

IN THE HIGH COURT OF FIJI

AT LABASA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 23 of 2019

STATE

V

1. ASIF KHAN

2. IMMANUEL SILUS KUMAR SIDAL

3. PHILIP RAO

Counsel : Ms. Dharshani Rao for the State
Mr. Amrit Sen for the 1st, 2nd and 3rd Accused

Dates of Trial : 1-4 June 2020

Summing Up : 5 June 2020

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "KBL". The name of the prosecution witness No 2 is also suppressed. Accordingly, she will be referred to as "EV".

SUMMING UP

Madam Assessor and Gentlemen Assessors,

[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The

Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the respective charges against each of the three accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the respective charges against each of the three accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the document tendered as a defence exhibit and the Agreed Bundle of Photographs tendered by consent by both parties.

- [9]** If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10]** A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submissions made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, a matter which will be of primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and 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 correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14]** The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15]** According to the evidence you heard in this case, the complainant, KBL, was 17 years and 9 months old at the time of the alleged incident, and was almost 19 years old when she testified in Court (Her date of birth being 10 June 2001). Experience shows that children do not all react the same way to sexual acts as adults would. It would be

a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the three accused are charged with.

- [16] Furthermore, the experience of the Courts is that victims of sexual offences react to the incident in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, may not complain or go to the authorities for some time. There is, in other words, no classic or typical response by victims of sexual offences.
- [17] In this case it has been established by evidence that the investigations into the matter commenced pursuant the complaint made by the complainant to the Labasa Police, on 8 April 2019. The complainant explained that she had previously made a complaint to the Taveuni Police around 18 March 2019, which was about 3 days after the alleged incident. However, no documentary proof of that statement was produced in Court by the prosecution. Therefore, what is available in Court and could be relied upon is a belated complaint made by the complainant.
- [18] You must bear in mind that a late complaint does not necessarily signify a false complaint; any more than an immediate complaint necessarily demonstrates a true complaint. In this matter, it is for you to determine regarding the lateness or belatedness of the complaint and what weight you attach to it. It is also for you to decide, when eventually the complainant did complain to the Labasa Police, as to the genuineness of the said complaint, taking into consideration the fact that she testified to complaining previously to the Taveuni Police.
- [19] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to perceive (or know) in any other way the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [20] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This could be in relation to the

testimony of the witness given in Court or in comparison to any previous statement made by that witness.

- [21]** A statement made to the Police by a witness can only be used during cross-examination to highlight inconsistencies or omissions. That is, to show that the relevant witness on a previous occasion had said something different to what he or she said in Court (which would be an inconsistency) or to show that what the witness said in Court was not stated previously in the statement made to the Police (which would be an omission). You have to bear in mind that a statement made by a witness out of Court is not evidence. However, if a witness admits that a certain portion in the statement made to the Police is true, then that portion of the statement becomes part of the evidence.
- [22]** This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [23]** However, if there is no acceptable explanation for the inconsistency or omission, 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 inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission 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 his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider the witness to be reliable.
- [24]** Madam and Gentlemen Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [25]** Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [26]** When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you

have to decide in order to reach your final conclusion, whether the three accused are guilty or not of the respective charges against them. I have used the term “*question of fact*”. A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.

- [27] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [28] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [29] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. This is also referred to as circumstantial evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [30] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench of this Court room. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [31] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [32] This is because the accused are presumed to be innocent. They may be convicted only if the prosecution establishes that they are guilty of the offences charged.

- [33] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [34] For the prosecution to discharge its burden of proving the guilt of each accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict each of the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence each accused has been charged with. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [35] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find each of the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [36] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant in this case or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [37] I must also explain to you as to the reason for permitting a closed court proceedings when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when it is a closed court proceedings, the complainant is relieved of any mental pressure to describe the often unpleasant incidents which she alleged took place. The same applies for permitting a closed court proceedings when prosecution witness No 2 gave evidence in this case. However, please bear in mind that you must not infer that such a protection to the witnesses was warranted due to the accused's behaviour and you should not draw any adverse inference against them on that account.
- [38] Let us now look at the charges contained in the Consolidated Information.
- [39] There are three charges preferred by the Director of Public Prosecutions (DPP), in this case:

COUNT 1

Statement of Offence

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

Particulars of Offence

ASIF KHAN, between 15 and 16 March 2019, at Taveuni, in the Northern Division, penetrated the vagina of KBL with his penis, without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

IMMANUEL SILUS KUMAR SIDAL, between 15 and 16 March 2019, at Taveuni, in the Northern Division, penetrated the vagina of KBL with his penis, without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

PHILIP RAO, between 15 and 16 March 2019, at Taveuni, in the Northern Division, penetrated the vagina of KBL with his penis, without her consent.

[40] As you would observe each of the accused has been charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act). Count 1 is in respect of the 1st Accused; Count 2 is in respect of the 2nd Accused; and Count 3 is in respect of the 3rd Accused.

[41] Let me now explain to you the elements of the charges.

[42] Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

[43] Section 207 (2) (a) of the Crimes Act is reproduced below.

(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; or

[44] Therefore, when Section 207 (1) is read with Section 207 (2) (a) it would read as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

(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.

[45] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile sexual intercourse with that other person or penetrating the vagina of that other person with the use of the penis.

[46] Therefore, in order for the prosecution to prove the first count of Rape against the 1st Accused, they must establish beyond any reasonable doubt that;

- (i) The 1st Accused;
- (ii) During the specified time period (in this case between 15 and 16 March 2019);
- (iii) At Taveuni, in the Northern Division;
- (iv) Penetrated the complainant's vagina, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The 1st Accused knew or believed that the complainant was not consenting, or the 1st Accused was reckless as to whether or not she was consenting.

[47] In order for the prosecution to prove the second count of Rape against the 2nd Accused, they must establish beyond any reasonable doubt that;

- (i) The 2nd Accused;
- (ii) During the specified time period (in this case between 15 and 16 March 2019);
- (iii) At Taveuni, in the Northern Division;
- (iv) Penetrated the complainant's vagina, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The 2nd Accused knew or believed that the complainant was not consenting, or the 2nd Accused was reckless as to whether or not she was consenting.

[48] Similarly, in order for the prosecution to prove the third count of Rape against the 3rd Accused, they must establish beyond any reasonable doubt that;

- (i) The 3rd Accused;
- (ii) During the specified time period (in this case between 15 and 16 March 2019);
- (iii) At Taveuni, in the Northern Division;
- (iv) Penetrated the complainant's vagina, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The 3rd Accused knew or believed that the complainant was not consenting, or the 3rd Accused was reckless as to whether or not she was consenting.

[49] Let me now elaborate on these elements together in respect of Counts 1, 2 and 3.

[50] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the respective accused and no one else who committed the offence.

[51] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt in respect of each count.

[52] The fourth element involves the penetration of the complainant's vagina; with the accused's penis. It must be noted that, in law, 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 or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that each of the accused penetrated the vagina of the complainant with his penis to any extent.

[53] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that each of the accused penetrated the complainant's vagina, with his penis, without her consent.

[54] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the 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:

- (a) by force; or

- (b) by threat or intimidation; or
- (c) by fear of bodily harm; or
- (d) by exercise of authority; or
- (e) by false and fraudulent representations about the nature or purpose of the act; or
- (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[55] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove either that each of the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[56] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 17 years and 9 months of age at the time of the incident, and therefore, she had the mental capacity to consent.

[57] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape is obviously considered as a Sexual Offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

[58] If you are satisfied beyond any reasonable doubt that the 1st Accused, between 15 and 16 March 2019, penetrated the complainant's vagina with his penis, without her consent, and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the first count of Rape.

[59] If you find that the prosecution has failed to establish any of these elements in relation to the first count of Rape, then you must find the 1st Accused not guilty of the charge.

[60] If you are satisfied beyond any reasonable doubt that the 2nd Accused, between 15 and 16 March 2019, penetrated the complainant's vagina with his penis, without her

consent, and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the second count of Rape.

- [61] If you find that the prosecution has failed to establish any of these elements in relation to the second count of Rape, then you must find the 2nd Accused not guilty of the charge.
- [62] If you are satisfied beyond any reasonable doubt that the 3rd Accused, between 15 and 16 March 2019, penetrated the complainant's vagina with his penis, without her consent, and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the third count of Rape.
- [63] If you find that the prosecution has failed to establish any of these elements in relation to the third count of Rape, then you must find the 3rd Accused not guilty of the charge.
- [64] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [65] The prosecution and the defence by consent tendered to Court an Agreed Bundle of Photographs. The said bundle comprises of photographs of the 2nd Accused's residence, taken by the police during the course of their investigations and also photographs taken by the defence of the 2nd Accused's residence. The bundle also contains a map or sketch drawn by the police of the 2nd Accused's residence.

Case for the Prosecution

[66] The prosecution, in support of their case, called the complainant KBL, a friend of the complainant, EV, and Corporal 3364 Merewalesi, who was the Investigating Officer in this case.

[67] Evidence of the complainant KBL

- (i) *The complainant testified that she currently resides at Delaivuna in Taveuni. She lives there with her dad, her mum and her four siblings. She's the eldest in the family.*
- (ii) *She testified that her date of birth is 10 June 2001. Therefore she will be turning 19 on the 10 June this year.*
- (iii) *Last year she was a form 7 student. During the first term she was attending South Taveuni Secondary School. During the second and third terms she was attending Bucalevu Secondary School.*
- (iv) *The complainant testified that she recalls the incidents that took place on 15 March 2019. On the said day, which was a Friday, she had not gone to school. School was closed that day. She was attending an inter-zone athletics*

competition taking place at the Wairiki grounds. She had been attending this competition with her friends.

- (v) She had been at the Wairiki grounds the full day – from morning. She said she had been there until 6.00 or 7.00 pm. She had waited for the afternoon school bus, but the bus was full. The driver had signaled for them to take the bus when it makes the second trip. So she and her friends had waited.
- (vi) Since it was getting dark she had decided to take a lift from Wairiki to her home in Delaivuna. Upon waiting, she had seen Immanuel's (the 2nd Accused's) cab going down the same road towards her house. Her cousin Meli had also been in the cab. She had asked Meli for a lift and Meli had said yes.
- (vii) The 2nd Accused had been driving the cab. She said the 2nd Accused is from the same area. She had lived in that area her whole life (for 18 years). The 2nd Accused lives in Qarawalu. Delaivuna and Qarawalu are nearby. The 2nd Accused's house is five minutes' drive by cab from her house.
- (viii) When asked to look around court and point towards the Accused she duly identified the 2nd Accused in the dock (The 2nd Accused was wearing a green shirt and the complainant identified him as the person wearing the green shirt).
- (ix) At the time she got into the 2nd Accused's cab, her cousin Meli and his brother Robert were in the cab. She got into the cab along with three of her friends – Sitima, Meri and EV.
- (x) After a while her friends Sitima and Meri had got off the cab. Then her cousin Meli had asked her if she wanted to drink alcohol. At the time there was a carton of Joskes on Meli's lap. She had then asked her friend EV and they both had agreed.
- (xi) Her friend EV is junior to her. She had known EV since they were attending South Taveuni Secondary School together.
- (xii) The complainant, EV and Meli had proceeded in the 2nd Accused's cab, going towards 2nd Accused's house. The time had been past 7.00 pm. On the way they had picked a person name Junior (the 3rd Accused), who was said to be a friend of Meli and the 2nd Accused, from Waimaqera.
- (xiii) After Junior had got into the vehicle, the 2nd Accused had given an introduction about Junior and said that he's going to be cook for the night. The complainant said that she did not know Junior prior to that night. She described Junior as a short, chubby old man with dark skin colour and of Indo-Fijian ethnicity.
- (xiv) After picking the 3rd Accused, the vehicle had proceeded straight to the 2nd Accused's house. At the 2nd Accused's house they had started drinking alcohol. They had been drinking the Joskes, which were with Meli, and also some bottles of long neck beer. The complainant said that they drank the beer first and then the Joskes.
- (xv) The complainant testified that the five of them present at the time had consumed six bottles of long neck beer. They had all drunk the Joskes as well.

She could not recall how many bottles of Joskes were consumed by them. However, she said that she felt really drunk. Although she could talk normally she said she was unable to walk normally. All this drinking was taking place in the kitchen of the 2nd Accused's house. Later the drinking had continued in the sitting room.

- (xvi) The complainant said that she had spoken to the 3rd Accused during the night. When asked as to how long she had spent in the presence of the 3rd Accused, the complainant said the whole night. While drinking, the 3rd Accused had asked her whether they could have a relationship. She had not said anything. Thereafter, the 3rd Accused is said to have forcefully kissed her on her lips. This had taken place in the kitchen.*
- (xvii) When asked to look around court and point towards the Accused she duly identified the 3rd Accused in the dock (The 3rd Accused was wearing a blue shirt and the complainant identified him as the person wearing the blue shirt).*
- (xviii) The complainant testified that the 2nd Accused had asked her to join him in going and picking up another friend of his from Vatuviri (The 1st Accused). She had agreed. Accordingly, she had accompanied the 2nd Accused and gone and picked up the 1st Accused.*
- (xix) The complainant said that she did not know the 1st Accused prior to that night. The complainant described the 1st Accused to be tall and fit and of Fijian ethnicity. The complainant said that she had spoken to the 1st Accused during the night. When asked as to how long she had spent in the presence of the 1st Accused, the complainant said half the night.*
- (xx) When asked to look around court and point towards the Accused she duly identified the 1st Accused in the dock (The 1st Accused was wearing a yellow tie and the complainant identified him as the person wearing the yellow tie).*
- (xxi) When asked the question what makes her remember the 1st and 3rd Accused whom she had never met before, the witness said: "They were with me the whole night plus they did an unforgiving thing to me."*
- (xxii) The witness clearly described the lighting in the kitchen and dining/sitting room.*
- (xxiii) After returning to the 2nd Accused's house on picking the 1st Accused, the complainant had asked Meli where her friend EV was. Meli had said that EV was lying inside one of the rooms.*
- (xxiv) Thereafter, the complainant said she had kept on drinking for a couple of hours in the kitchen. Then she had wanted to take nap. The 2nd Accused had shown her his room. She had been lying down on the bed inside the room. The door to the room was closed but not locked. There had been a dim yellowish, orange light inside the room. The light had been attached to the ceiling.*
- (xxv) The witness said that at the time she had been wearing a thin strap top and jeans. Inside she had been wearing her panties.*
- (xxvi) The complainant testified that she had been napping for a couple of minutes when she felt someone on top of her. She had seen the 3rd Accused on top of*

her. He had put his penis into her vagina. She had tried pushing him away. She said at the time her jeans and her panties had been taken off. She doesn't know who took them off (because she was drunk). The thin strap top was still on. The 3rd Accused had taken his pants off but had been wearing his t-shirt. She had tried to push the 3rd Accused away by pushing him back on his chest using both the hands. However, the 3rd Accused had not moved away. He had held her hands tightly on to the bed. The witness said "Then he raped me." When asked to explain the complainant said the 3rd Accused had kept on having sexual intercourse with her. The 3rd Accused had sexual intercourse with her for a couple of minutes.

(xxvii) She had identified the 3rd Accused by the dim light inside the room.

(xxviii) The complainant testified that her whole body was numb at the time. Then she had fallen asleep again.

(xxix) After a couple of seconds she had felt the 2nd Accused was on top of her. The 2nd Accused was putting his penis into her vagina. She had tried to push the 2nd Accused with her hands. She had pushed him on his chest using her hands. However, the 2nd Accused did not move away. The witness said "Then he raped me." When asked to explain the complainant said the 2nd Accused had sexual intercourse with her. The 2nd Accused had sexual intercourse with her for a couple of minutes.

(xxx) The complainant said her jeans and her panty had still been off at the time. She had been wearing her top. The 2nd Accused had taken off all his clothes.

(xxxi) She had identified the 2nd Accused by the dim light inside the room.

(xxxii) Thereafter, the 2nd Accused had gone back to drink. While she had slept off. Her clothes were still missing. She had been sleeping for a couple of minutes when the 1st Accused had come and raped her. She had realized this only when the 1st Accused was on top of her. The 1st Accused had sexual intercourse with her. He had put his penis into her vagina. While the 1st Accused was doing this, the witness said she had blacked out.

(xxxiii) She had identified the 1st Accused by the dim light inside the room.

(xxxiv) The complainant said that a couple of hours later she had woken up, she had looked for her jeans and her panty and found them underneath the bed. She had put on her clothes and gone back to the kitchen. The three Accused, Meli and her friend EV were in the kitchen at the time.

(xxxv) She had then asked the 2nd Accused whether he has a spare towel so that she can take a bath. She had then taken a bath. The time had been past midnight. She said she was still having a hang-over.

(xxxvi) The complainant said she was trying to find a way to go back home. She had gone outside by the front door. The 2nd Accused had followed her and asked what she was doing outside. She had lied to the 2nd Accused saying she came to get her bag which was in the car. She had taken her bag and gone back to the house and joined the others in the kitchen.

- (xxxvii) After couple of minutes she went to the sitting room and was lying down on the couch. Then she had seen a cell phone on the couch. She had taken the phone and gone to the bathroom and dialed her father's number. However, the phone was switched off. Thereafter, she had called her history teacher – one Master Shamal and told him that she needed help.
- (xxxviii) However, at this time the 1st and 3rd Accused had come and knocked on the bathroom door so she had hung up. 1st and 3rd Accused then had an argument as to who gave the phone to her.
- (xxxix) The complainant then testified that she had remained in the 2nd Accused's house until the next morning. She and EV had left the 2nd Accused's house around 6.00 in the morning. They had travelled to town by public transport. In town they had met one Master Praveen. He is a school teacher at South Taveuni Primary School.
- (xl) She and EV had then travelled in Master Praveen's white twin cab to Maravu. They had been in Maravu for a couple of minutes and then come back to South Taveuni Primary School. They had reached the school around 11.00 am.
- (xli) The complainant said that she had spent the rest of the day and that night (Saturday night) at Master Shamal's quarters at South Taveuni Primary School.
- (xlii) While at Master Shamal's the police came looking for her. Thereafter, she had returned home.
- (xliii) The complainant said that her friend EV had been dropped off at her home in Vuna by Master Praveen.
- (xliv) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.
- (xlv) During the witness's cross-examination a map of Taveuni Island was tendered to Court as Defence Exhibit DE1.
- (xlvi) In cross-examination the witness agreed that the distance from the 2nd Accused's house to her house was about 1km or 10 minutes by foot.
- (xlvii) She was questioned at length as to her movements after leaving the 2nd Accused's house in the morning of 16 March 2019.
- (xlviii) The witness agreed that on Sunday morning (17 March 2019) the Principal of her School, D J Singh, the Vice Principal, Pratap and the Assistant Principal and Chaplain, Mrs Jennings had come outside Master Shamal's quarters and called her out.
- (xlix) The complainant agreed that she was expelled from school following this incident. She also agreed that Master Shamal and Master Praveen were also dismissed from their employment.
- (l) The Defence highlighted an inconsistency in the testimony given in Court by the witness vis a vis her statement made to the Police:

- i. *In her testimony in Court, the witness said that after the three Accused had raped her she had slept for a couple of hours. Then she had got up and had a bath.*

However, in her statement made to the Police, it is recorded as follows:

“After a few minutes I wore my clothes and went to have my bath.”

- (ii) *It was suggested to the complainant that the three Accused never had sexual intercourse with her and that she was making up the allegations against the accused.*

[68] Evidence of witness EV

- (i) *The witness testified that she currently resides at Vuna in Taveuni. She lives there with her mother, father and her five siblings. She’s the eldest in the family.*
- (ii) *She testified that her date of birth is 5 April 2002. Therefore, she’s now 18 years old.*
- (iii) *She’s attending Holy Cross College and is in form 7. Her school is located in Wairiki.*
- (iv) *The witness said that last year too she was attending Holy Cross College.*
- (v) *The witness testified to the events which transpired on 15 March 2019. She said she too had attended the inter-zone athletics competition which took place at the Wairiki grounds that day.*
- (vi) *Thereafter, the witness testified to how she and the complainant had come to the 2nd Accused’s house and consumed alcohol. They had come there in 2nd Accused’s cab.*
- (vii) *On the way to the 2nd Accused’s house she described as to how they picked up the 3rd Accused.*
- (viii) *The witness clearly identified the 2nd Accused, whom she knew prior to this day and also the 3rd Accused. Although she described the presence of another man during the drinking party, she didn’t specifically identify the 1st Accused during her testimony.*
- (ix) *In evidence-in-chief she made no mention to the presence of Meli, the complainant’s cousin, at the 2nd Accused’s house. However, in cross-examination she said Meli had been present.*
- (x) *The witness testified that she had remained at the 2nd Accused’s house together with the complainant until the next morning.*
- (xi) *The witness also testified as to the event which took place after she left the 2nd Accused’s house, together with the complainant in the morning of 16 March 2019.*

- (xii) *This witness was also cross-examined at length by the defence. The defence also put several suggestions to the witness.*
- (xiii) *The Defence highlighted certain inconsistencies in the testimony given in Court by the witness vis a vis her statement made to the Police:*
 - i. *In her testimony in Court, the witness said that she always slept on a settee and that she never slept in the bedroom on a bed.*

However, in her statement made to the Police, it is recorded as follows:

“I was too drunk so I knocked out on the settee – when Meli took me to one of the bedrooms. As soon as I reached the bedroom, I laid on the bed and fall off to sleep.”

- ii. *In her testimony in Court, the witness said that although that she was lying in the bedroom she never slept there (never slept in the bedroom).*

However, in her statement made to the Police, it is recorded as follows:

“Whilst asleep.....”

- (xiv) *The witness also agreed that at the time she and the complainant left the 2nd Accused’s house in the morning of 16 March 2019, the complainant had no complaints to make.*
- (xv) *When asked the question both you and KBL left happily with nil complaints? The witness answered: “She only complained inside the bus.”*

[69] Evidence of Corporal 3364 Merewalesi

- (i) *She is the Investigating Officer in this case. She is currently serving at the Labasa Police Station. She has over 15 years’ experience in the Fiji Police Force.*
- (ii) *In April 2019 she was attached to the Sexual Offences Unit of the Labasa Police Station.*
- (iii) *She testified to the investigation she carried out in this case. She had recorded the statement of the complainant on 8 April 2019. She had also accompanied the Photographing Officer who took photographs at the 2nd Accused’s residence in Qarawalu in Taveuni. The said photographs are now part of the agreed bundle of photographs which has been tendered to court by the consent of both parties.*
- (iv) *The report of this incident had originally been received at the Taveuni Police Station on 17 March 2019. She had received instructions to investigate the*

case about two weeks after the report had been lodged at Taveuni Police Station.

[70] That was the case for the prosecution. At the end of the prosecution case, this Court decided to call for the defence. You then heard me explain several options to the three accused. I explained to them that they could give sworn evidence from the witness box and/or call witnesses on their behalf. They could also address Court by themselves or their counsel. They could even remain silent. They were given these options as those were their legal rights. The accused need not prove anything. The burden of proving their guilt rests entirely on the prosecution at all times.

[71] In this case, the three accused exercised their right to remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for their defence or of their choice to remain silent.

Analysis

[72] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, KBL, a friend of the complainant, EV, and Corporal 3364 Merewalesi, who was the Investigating Officer in this case.

[73] As I have informed you earlier, the burden of proving each ingredient of the three charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

[74] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.

[75] In this case, it is clear from the evidence that the 2nd Accused was known to the complainant and her friend EV, prior to the date of the alleged incident, which was 15 March 2019. However, it is also clear from the evidence that, the complainant and her friend EV, saw or met the 1st Accused and 3rd Accused for the first time on the date of the alleged incident. Thereafter, the complainant identified the 1st Accused, the 2nd Accused and 3rd Accused in Court; while EV identified the 2nd Accused and 3rd Accused in Court.

[76] Identifying an accused for the first time in court after the alleged incident, when the accused is inside the accused box is known as 'dock identification'. Dock identification is unreliable in the absence of a prior identification in the investigation stage during an identification parade or photograph identification. Therefore, you should consider the evidence pertaining to identification of the accused with caution. It is because the witness may identify the accused merely because he is sitting in the 'dock'. The witness may assume that the accused is the person who committed the crime merely

because he is sitting in the dock. Therefore, it is for you to decide what weight you should give to the evidence of dock identification.

[77] When you consider the evidence on the identification of the accused in respect of each offence, please bear in mind that an honest and a convincing witness can still be mistaken with regard to identity. Mistaken recognition can occur even of close relatives and friends. Recognition may be more reliable than identification of a stranger; but, even when the witness is claiming to recognise someone whom he or she knows, I wish to remind you that mistakes in recognition of close relatives and friends are sometimes made.

[78] Therefore, you should closely examine the following circumstances, among others, when you evaluate the evidence given by the complainant and her friend EV on identification of the accused in relation to each offence;

- a) Duration of observation of each accused person;
- b) The distance within which the observation was made;
- c) The lighting condition at the time the observation was made;
- d) Whether there were any impediments to the observation or was something obstructing the view;
- e) Whether the complainant and EV knew or had seen the accused before;
- f) For how long had the complainant and EV known or seen the accused before;
- g) If not known or seen before or only known or seen occasionally, is there any special reason to remember the accused person;
- h) Duration between original observation and identification; and
- i) Is there any material discrepancy between description given to the Police by the witness when first seeing the accused and his actual appearance.

[79] All these matters go to the quality of the identification evidence. If the quality is good and remains good during the case, the danger of a mistaken identification is lessened. However, the poorer the quality of the identification evidence, greater is the danger of a mistaken identification.

[80] I have already explained to you how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation given by the witness for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.

[81] However, if there is no acceptable explanation given by the witness for the inconsistency or omission 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 and omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission 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 his evidence is inaccurate. In the alternative, you may accept the reason he provided for the inconsistency or omission and consider him or her to be reliable as a witness.

- [82] The three accused totally deny the allegations against them. The defence position is that the complainant is fabricating the allegations of Rape against them. The accused totally deny that they had sexual intercourse with the complainant. The Defence position is that the complainant and her friend EV were drinking at the 2nd Accused's house till the morning of 16 March 2019 and that they were both treated very well. They had no complaints to make at the time they left the 2nd Accused's house.
- [83] The Defence position is that the reason why the complainant is alleging that the three accused raped her was because she had been expelled from her school (South Taveuni Secondary School) due to misconduct and because she required to gain entry to a new school.
- [84] The Defence also suggest that the complainant was too drunk so as to be aware of anything that happened to her that night. On the other hand, the prosecution states that each of the three accused took advantage of the complainant's drunken state and had sexual intercourse with her without her consent.
- [85] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the element of the offences, beyond any reasonable doubt.
- [86] You must consider each count separately and you must not assume that because one count is proved against one accused, that the other accused must also be guilty of the other counts as well.
- [87] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the three accused not guilty of the charges of Rape;*
 - ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of Rape*

have been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.

[88] Any re directions the parties may request?

The State Counsel made no request for re-directions.

The Defence Counsel wanted me to direct the Assessors with regard to the complainant's testimony of what transpired on reaching the Maravu Resort with Master Praveen. In cross examination she agreed that at the Maravu Resort, Master Praveen had asked her for sex. However, the complainant testified that she had told him that she is having her mensus.

Further the Defence Counsel wanted me to direct the Assessors with regard to what the complainant had told Master Shamal when he inquired as to who caused the love bites on her neck. In cross examination she agreed that when Master Shamal had inquired about as to who caused the love bites on her neck, she had told him that her lesbian partner had made the love bites on her neck.

I directed the Assessors accordingly. I directed them when deciding the credibility of the complainant's evidence they should consider the totality of the evidence, including this portion of the evidence.

[89] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately on the charges of Rape against each of the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[90] Your possible opinions should be as follows:

Count 1 against 1st Accused

Rape- Guilty or Not Guilty

Count 2 against 2nd Accused

Rape- Guilty or Not Guilty

Count 3 against 3rd Accused

Rape- Guilty or Not Guilty

[91] I thank you for your patient hearing.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT LABASA

Dated this 5th Day of June 2020

Solicitors for the State : **Office of the Director of Public Prosecutions, Labasa.**
Solicitors for the Accused : **Maqbool & Company, Labasa.**