduced sufficient evidence covering the elements of the alleged offence, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.
33. The accused having understood his rights elected to give evidence on his behalf. His evidence was that;
- i) He resides at the Draiba Village in the Ba settlement with his brothers and work at his father's farm there.
 - ii) On the 25th of January 2017, he has worked in the farm in the morning and having had some rest in the afternoon, has gone to the river bank to play volleyball in the evening.
 - iii) While playing volleyball, Vasemaca Ratu and few others too joined. He was joking and telling stories with Vasemaca, while playing volleyball and thereafter. Then he has taken the initiative to have a relationship with her by approaching her and talking to her. Vasemaca has smiled and was happy with his approach. She has agreed to ride on his horse after the volleyball match.

- iv) After playing volleyball, Vasemaca has waited for him at a place close to the volleyball court. He has gone to the place where the horse was tied and saddled him and taken to the place Vasemaca was. Then both of them have got on the horse and gone towards the Draiba Village. She was seated at the back, behind him and while riding, they have started kissing. Vasemaca has kissed his neck and cheeks from behind and he has turned back and kissed her.
- vi) At the intersection area, they stopped and got down from the horse. Then they discussed and agreed to have sex and walked little bit into the guava plantation therein. There he has spread the blanket used for the saddle on the floor. At there, she has started touching the front of his pants and he has had an erection and has started touching her breasts. He has pulled down his pants and then Vasemaca has sat down and started sucking his penis.
- vii) Thereafter she has removed her clothes and lied down on the blanket and the accused too has removed his clothes. They have had sexual intercourse then. The accused describes of 3 positions he has had sex with her. It should be noted that those positions do not include the girl on top position, which the PW1 was cross-examined upon instructions. You may give the said inconsistency an appropriate consideration.
- viii) Then they have put on their own clothes and the accused having saddled the horse with the folded blanket, rode on the horse up to the place where she lived. Close upon the gate, she has got down and walked home while he waited there on the horse back. While waiting he has heard an argument and Vasemaca being scolded by Pete. Then he has turned back and returned home.
- ix) Having come home, he has had a shower, changed his clothes and gone to sleep. When he woke up next morning the police officers were there and he was taken to the police station.

x) The accused stated that he was at home that night. It should be noted that PW1 stated that the police went in search of him that night and he was not at home. This would be a material point pointing out to the subsequent conduct of the accused. The said contradictory positions were not cross examined or challenged upon by either party. Therefore there is an inconsistency between the prosecution version and the defense version. Prosecution fails to bring in any evidence to establish their stance by calling the police officers. The accused need not prove his version as he bears no burden of proof. The question would be whether the accused's version creates a reasonable doubt in the prosecution case.

34. In answering the cross examination, posed on behalf of the prosecution, the accused states that;

- i) He knows Vasemaca for quite some time as he goes to the place where she stayed to drink grog and has joked with her quite often. He admits of having joked with her about having sex and she joking him back.
- ii) The accused admits that he thought Vasemaca agreed to have sex with him.
- iii) The accused denies that Vasemaca refused to have sex with him. Further while denying that he followed Vasemaca, he states that she waited for him and both of them went on the horse together.
- iv) He admits of having a good relationship with her and her uncle Pate and aunty Rusila. He does not understand why they reported against him.

35. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained,

which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.

36. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offences have been proven beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
37. The Accused has indicated his stance and it was that the sexual intercourse they had was done with the consent of Vasemaca. In other words he denies committing rape. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.
38. With the submission of the accused's stance, one of the three situations given below would arise;
 - (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should

consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged count.

39. Any re-directions? - none -

40. Lady and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. You have the copies of the document tendered as exhibit "PE 1". When each of you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

41. Your opinion should be;
whether the accused is guilty or not guilty of the alleged offence of Rape.



Chamath S. Morais
JUDGE

Solicitors for the State : *Office of the Director of Public Prosecutions, Lautoka*
Solicitors for the Accused : *Legal Aid Commission, Lautoka.*