

- [4] The burden of proof rests throughout the trial upon the prosecution. In our system of justice there is a presumption of innocence in favour of an accused. The prosecution brings the charge against the Accused. Therefore it is for the prosecution to prove the charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.
- [5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty. If you entertain reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of that charge.
- [6] The Accused has elected to give evidence. He was not obliged to give evidence. He does not have to prove his innocence. He does not have to prove anything. However, he has chosen to give evidence. You must take what he has said into account when considering the issues of fact which to determine. It is for you to decide whether you believe the evidence of the Accused or whether it may be true. If the account given by the Accused is or may be true, then the Accused must be found not guilty. But even if you entirely reject the account given by the Accused, that would not relieve the prosecution of its burden of making you sure by evidence of the Accused's guilt in respect of each charge which you have to consider.
- [7] You must decide this case upon the evidence presented to you. If a witness was not called you must not speculate the reasons why the witness was not called. You must only consider evidence which were led in the trial.
- [8] During the complainant's testimony there was an outburst by the Accused from the dock. As a result of that outburst, the complainant gave evidence behind a screen. The giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudice the evidence which the witness give. The outburst of the Accused or the fact that the evidence had been given by the complainant using a screen must not in any way be considered by you as prejudicial to the Accused.

- [9] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state his or her individual opinions orally on the charges against the Accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.
- [10] However it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions. Those opinions must be based solely upon the evidence, that is, the sworn testimony of the witnesses that was called at the trial.
- [11] Neither speculation nor theories of one's own constitute evidence. Media coverage, idle talk, or gossip, are similarly not evidence. Put out of your mind when considering your opinions, anything you may have read in the newspapers about this case. Focus solely on the evidence which you have seen, heard, or examined in this court.
- [12] This summing up is not evidence either, nor are counsel's addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [13] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness's answer is evidence. If he or she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [14] In arriving at your opinions, use the common sense you bring to bear in your daily lives, at home and at work. Observe and assess the witness's evidence and demeanor. You can accept part of the witness's testimony and reject other parts. The witness may have told the truth about one matter and lie about another; he or she may be accurate in saying one thing and be wide of the mark about another.
- [15] If you have formed a moral opinion on the conduct alleged in this case, put that to one side. Consistent with your oath, you should put away both prejudice and sympathy. Approach your assessment of the evidence dispassionately. Bring a cool detachment to

your task of examining whether the case against the Accused has been proved before you, proved with evidence led by the prosecution.

- [16] I turn now to deal with what the prosecution must prove. The Accused is charged with two counts. But you must consider each count separately, when you examine the case in your deliberations. Look at the evidence as it affects each count separately. Your opinions about the charges could differ from one to the other, depending on the view you took on each count and the evidence available on each count.
- [17] On count one, the Accused is charged with assault with the intent to commit rape. To prove count one, the prosecution must prove that at the time and place alleged, the Accused assaulted the complainant with the intention to rape her. An assault in law means a striking, touching or application of force or threat of striking, touching or application of force. The alleged act must be intentional (not accidental) and without lawful excuse and without consent of the complainant.
- [18] The prosecution case is that that the Accused intentionally applied actual force on the complainant by striking and kicking her without her consent and without lawful excuse. The defence case is that the Accused acted with lawful excuse in self defence when the complainant attacked him with a knife.
- [19] Ladies and gentleman assessors, it is both good law and good sense that a person who is attacked or who is threatened with an attack may defend himself. A person attacked or threatened has a right to defend himself and strike a blow if it be reasonably necessary in self-defence. Self-defence does not mean that a person has a right to revenge himself upon an assailant when the danger has passed. He is not entitled to take action which he does not believe on reasonable grounds to be necessary in order to defend himself. In considering the claim by the Accused that he acted in self- defence, the questions to be asked and answered are these:
- Did the Accused believe on reasonable grounds that it was necessary to do what he did in defence of his person?
 - If he had that belief and had reasonable grounds for it, or if you the assessors are left in reasonable doubt about the matter, then the accused is entitled to be found not guilty on count one.

- [20] On the other hand, if you are satisfied beyond reasonable doubt that the Accused did not believe that it was necessary to do what he did in self-defence or, if you accept that he may have had the belief but you are satisfied beyond reasonable that he did not have reasonable grounds for holding that belief, the claim of self-defence fails. In determining whether he had that belief and had reasonable grounds for holding it, you must have regard to the circumstances as the Accused genuinely regarded them to be at the time.
- [21] There is a fundamental point in relation to the claim of self-defence which must be taken into account by you when you consider this question, and it is this: the onus is not on the Accused to prove that his act was done in self-defence. Because the Accused claims that he acted in self-defence, the law requires the prosecution to prove that he was not acting in self-defence. So, the prosecution must prove beyond reasonable doubt that the Accused was not acting in self-defence before you can find him guilty.
- [22] If you feel sure that the assault on the complainant was not an act of self-defence, then go on consider the second element of the charge, namely, whether the Accused intended to rape the complainant when he assaulted her, that is, he intended to have sexual intercourse with the complainant without her consent. You decide intent by considering what the Accused did or did not do and by what he said or did not say. You should look at his actions before, at the time of and after the alleged offence. All these things may shed light on his intention at the critical time.
- [23] It is only when you feel sure that the assault on the complainant was not an act of self-defence but was an act with intention to have sexual intercourse with her without her consent that you may express opinions of guilty on count one. If you unsure of guilt on count one, then you must express an opinion of not guilty.
- [24] On count two, the Accused is charged with rape. To prove rape the prosecution must prove three elements.
- [25] First, it must be proved beyond reasonable doubt that the Accused had sexual intercourse with the complainant, that is, he penetrated her vagina with his penis. The prosecution does not have to prove that full penetration occurred nor does it have to prove that the Accused ejaculated.

- [26] Second, the prosecution must prove beyond reasonable doubt that when the Accused penetrated the vagina of the complainant with his penis, he did so without her consent. The term consent means consent freely and voluntarily given by the complainant to engage in the physical act of sexual intercourse. Consent can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated in other ways. Consent obtained after persuasion is still consent. However, the law specifically provides that a person who does not offer actual physical resistance to sexual acts is not, by reason only of that fact, to be regarded as consenting to the sexual acts. A person who submits to sexual acts with another person as a result of threats or violence is, by law, not to be regarded as consenting to the sexual acts.
- [27] In considering whether it is proved that the complainant did not consent, bear in mind when considering the evidence the relationship between her and the Accused. When people enter into living relationship either within or outside marriage they usually contemplate regular sexual relations. In most partnerships, even not entirely happy ones, there is often give and take between the partners on sexual as other matters. A female partner may not particularly want sexual intercourse on a particular occasion but because it is her husband or her partner who is asking for it she will consent to sexual intercourse. The fact that such consent is given reluctantly or out of a sense of duty to her partner, is still consent.
- [28] However, a woman is entitled to say “no” and to refuse to consent even to her husband or her partner. There is a dividing line between a real consent on the one hand and a lack of consent or mere submission on the other. It is for you to decide whether the absence of consent is proved in this case applying your combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case.
- [29] Third, it must be proved that the Accused knew that the complainant did not consent. This is a subjective, and not an objective test. You might ask how, in the absence of an admission by the Accused, the prosecution can prove that the Accused was aware that the complainant did not consent. The prosecution asks you to infer from other facts which it has set out to prove, that the Accused must have known and that he did indeed know.

- [30] If you feel sure that on the alleged time and place, the Accused had sexual intercourse with the complainant without her consent and that he knew she did not consent, then the proper opinion would be guilty on count two. But if you feel unsure of guilt on any of the three elements of rape or if you have a reasonable doubt as to the guilt of the Accused then you must find him not guilty on count two.
- [31] I turn now to summarize the evidence. In doing this it would be tedious and impractical for me to go through the evidence in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.
- [32] You have been provided with a document that contains the agreed facts. For example it is agreed that when the charges arose the Accused and the complainant were in a living relationship. Together they have two children. You must consider the agreed facts as true when you consider the case against the Accused.
- [33] In relating to the alleged incidents the complainant said she was preparing for her daughter's birthday during the day on 15 July 2018 when the Accused approached her for sex in her room. She replied she was busy cooking. She said he was angry at her response and accused her of having an affair. She said he was on hangover from previous night drinking.
- [34] At around 8pm when the complainant entered her room the Accused threw a punch from behind, which landed on the back of her head. She tried to escape but he had locked both doors in the room. He pulled her hand and she landed facedown hitting her forehead on the floor. He stomped her on the back of her neck and kicked her on her arms. While she was being beaten she called out to her aunty who were living with them at that time.
- [35] When she tried to stand up he pushed her and she landed on the bed. He removed her underwear and had sexual intercourse with her. She said he was angry and forceful during sexual intercourse. She tried to resist but her body felt weak. After having sexual intercourse he lay beside her and told her that that is the only thing he wanted. She said

she was crying. She felt physically weak. She wanted to go to the hospital but he stopped her. He told her to lie to the doctor that she had fallen down. She did not go to the doctor that day. She went and reported the incidents two days later and got medically examined.

[36] She was cross examined about an argument that she had with the Accused when she had noticed love bites on him. She said that was a different incident altogether. She said she did not attack the Accused with a knife on 15 July 2018.

[37] The next witness for the prosecution was the aunt of the complainant, Ms Nauluca. She told the Court that on 15 July 2018 at around 8pm she heard the complainant call out to her in distress from her room but she did not intervene because she was afraid of the Accused. She said she had witnessed the Accused using violence on the complainant on previous occasions.

[38] Now Ladies and Gentleman Assessors, you have heard evidence of other acts of violence which are not subject of the charges. It is important that I explain to you the relevance of this evidence of other acts. It was admitted solely for the purpose of placing the evidence of the particular acts relied upon by the prosecution, to prove the charges in the Information, into a true and realistic context. It is confined, in other words, to making the circumstances of the particular offences charged more intelligible. Otherwise, you may wonder about the likelihood of apparently isolated acts occurring suddenly without any apparent reason.

[39] Thus, it is open to the prosecution to lead evidence of other acts of violence between the Accused and the complainant and the circumstances under which the acts took place for instance in the context of domestic violence. However, I must give you certain important warnings with regard to this evidence of other acts, which can be referred to as context evidence. You must not use this evidence of other acts as establishing a tendency on the part of the Accused to commit offences of the type charged, and, therefore, it cannot be used as an element in the chain of proof of the offences charged. You must not substitute the evidence of the other acts for the evidence of the specific offences charged. You must not reason that, because the Accused may have done something wrong to the complainant on another occasion, he must have done so on the occasion charged. The only use you

can make of this evidence if you accept it to be true is to place the charged acts into a realistic context.

- [40] The third witness was the medical doctor who examined the complainant on 17 July 2018, Dr Natuva. Dr Natuva found an abrasion on the complainant's forehead and swelling on her scalp. She did not find any vaginal injuries.
- [41] The Accused in his evidence has given a different version of the events. He said that one the day in question the complainant raised a cane knife on him and that is why he had assaulted her. He said he pushed her and she fell on to the steps. He then stepped on her hand to grab the knife off her. He also threw punches on her forehead and ribs. He denies having sexual intercourse with her on 15 July 2018. At midnight he woke up and saw she was trying to hang herself. He rescued her and took care of her. The next day he asked her for her forgiveness and had consensual sex with her. On 17 July 2018 he left home for work and returned home with another woman.
- [42] Which version of the events you believe as true is a matter for you. If you believe the Accused's version, then he is not guilty of the charges. But even if you do not believe the Accused, then you must consider whether you believe the version of the complainant as true.
- [43] On count one the Accused admits assaulting the complainant. He defence is that he acted in self defence when the complainant attacked him with a knife. It is for you to decide whether the assault on the complainant was committed in self defence, that is, whether the Accused believed it was necessary to do what he did and that he had reasonable grounds for that belief? If you accept that the Accused acted in self defence, then you must find him not guilty on count one. If you feel sure that the Accused did not act in self defence, then go on to consider whether he intended to have sexual intercourse with the complainant without her consent when he assaulted her. If you feel sure that the Accused did not act in self defence but with the intention to have sexual intercourse with the complainant without her consent, then the proper opinion would be guilty on count one.


[44] On count two, the issues for you to consider in summary are:

- Whether the Accused had sexual intercourse with the complainant on 15 July 2018 at Muana village, Tailevu?
- Whether the sexual intercourse was without the consent of the complainant?
- Whether the Accused knew that the complainant did not consent to the sexual intercourse?

[45] The resolution of these issues depends on whether you believe the complainant's evidence that her consent was obtained by use of force by the Accused. If you feel sure that the Accused had sexual intercourse with the complainant by penetrating her vagina with his penis without her consent, and that he knew she did not consent to the sexual intercourse, then you may find the Accused guilty of rape as charged on count two. If you disbelieve the complainant on the use of force by the Accused or if you have a reasonable doubt regarding the guilt of the Accused, then you must find him not guilty on count two.

[46] On each count, your opinions would be either guilty or not guilty. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them. Please now retire to deliberate on your opinions.




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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused