

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 203 OF 2017

BETWEEN : **STATE**

AND : **MATEO VALU**

Counsel : *Mr. S. Babitu for the State*
Ms. P. Reddy for the Accused

Hearing on : *28th – 29th of September 2020*

Summing up on : *02nd of October 2020*

SUMMING UP

Ladies and gentleman assessors;

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

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

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

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

ii) An innocent person should never be punished.

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

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

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

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

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

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

8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provide for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept.

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

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

COUNT 1

Statement of Offence

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

Particulars of Offence

Mateo Valu, on the 16th of September 2017 at Nadi, in the Western Division, penetrated the vagina of Losana Ledua 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

Mateo Valu, on the 23rd of September 2017 at Nadi, in the Western Division, penetrated the vagina of Losana Ledua with his penis, without her consent.

18. Now I will deal with the essential elements of the offence of Rape alleged in the counts. Section 207(1) of the Crimes Act reads as;
 207. —(1) Any person who rapes another person commits an indictable offence.Section 207 (2) (a) of the Crimes Act reads as;
 - (2) A person rapes another person if —
 - (a) The person has carnal knowledge with or of the other person without the other person's consent;

19. Accordingly, in this case, to prove the offence of Rape as for the alleged count, the prosecution must prove the following elements beyond a reasonable doubt.
- (i) The accused;
 - (ii) penetrated the vagina of Losana Ledua with his penis,
 - (iii) Without the consent of Losana Ledua; and
 - (iv) Either the accused;
 - knew or believed that Losana Ledua was not consenting; or
 - was reckless as to whether or not she was consenting.
20. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.
21. The second element is penetration of the Losana Ledua's vagina with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration.
22. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the vagina of the complainant, without the complainant's consent.
23. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact, that there was no physical resistance alone, shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;

- i) by force; or
- ii) by threat or intimidation; or
- iii) by fear of bodily harm; or
- iv) by exercise of authority.

24. Apart from proving that the complainant did not consent for the accused to penetrate her vagina with the accused's penis, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
25. It is not difficult to understand what is meant by the words "the accused knew or believed". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina with his penis, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
26. Please remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based upon relevant proven facts and circumstances.
27. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the count of Rape.

28. The following were recorded as the admitted facts by the prosecution and the defense.

- i) That Mateo Valu (hereinafter referred to as the 'Accused') was 28 years of age and worked as a labourer at Kala's Construction at the material time.
- ii) That Losana Ledua (hereinafter referred to as the 'Complainant') was 16 years of age and a form 3 student at the Votualevu College at the material time.
- iii) That since June, 2017 the accused has resided at Voivoi, Legalega in Nadi with his cousin Epeli.
- iv) That the complainant has been residing at Voivoi, Legalega in Nadi since birth with her parents and other siblings.
- v) That the accused was the complainant's neighbor at Voivoi, Legalega in Nadi.
- vi) That the accused would sometimes go to the complainant's house with her brother to drink grog.
- vii) That on the 16th of September 2017, the accused had penetrated the vagina of the complainant with his penis.
- viii) That on the 23rd of September 2017, the accused had penetrated the vagina of the complainant with his penis.
- ix) That later in October 2017, the complainant's father Josateki Basekimoala reported the matter to the police.
- x) That the issue to be determined is whether the complainant consented to the accused penetrating her vagina with his penis on two occasions (16/09/ 17 and 23/09/17).

These admitted facts need no further proof. You should consider them as already proved. If there happens to be any inconsistency between the admitted facts and the evidence, the admitted facts should prevail.

Summary of Evidence

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

- i) Presently she is 19 years old form, 6 student at Votualevu College and lives in Voivoi, Legalega, Nadi with her parents.
- ii) On the 16th of September 2017, a Saturday, in the evening her mother has sent her to the nearby shop to buy sugar. Though her mother asked to go with a younger brother, since he refused to come, she has gone alone.
- iii) She knows Valu, as her brothers know him. She did not know that Valu followed her. Halfway on to the store, she has looked back and had seen Valu following her. He has come and pulled her by her hand to the nearby cassava patch of theirs. Then he has kissed her and having taken off her trousers, has inserted his penis into her vagina. She has been lying down when it is done. She has not consented to it. After a while she has told him 'that's enough' and he has stopped it. Then she has put on her clothes and gone to buy sugar. He has told her to not to tell it to her siblings. Having bought sugar, she has gone straight home.
- iv) She has not told anyone at home as she was afraid. When asked what or why, she was afraid of, she states that she doesn't know.
- v) On the 23rd of September, 2017 her dad has sent her to get mangoes from their mango plantation. While on the way, near the sugar cane field, when she looked back, she has seen Valu following her. He has come and told her whether they can go to the mango tree. At there, he has taken off her clothes and made her lie down on the ground and inserted his penis into her vagina and kissed her.

- vi) At that time she was having a stomach ache and she has not consented him to insert his penis into her vagina. Then she has told him to stop as she was having a stomach ache and he has stopped. Then she has put on her clothes and gone on to look for the mangoes. She has not told anyone of this as she was told by Valu that if she tell someone, he will do something to her and she was afraid. She identifies the accused as Valu.
- vii) This incident came to light as a neighbor, an Indo-Fijian has seen them and told her brothers. Then she has told her brothers and the parents, the truth.

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

- i) The houses in the village are situated at about 10-20 feet apart. She admits knowing Valu prior to the alleged incidents. She has known him by the name.
- ii) On the 16th of September 2017, while going to the store in the evening at around 7.00pm Valu has followed her very close within a distance of a foot or two. When she turned back, he was there. In her statement to the police, she states that while going to the shop, all of a sudden, she saw an I-Taukei man standing there in front of her. Her explanation was that police has not recorded her statement properly.
- iii) She admits that Valu only pulled her to the cassava patch. She has told the police that Valu has dragged her in to the cassava patch. She understands the difference between pulling and dragging and admits that he did not drag her. When he pulled her by her right hand, she did not ask him to leave her as she was frightened. She admits that she did not shout, try to free herself or cry for any help.

- iv) She admits that Valu used to come to her house to drink grog. She further admits that Valu was a quiet person and there was no reason for her to be afraid of him.
- v) She states that she did not tell anyone at home because she was frightened that they will do something to her and to Valu.
- vi) She admits that the name of the perpetrator is not recorded in her statement to the police. She states that she did inform the name to the police. However, the police has not recorded it.
- vii) The said cassava plantation of theirs is about 20 feet away from her house. If she raised her voice, someone at home would have heard it. After the alleged 1st incident, she wore her clothes, went to the shop, bought sugar and went home alone.
- viii) In reference to the 2nd incident, she states that it happened in the morning around 7.00am. She was sent to get mangoes from their mango plantation which was about 1km away. She has gone to get the mangoes without any bag and intended to bring them in her t-shirt. The church is on the way to the mango plantation. The alleged incident happened at their mango plantation.
- ix) She admits stating to the police that;
'The second time was on the 23rd of September on Saturday at about 6.00pm as I was on my way to church alone, when I reached the church I saw him standing near a mango tree.'
- x) She admits of giving two different versions and states what she state in court is the correct version as she was sick and weak at the time of giving the statement to the police. She has been examined by a doctor on the same day. The doctor has not mentioned that she was sick. She further admits that she did not report the matter voluntarily, but did so due to the forcing of her family.
- xi) She states that she gave a statement to the police only once and that was on the 24th of October 2017. When confronted with her subsequent

statement of 18th February 2018, she admits it. She has not mentioned in any of her statements that the alleged 2nd incident occurred while going to pick mangoes. She has mentioned in both the statements that it occurred while she was going to the church.

- xii) Her evidence in regards to the threatening by the accused is much inconsistent and contradictory. She admits of having no reason to be afraid of Valu. On the 23rd, she met Valu close upon her Aunt's house gone passed the church. From there to the mango plantation, she was aware of Valu, following her. Again she contradicts her-self by stating that she was unaware of Valu following her.
- xiii) She states that she did not speak with Valu when she met him. Later she contradicts it and state that they greeted each other and also asked, where is she going. The witness denies that he told her to go to the mango tree as stated by her in the examination-in-chief.
- xiv) She is inconsistent again in regards to whether she was aware of his presence until she reached their mango plantation or not. Further, earlier her stance that he held her by the hand and took her to the mango plantation, was contradicted by her saying he followed her and told her to *"don't look back or do anything, keep on looking forward"*.
- xv) She reconfirms that what she told to the police is incorrect in threatening her after the 2nd incident. Further she contradicts by saying that he did not hold her from her aunt's place but from the church. Her evidence of the place of meeting Valu is much inconsistent and contradictory.
- xvi) Subsequent to the 2nd incident she has not seen Valu until she saw him in the Magistrates' Court. She admits of informing a different version to the police of seeing him thereafter. She admits of giving incorrect evidence to the court earlier of threatening by Valu. When they met they greeted each other, Valu took her hand and told her for them to walk to the mango tree.

- xvii) As you have followed her evidence carefully, I am sure you will notice that there are many more inconsistencies in her evidence as to the way these alleged incidents took place and the backgrounds of each.
- xviii) Ultimately, she agrees that she has had consensual sex with Valu and due to the pressure of her family, complained to the police and her family informed the police of the incident and made up a rape.

31. With leading the evidence of PW1, the prosecution closed their case. The Court being satisfied that there is sufficient evidence adduced by the prosecution covering the elements of the offence decided to call for defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.

And

32. The accused having understood his rights elected to give evidence on his behalf. His evidence was that;

- i) In 2017, he was 28 years old, worked at Kala's Construction and resided at his cousin, Epeli's house in Voivoi, Legalega, Nadi.
- ii) He has known Losana, the complainant and they have met every day, first having met at the volleyball court. He has known her father and brothers and used to go to her house to drink grog.
- iii) By the time of the alleged incidents, he has known her for about a month and they were having a boy-friend and girl-friend relationship between them. She used to call him from her father's mobile phone and they used to go out to talk. Also when at the grog sessions, she used to signal him and they would go to the mango tree behind her house and talk.
- iv) On the 16th of September 2017, evening, he was at Losana's house. He has come there with Losana, after playing volleyball. During their stroll back

from the volleyball court, they have discussed of having sexual intercourse and had agreed upon.

- v) When Losana was asked to go to the store to buy sugar, he has left following her and having caught up with her has walked together. They were playing with each other and when they reached the cassava patch each of them have taken off their clothes and has had sexual intercourse. Having had that, they have worn their clothes and Losana has gone to the store and he has gone to his home. Losana has called him using her fathers' phone at about 4.00am on the following morning and talked of the sexual intercourse they have had in the evening.
- vi) He has met Losana only about twice or thrice a week as she was home most of the time. On Friday, the 22nd of September, 2017 she has called him around 8.00pm and told to meet her on Saturday and she has called him again on Saturday morning and has told him to meet her at the mango tree beside the church at 10.00am. He has met Losana on the 23rd at about 10.30am and gone to pick mangoes. He has proposed her to have sex and she has agreed thereto and having taken off their own clothes they have had sexual intercourse there.
- vii) Thereafter, they have worn their clothes and having picked mangoes they have returned home. Even thereafter, they used to speak over the phone and he used to go to her place for grog sessions. After some time Losana's father took his phone away from Losana and she could not speak to him. He has gone to Losana's house on three days after the 2nd incident and he had gone to Savusavu thereafter and couldn't go there. He came to know of the complaint when her mother phoned him while at Savusavu and told him of the allegations. She has also said that there was a photo taken by an Indo-Fijian of him having sexual intercourse with Losana.
- viii) While they were having sex Losana was having her hands wrapped around him and was also enjoying it.
- ix) He denies raping Losana.

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

- i) In 2017, he was 28 years old and Losana was about 16 years old.
- ii) He agrees that it was not proposed to Losana, when giving her evidence, of any pre-planning of the 1st incident.
- iii) In relation to the way he met Losana just before the 1st incident, he admits that his evidence is different from his statement to the police.
- iv) He denies that he dragged Losana to the cassava patch. He states that they walked in to it holding hands. He denies raping Losana.
- v) He states in evidence that Losana took off her own clothes before the 1st incident. But he has stated to the police that he took off her top and the pants. He admits that what he told police is the correct version.
- vi) Though he testified he met Losana for the 2nd incident at around 10.30am, he admits that he met her at about 6.00am as stated by him to the police and what he told in evidence is incorrect.

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

35. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proved and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence has been proved

beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

36. The Accused has indicated his stance and it was that they had consensual sexual intercourse and he did not rape her. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.

37. With the submission of the accused's stance, one of the three situations given below would arise;

(i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.

(ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.

(iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged count.

38. Any re-directions?

— fear
defilement —

39. Ladies and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

40. Your opinion should be; - *prosecution seeks further directions on absence of corroboration, addressed sufficiently.*

Whether the accused is guilty or not guilty of the alleged two counts of Rape?



Chamath S. Morais

Chamath S. Morais
JUDGE

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