

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 211 of 2017

STATE

V

SAMISONI BALEIMATUKU a.k.a SAMISONI BALEIYAROI

Counsel : Ms. R. Uce for the State.
: Ms. V. Diroiroi for the Accused.

Dates of Hearing : 14, 15, 16, 19, 20 October, 2020
Closing Speeches : 21 October, 2020
Date of Summing Up : 22 October, 2020

SUMMING UP

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

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence

which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy for either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

13. The accused is charged with one count of sexual assault, and one count of rape (a copy of the information is with you).

FIRST COUNT

(Representative Count)

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) and (2) of the Crimes Act 2009.

Particulars of Offence

SAMISONI BALEIMATUKU also known as **SAMISONI BALEIYARO I** between the 1st of December, 2016 and 12th of November 2017 at Nadi and Lautoka in the Western Division, unlawfully and indecently assaulted “AD”.

SECOND COUNT

(Representative Count)

Statement of Offence

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

Particulars of Offence

SAMISONI BALEIMATUKU also known as **SAMISONI BALEIYARO I** between the 1st of December, 2016 and 12th November, 2017 at Nadi and Lautoka in the Western Division penetrated the vagina of “AD” with his penis without her consent.

REPRESENTATIVE COUNTS

Ladies and Gentleman Assessors

14. You will note that both the counts are representative counts, which covers a period between the 1st day of December, 2016 and the 12th day of November, 2017. By a representative count the prosecution alleges that more than one offence as described in the information was committed during the period specified in the count. The law says that it shall be sufficient for the prosecution to prove that between the specified dates mentioned in both the counts at least one offence was committed.
15. To prove count one the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:

- a) The accused;
 - b) Unlawfully and indecently;
 - c) Assaulted the complainant “AD” by touching her breast and licking her vagina.
16. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offence.
17. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
18. The final element of assault is the unlawful use of force on the complainant by touching her breast and licking her vagina.

You should ask yourself:

- a) whether you consider the force which was used in touching her breast and licking vagina was sexual in nature; and
 - b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
19. In this trial, the accused has denied committing the offence of sexual assault he says that he did not touch her breast and lick her vagina near Nasoso as alleged.
20. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by touching her breast and licking her vagina.

21. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then you must find the accused guilty of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused not guilty.
22. To prove count two the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant “AD” with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.
23. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.
24. The first element of the offence is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute and therefore you can accept this element as proven beyond reasonable doubt.
25. The second element is the act of penetration of the complainant’s vagina by the penis. Like the first element this element of the offence is not in dispute you can also accept this element of the offence as proven beyond reasonable doubt.
26. The third element is that of consent, this element is in dispute you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or

fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

27. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
28. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
29. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
30. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
31. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty.
32. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
33. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant

and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.

34. You must be satisfied that the prosecution has proved all the elements of the above offences beyond reasonable doubt in order for you to find the accused guilty of either or both the offences. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or both the offences, then you must find the accused not guilty.
35. In this case, the accused is charged with more than one offence, you should bear in mind that you are to consider the evidence in respect of each offence separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.

ADMITTED FACTS

36. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final admitted facts.
37. The final admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
38. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

39. The prosecution called one witness to prove the charges against the accused.
40. The complainant informed the court that in the year 2016 she was 16 years of age and a year 9 student she was in court because she was raped without her consent on three occasions by the accused. The complainant identified the accused in court.
41. On 7th June, 2017 when the complainant was walking home with her friend Laite after a church practice the accused came in his car and asked for directions to reach the AFL pool. This was the first time she had seen the accused.
42. The accused was accompanied by a girl whose name was Dee. The complainant and her friend got into the car and they showed the accused where the AFL pool was. After this, the complainant and her friend were dropped home.
43. The next time the complainant met the accused was during Diwali in 2017 when she was going home from church with some of her friends at the Nadi Arya Samaj sign board in Waqadra the accused came in his car. He asked her to get in so that he could drop her home. The complainant got into the car leaving behind her friends.
44. On the way the accused told the complainant if he could go to the Shop and Save supermarket to buy something but he never went to the supermarket, he drove the vehicle and parked it near the sign board of Nasoso. The accused asked her whether they could be friends or be in a relationship. The complainant refused and then questioned him if he meant more than a friend or just a friend.

45. In the car the complainant was sitting in the back seat while the accused was driving. When the car was parked, the accused turned towards the complainant and in an angry tone was forcing the complainant to remove her pants and panty. The complainant was scared so she did as she was told. The accused came to the back seat and started touching her breasts then he pulled her dress up and started licking her vagina.
46. The complainant did not agree to what the accused was doing to her. When the accused had opened the front door of the car to come to the back seat she did not leave the car because she was scared. She also did not call out or shout for help because there were no houses around, the car was parked near the road and only vehicles were going past.
47. After the accused had licked her vagina she told him that she wanted to go home. At this time a police car came to go into the Nasoso road so the accused started the car and both left.
48. When the police car came, the complainant did not call out for help although she was trying to open the car door so that she could run away, but she couldn't because the accused was hanging her neck with the collar of her dress.
49. At home the complainant had her shower and she did not tell anyone about what had happened because she was scared of her family particularly her brother. The complainant knew the accused was drunk because she smelt alcohol when he was close to her.
50. During the same year on a Saturday the complainant was in Lautoka with her friend Esita sitting under a tree having lunch. After this, they wanted to take a walk to catch a bus home. While they were on the footpath crossing over to the Jacks shop the accused came in his car. The complainant wanted to run away since she was scared.

51. The accused was also calling Esita the complainant was trying to pull Esita so that they can cross the road. The accused came out of his car and said to the complainant to get inside the car right away, she refused. She could not run away since Esita was inside the car.
52. Esita got inside the car when the accused told her to get in. The complainant wanted to cross the road but he caught her and dragged her inside the car she did not call out or shout because the accused was touching her T-shirt with a knife at her back.
53. From here the complainant was taken to an unknown farm in Lautoka. At the farm the complainant was dragged out of the car and dragged into the bush. At this time, Esita was in the car. The complainant did not shout or yell because she was scared since the accused had a knife.
54. The complainant refused to remove her clothes the accused took a stone and told her that he will kill her. After the complainant removed her clothes the accused put his penis into her vagina and had sexual intercourse with her. The complainant did not agree for the accused to have sexual intercourse with her.
55. The complainant was crying since she was a virgin and it was painful to her. She did not call out or shout for help because there was no one else there. She did not push him away and try to run away because he had a stone and a knife with him. The sexual intercourse was hard and forceful. She was lying down and the accused held her arms, stopping her from moving around.
56. The complainant was lying on the ground which had pieces of beer bottles, glasses and mirrors which injured her back, breast and buttocks. After this, the complainant and her friend were dropped in Lautoka city from where they caught a minivan and went home.
57. The complainant did not report the matter to the police because the accused had told her if she told anyone he will burn her house and if he sees her anywhere he will kill her. The complainant came to Lautoka city in the

accused's vehicle because there was no transport from the pine forest to Lautoka city.

58. The complainant did not go to her home but went to Esita's home and had her shower. She did not tell anyone at Esita's home because of the threats made by the accused.
59. The complainant did not go home since her family knew that she was at Esita's house for the weekend. At about 6pm the same day, the complainant left Esita's house and was hanging around in Namaka. It was a Saturday night the complainant with Esita was at Nasareci church compound waiting for their friends to come from the nightclub.
60. At this time, the police saw Esita and the complainant, while they were having a discussion with the police officers the accused came and said he was their guardian. The accused was forcing Esita to get inside his car so the complainant told the police that the accused was not their guardian.
61. There was an argument between Esita and the complainant because Esita wanted to go with the accused. As a result the police took the complainant, Esita and the accused to the police station.
62. At the police station the complainant made a report about the accused threatening her and the marks on her body and nothing else. She also told the police everything that had happened between the accused and her.
63. In cross examination, the complainant agreed when she got into the car of the accused near Arya Samaj sign board, the accused had not forced her to get in the vehicle she was happy to get in. It was after 8pm that they had stopped at Nasoso.
64. The complainant was referred to her police statement dated 12th November, 2017 which was read as follows:

Page 3, line 1 to line 9

“He was too old for me. He then told me that he’ll help in supporting me through my studies. I told him my brother is there to support me and he stated that he will always be by my side. I refused him all the time. He then told me that if I kept on saying no to him, he will take the knife around and will kill me if he sees me anywhere away from home. I then asked him his name and he stated that his name is Sami and can call him Sam. I then requested him to drop me home and he did. After dropping me I went off to sleep and he left.”

Page 2, line 45

65. *“Nasoso before going there he has said to go on a cruise. I refused but he kept on insisting then went to Nasoso. At Nasoso he told me that he wants to be friends with me.”*
66. The complainant agreed that nowhere she had mentioned to the police about the accused touching her breast and licking her vagina. The reason why she did not tell the police officer recording her statement was because she was thinking about the incident at the pine forest. When it was put to the complainant that at no time the accused had touched her breast and licked her vagina, the complainant stated that she knew it was not in her statement but it was true the accused had touched her breast and licked her vagina.
67. The complainant maintained that she had met the accused in June, 2017 and not June 2016. The complainant was again referred to her police statement which was read as follows:

Page 1, line 7

“I can clearly recall that sometimes in June 2016 I was with one of my friend Laite Kurunaleba, we go to the same denomination and we were returning from choir practice in the night. The choir practice was at Nasareci Church, Namaka.”

68. The complainant agreed she met the accused in June, 2016 and not June 2017. The complainant used to go for car rides and cruise with the accused and Dee in 2016 but not alone with the accused. She agreed that before the sexual encounter with the accused she had gone for a cruise with the accused for about 4 or 5 times. Her first sexual encounter with the accused was at Nasoso.
69. The complainant disagreed that she was in a boyfriend and girlfriend relationship with the accused, however, whenever she wanted money or clothes she would tell the accused who told her that he cared about her and would support her and he always supported her.
70. The complainant denied after June, 2016 until November, 2017 they had frequent sexual encounters. When it was put to the complainant that she had sex with the accused in the pine forest, sugar cane field and even at the accused's house at Sabeto, the complainant stated that all she knows it was at the accused's house at Sabeto.
71. In respect of the Nasoso incident the complainant stated that when she was struggling to get out of the car the accused was hanging her neck and had locked the car, but she did not tell this to the police and therefore it was not in her police statement.
72. When it was put to the complainant that she had called the accused to come and pick her from near Jacks in Lautoka the complainant disagreed. She also maintained that the accused had dragged her inside his vehicle and had threatened her with a knife. The complainant was referred to page 4, line 47 of her police statement which was read as follows:
- “On the 3rd of November, 2017 at about 9.54am I was at Lautoka going to one of the hair salon to cut my hair and I had gone with one Esita then Sami saw us.”*
73. The complainant agreed it was not in her police statement but what she told the court was all true. In respect of what happened at the pine forest, the complainant stated that she went right inside the forest with the accused

while Esita was in the car. They went right inside so that they could have sexual intercourse after both removed their clothes.

74. The complainant stated that it was true that the accused had made her lie on pieces of glass and broken beer bottles. However, she did not tell this to the police. The complainant agreed her police statement was recorded almost 8 days after the pine forest incident.

Ladies and Gentleman Assessors

75. The learned counsel for the accused in this regard was cross examining the complainant about some inconsistencies in the statement she gave to the police when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant with her evidence given in court. You are allowed to take into consideration the inconsistency in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
76. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
77. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.

78. The complainant agreed that her cousin Manaini would join the accused and the complainant for bbq and pizza. On one particular day in 2017 she had invited Manaini to join her and the accused to drink at the house of the accused. The complainant said when she is alone with the accused, he threatens her but not when she has her friends with her.
79. When it was suggested that she could have avoided him altogether, she replied she has no answer for that question. The complainant could not remember that on this night close to midnight she had gone into the accused's bedroom and had sex while Manaini was sitting in the shed.
80. The complainant agreed the allegation of rape would not have been brought up by her if the police had not approached her. She was scared about her family particularly her brother finding out about what was going on between her and the accused.
81. The complainant disagreed that she knew the accused was in a relationship with another woman and that she was jealous of his new relationship or that he would stop giving her what she would ask for.
82. The reason why the complainant wanted to help the accused after having reported against him was because the accused had helped her when she was pregnant last year that is in 2019, when it was put to the complainant that the matter was reported in 2017 the complainant said she had no answer.
83. When it was put to the complainant that she wanted to help the accused after she had lodged her report because she knew the allegations she had made were all false the complainant agreed and stated her allegations were all false.
84. In re-examination the complainant stated that she would go for car rides, call the accused and ask for money after the incident at Nasoso. When the complainant was asked to explain the reason for this, she told the court she had no answer.

85. The complainant stated that at the pine forest she removed her clothes because the accused was forcing her when the complainant was asked to explain why it was not in her police statement that at Nasoso the accused was trying to hang her neck and that the accused made her lie down on pieces of broken beer bottles, the complainant said she does not have any answer for that.
86. After the Nasoso and the pine forest incidents the accused would take the complainant and her friends for bbq and pizza when asked to explain why this was happening the complainant said she does not have any answer.
87. The reason why the complainant had agreed that she had contacted the accused and had felt sorry for him after the incident was reported was because he had helped and cared for her.
88. The complainant stated the allegations she raised were true when she was asked to clarify why she had said her allegations were false during cross examination the complainant said she had no answer.
89. This was the prosecution case.

Ladies and Gentleman Assessors

90. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.
91. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also called one witness.

DEFENCE CASE

92. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath and also called one witness which you must take into account when considering the issues of fact which you are determining.
93. The accused informed the court that in 2016 he was living at Sabeto, Nadi in his farm house. He met the complainant for the first time in 2016 at Namaka, Nadi when he was driving with a friend by the name of Dee.
94. Dee recognized the complainant who was standing by the roadside the accused stopped the car. The complainant showed them where the AFL pool was in Namaka. The following week on Friday the accused met the complainant after she called him to pick her. The complainant had asked Dee for the mobile number of the accused.
95. The complainant had called him between 8 and 9pm. He went and picked the complainant and then both went to pick Dee who was not at her home. Both the complainant and the accused had their dinner and then he dropped the complainant at her home. By this time it was 11pm to midnight.
96. According to the accused they didn't talk much because he had to do his taxi business so he informed her he won't be hanging around for long. Thereafter the complainant used to call him and they met about 4 to 5 times.
97. During these times they used to go and sit around, at times they bought bbq, sometimes he bought drinks for the complainant and her friends, and sometimes he dropped her at the nightclubs and then dropped her home.
98. The accused knew he had a good and strong relationship with the complainant since whatever she needed he supported her eventually they were to get married. The reason he fell in love with the complainant was because of the hardship she was going through.

99. The complainant used to visit his farm in Sabeto sometimes for the whole day or for 2 days, sometimes she comes with her friends and they spent 2 to 3 days together. After meeting each other for about 4 to 5 times the first time they had sexual intercourse was in a motel in Lautoka they had come for dinner and then they ended up paying for a room. After this, their love grew stronger and more intimate.
100. In respect of the incident at Nasoso, the complainant was sitting in the front seat he had parked the vehicle near the airport on the road before Nasoso. Since they were sitting close to each other, the accused started touching her hands and then both agreed to have sex so they went to the backseat removed their clothes and had sexual intercourse.
101. According to the accused every time the complainant calls him they used to have sex sometimes after 2 or 3 days. The accused stated that the complainant had lied when she said he had forcefully touched her breasts and licked her vagina.
102. In respect of the pine forest incident, it was 3rd November, 2016 the accused had started work he went to Lautoka to pick his employer's car. When he was in Lautoka, the complainant called him to pick her from Narara Parade near Jacks shop. It was Friday the accused came, the complainant was with Esita the road was busy as he stopped the vehicle the complainant sat in the front seat and Esita at the back seat.
103. The accused denied he had dragged the complainant into the car and that he had a knife with him which he had held at her back. They went to the motel but it was full so they went up to the pine forest in Tavakubu to have sexual intercourse.
104. At the pine forest the complainant and the accused left the car with Esita sitting in the car. In the forest both removed their clothes and had sexual intercourse. The complainant was not lying on pieces of glass and broken beer bottles and she was not crying since the accused took good care of her and did not force her.

105. After having sexual intercourse the complainant asked him that she wanted to have a haircut and she also asked for some money to buy clothes for herself and Esita. The accused gave her \$80.00.
106. The accused said they had a boyfriend and girlfriend relationship as part of the relationship he used to buy the complainant her clothes, drinks and cigarettes. The complainant would always come to his house with him, clean the house, sometimes cook and wash the clothes.
107. One early morning at about 1am when passing through Namaka he saw the complainant and Esita standing by the road. At this time Esita and her elder sister were staying with him so he stopped his taxi to pick Esita. Esita wanted to get in his vehicle but the complainant told Esita not to. At this time there was an argument when he was pulling Esita into the car the police came and took all of them to the police station.
108. At this time, the relationship between the complainant and the accused was not good and both were not in good terms. The reason why the accused and the complainant were not in good terms was because he was with another girl by the name of Lusiana and the complainant was in another relationship. They were not in good terms for about two weeks but the complainant was calling him often and kept apologizing.
109. When the complainant gave her report at the police station he was there he was shocked and did not expect this from her. He even tried to commit suicide in the cell block because he could not believe what he heard.
110. The accused maintained that he did not have forceful sexual intercourse with the complainant at the pine forest and also he did not touch the breast or lick the vagina of the complainant at Nasoso. According to the accused the allegations were false.

111. On one occasion the accused had picked the complainant and Manaini from Waqadra. Manaini was the complainant's friend and they came to his house at Sabeto at about 8pm to 9pm on a Friday. The accused bought 6 bottles of beer which all of them drank. The accused was sitting with the complainant and they were holding hands. Shortly after, the accused and the complainant went into the bedroom, both took off their clothes and had sexual intercourse.
112. Afterwards he dropped Manaini at home whereas the complainant was dropped at the After Dark nightclub by the accused. The accused said the complainant lied in court and he did not do the bad things she told the court.
113. In cross examination by the state counsel the accused agreed that he had met the complainant in 2016 and by her appearance she was a young person. After the complainant had shown him the AFL pool he had dropped her home and he had told her that he will pick her on Friday which he did.
114. The accused denied that he would call the complainant to take her for a cruise but he used to take the complainant and her friends for bbq, pizza and drinking but not to the nightclub.
115. The accused maintained that he and the complainant were in a boyfriend and girlfriend relationship. He denied that he had asked the complainant to be in a relationship but she only wanted to be a friend. He also denied that in 2016 he was in a relationship with someone else according to him it was an "on and off" thing nothing serious.
116. The accused agreed that at that time he was in a defacto relationship with one Masi, however, he left Masi and began a relationship with the complainant.
117. The accused agreed when his counsel had cross examined the complainant she was not asked about there being any plans for both of them to get married. However, he denied that he had made this up.

118. The accused denied that the complainant only wanted to be his friend and nothing else. He could not remember his counsel asking the complainant if she had spent about 2 or 3 days at his farm house. When suggested that he had made this up in court, the accused denied this.
119. The accused denied touching the breasts and licking the vagina of the complainant instead he said they had sexual intercourse in the car which was consensual. He also denied having forceful sexual intercourse with the complainant without her consent or threatening the complainant or following her around so that she does not tell anyone about what he had done to her, he also denied that this was the reason why he used to give her money and take her for rides.
120. During further cross examination the accused was referred to his caution interview which he had given to the police when the facts were fresh in his mind as follows:

Question and Answer 43:

What happened on that day you stated that you took her to your farm house?

Ans: It was sometimes in the evening when I received a call from "AD" for me to pick her up and I picked her up from behind Nataly shop in Namaka and when she got in the vehicle she asked me to buy some liquor as she wants to drink. I then bought some rum and cola from the liquor shop in Sabeto and we went to the farm house and drink.

121. The accused stated he told the police he bought rum and cola when it was suggested that he had lied to the police because he had bought beer the accused said he had no answer.

Question and Answer 47:

What was the status of "AD" when you having sexual intercourse with her?

Ans: We did not drink much as I only bought about 12 bottles of rum and cola from my point of view she was not drunk.

122. The accused stated that what he told the police was not true since he had actually bought 6 bottles of beer. When it was suggested that he lied to the police, the accused said he had no answer.

123. When the accused stated that he had dropped the complainant at the After Dark nightclub he was again referred to his caution interview as follows:

Question and Answer 49:

What happened after that?

Ans: After that I put on my clothes and she put on her clothes and I came and dropped them again in Waqadra.

124. When the accused was questioned that he had told the police that he had dropped both the complainant and Manaini at their home, the accused said he did not have any answer to the question.

Ladies and Gentleman Assessors

125. The learned state counsel was cross examining the accused about some inconsistencies in his caution interview he gave to the police when facts were fresh in his mind with his evidence in court. Please consider the same principles as I had mentioned to you earlier in my summing up when some inconsistencies were brought about by the defence counsel when cross examining the complainant.

126. In re-examination the accused stated that because of his strong relationship with the complainant he thought that they were in a boyfriend and girlfriend relationship. He came to know later that they were only friends.

127. The accused also clarified that when he was told in court that the age of the complainant in 2016 was 15 years he said he had no answer because he used to pick her during school days. She was not attending school was smoking, drinking and always hanging around with her friends. The complainant had not told him her age.

128. The final defence witness Manaini Nuku informed the court that she came to know the accused through the complainant who was her neighbour. The complainant usually came to her house to use her phone to call the accused and this was how she was able to meet the accused with the complainant and other girls.
129. The witness used to go with the accused and complainant to buy pizza and bbq. In December the complainant had invited her for drinks at the house of the accused at Sabeto. This was not the first night the complainant had invited her for drinks at the house of the accused.
130. At the house of the accused the witness was sitting alone while the complainant and the accused were sitting in a corner. After a while they told Manaini that they were going inside the room to talk.
131. After a while they came out, the witness heard the complainant wanted to go to the After Dark nightclub the accused dropped the witness at her home. From her observations she knew that something was happening between the accused and the complainant on that night they were drinking long neck Fiji Gold beer. According to the witness the complainant would be seen to be hanging around most of the time and she would be staying at home.
132. In cross examination by the state counsel the witness stated that the complainant was related to her from her grandmother's side. On that night only 6 bottles of beer was bought and no other drinks because she was present when the beer was bought. The complainant and the accused did not spend a lot of time in the room according to the witness when they were drinking she saw the complainant and the accused were behaving like girlfriend and boyfriend, laughing and talking with each other.
133. This was the defence case.

ANALYSIS

134. The prosecution alleges that between the 1st of December, 2016 and 12th November, 2017 the accused after becoming friends with the complainant took the complainant near Nasoso where he parked his car. The complainant was sitting in the back seat the accused forced the complainant to remove her pants and panty thereafter he came to the back seat and forcefully touched her breasts and licked her vagina.
135. The complainant was struggling since the accused was hanging her neck with the collar of her dress to stop her from leaving the car. The complainant did not consent to what the accused had done to her.
136. In respect of the second incident the accused had forcefully taken the complainant to the pine forest with her friend Esita. At the pine forest the accused had dragged the complainant into the forest while her friend Esita was seated in the car. In the forest the accused forcefully got the complainant to remove her clothes and got her to lie on pieces of beer bottles, glass and mirror and forcefully had sexual intercourse with her.
137. The complainant did not consent to what the accused had done to her. The complainant was crying but the accused did not leave her. She did not tell anyone because she was threatened by the accused that if she told anyone he will burn her house and if he sees her anywhere he will kill her.
138. On the other hand, the defence case is that the complainant lied to the court that the accused had sexually assaulted her at Nasoso she made a false allegation. If what she told the court was the truth she would have told someone about what the accused had done to her. Since she was afraid of her brother she would have told her sister or anyone else, the fact that after the alleged incident she went home and had her shower and then went to sleep does not make sense.

139. The defence is also saying that the incident at the pine forest cannot be believed as well the complainant had called the accused and both had agreed to have sexual intercourse there was no other place to go to so all three that is the accused, Esita and the complainant went to the pine forest.
140. At the pine forest Esita was in the car while the complainant and the accused walked into the forest both removed their clothes and had sexual intercourse. The complainant went to the car but she did not tell Esita her friend about what the accused had done to her. She wanted to have her hair cut and buy clothes so the accused gave her \$80.00 dropped them in town and left.
141. The defence says the complainant was with Esita and after undergoing such a horrific incident she would no doubt have reported the matter to the police in Lautoka. It cannot be true that the complainant was scared of the accused because the complainant did not go home but went to Esita's house and no doubt the complainant was in a position to tell Esita immediately after and/or Esita's family about what had happened to her.
142. The defence is also saying that if the accused had sexually assaulted and raped the complainant then why is it that she continued to be with the accused going for cruise, eat bbq, pizza and have drinks and/or have an intimate relationship after the incidents. The complainant only cried rape after she was approached by the police at about 1 am in the morning at the roadside 8 days after the pine forest sexual intercourse. The complainant told the court that she would not have told anything had she not been taken to the police station where she made a false report against the accused.
143. The complainant herself told the court that the accused was supporting her financially and that she used to go to his farm house on her own with the accused. The accused was honest enough to tell the court that he had sexual intercourse with the complainant on more than one occasion when the complainant did not say so.

144. The defence finally submits that what the complainant told the court was a lie because the accused was in another relationship and therefore when she was taken by the police for questioning to avoid her family from coming to know about her relationship with the accused she made false allegations against him. She was scared about her family members particularly her brother finding out about what was going on between her and the accused. There are major inconsistencies between what the complainant told the police when things were fresh in mind with her evidence and therefore she should not be believed.

Ladies and Gentleman Assessors

145. You have seen all the witnesses give evidence keep in mind that some witness react differently when giving evidence.

146. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witness is reliable and which one is not. You observed all the witnesses give evidence in court. You decide which witness was forthright and truthful and who was not. Which witness was straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

147. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.


148. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with the other witnesses. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
149. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
150. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
151. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
152. As I have mentioned earlier in this case, the accused is charged with more than one offence you should bear in mind that you are to consider the evidence in respect of each offence separately from the other. You must not assume that because the accused is guilty of one that he must be guilty of the other as well.
153. Your possible opinions are:-
Count one: **SEXUAL ASSAULT**: GUILTY OR NOT GUILTY.

Count two: **RAPE**: GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

154. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.
155. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.




Sunil Sharma
Judge

At Lautoka
22 October, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid commission for the Accused.