

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 184 of 2020**

**STATE**

**vs.**

**TR**

**Counsel:** Ms. K. Semisi for the State  
Mr. J. Rabuku with Mr. L. Cati for Accused

**Date of Hearing:** 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> January 2021

**Date of Closing Submission:** 20<sup>th</sup> January 2021

**Date of Summing Up:** 21<sup>st</sup> January 2021

---

**SUMMING UP**

---

1. The name of the Complainant and the Accused are suppressed. Hereinafter the Complainant will be referred to as **KJ** and the Accused will be referred to as **TR**.
2. The hearing of this case has now reached its conclusion. I have to sum up the case now. As I explained to you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies to this action. You must accept the law from me and apply all directions I give you on matters of law.

3. Your function is to determine the facts of the case based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I explain it to you, to the facts as you find them to be, and in that way, arrive at your opinion.
4. I may comment on the facts if I think it will assist you when considering the facts. However, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts unless it coincides with your own independent opinion.
5. You must reach your opinion on evidence and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the exhibits tendered as evidence. This summing up, statements, arguments, questions, and comments made by the parties' counsel are not evidence. The purpose of the opening address by the learned counsel for the Prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the Prosecution is not evidence. The closing addresses of the counsel of the Prosecution and the Defence are not evidence either. They are their arguments, which you may properly consider when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss, and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that your opinion does not bind me, but I assure you that I will give the greatest possible weight to your opinions when I make my judgment.

7. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether sympathy for or prejudice against the accused, the Complainant, or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. It would be best if you approached your duty dispassionately, deciding the facts solely upon the whole of the evidence. You have to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

### **Burden and Standard of Proof**

8. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused guilty of the offence.
9. The burden of proof of the charge against the accused is on the Prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words, there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
10. The standard of proof in a criminal trial is "proof beyond a reasonable doubt." It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle in your mind about the accused's guilt that means the Prosecution has failed to satisfy you the guilt of the accused beyond a reasonable doubt. If you find any reasonable doubt about the commission of the offence as charged or any other offence by the accused, such doubt should always favor the accused.

### **Information and elements of the offences**

11. The accused is being charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act and one count of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act and one count of Sexual Assault, contrary to Section 210 (1) (a) of the

Crimes Act. The particulars of the offences are in the information. Hence, I do not wish to reproduce them in the summing up.

12. The main elements of the first count of Rape are that:

- (i) The Accused,
- (ii) Penetrated the vagina of the Complainant with his penis,
- (iii) The Complainant did not consent to the accused to penetrate her vagina with his penis,
- (iv) The accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.

13. The main elements of the second count of Rape are that:

- (i) The Accused,
- (ii) Penetrated the vulva and vagina of the Complainant with his tongue,
- (iii) The Complainant did not consent to the accused to penetrate her vulva and vagina with his tongue,
- (iv) The accused knew or believed or reckless that the Complainant was not consenting for him to insert his tongue in that manner.

14. The main elements of the offence of Sexual Assault are that:

- (i) The accused,
- (ii) Unlawfully and Indecently,
- (iii) Assault the Complainant.

15. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. You have to consider whether the accused had indecently sucked the breast of the complainant without any lawful excuse.

### **Separate Consideration**

16. The accused is charged with two count of Rape and one count of Sexual Assault. You have to consider each of these three counts separately. If you find the accused guilty of one count that does not automatically make him guilty of the remaining counts. Likewise, if you find the accused not guilty of one count that does not automatically make him not guilty of the remaining of the counts.

### **Admitted Fact**

17. I now request you to draw your attention to the Agreed Facts, which are before you. They are the facts that the Prosecution and the Defence have agreed without dispute. Hence, you are allowed to consider them as proven facts by the Prosecution beyond a reasonable doubt.

### **Accused**

18. It is the onus of the Prosecution to prove beyond a reasonable doubt that it was the accused who committed these three offences to the Complainant. According to the Admitted Facts, the Defence does not dispute the identity of the accused.

### **Penetration**

19. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the accused/with the tongue of the accused is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

## Consent

20. Consent is a state of mind that can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. A consent obtained through fear, by threat, by the exercise of authority, by use of force, or by intimidation, could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
21. The Complainant must have the freedom to make a choice. It means that she must not be pressured or forced to make that choice. Moreover, the Complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
22. If you are satisfied that the accused had penetrated the vagina of the Complainant with his penis and/or penetrated the vagina of the Complainant with his tongue and she had not given her consent, you are then required to consider the last element of the offence. That is whether the accused honestly believed or knew or reckless that the Complainant was freely consenting for these alleged sexual acts. I must advice you that belief in consent is not the same thing as hope or expectation that the Complainant was consenting. You must consider whether the accused knew either that the Complainant was not in a condition or a position to make a choice freely and voluntarily, or the Complainant had made no choice to agree to the sexual act. If you conclude that the accused believed or knew that the Complainant was consenting. In that case, you must then consider whether such a belief of the accused was reasonable under the circumstances that were prevailed at the time of the alleged incident.

### **Evidence of Corroboration**

23. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the Complainant and accept it as reliable, credible, and truthful, you are not required to look for any other evidence to support the account given by the Complainant.
24. One or more of you may have assumptions as to what constitutes Rape, what kind of person may be the victim of Rape, what kind of person may be the rapist, or what a person is being raped will do or say. Though such assumptions are natural in ordinary life, you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist, or a victim of Rape.
25. Offences of this nature can occur in any circumstances between any person who acts in various ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses during the hearing.
26. It is your duty to assess the evidence to determine whether the accused has committed this crime to the Complainant. In doing that, you must be mindful not to bring in to the assessment of the evidence any preconceived views as to how a victim of Rape in a trial such as this should react to the victim's experience. Every person has his or her way of coping with such an incident. Some may display apparent signs of distress, and others may not. Demeanours of the Complainant in the Court while giving evidence is not necessarily a clue to the truth of the Complainant's account.

### **Evidence of the Prosecution**

27. Let me now remind you of the evidence presented by the Prosecution and the Defence during the hearing. This is a very short hearing, where the Prosecution adduced the

evidence of two witnesses and the Defence presented the evidence of two witnesses. I trust that you have heard those evidence and still could recall them.

28. According to the Complainant's evidence, she had gone to Vilma's canteen to buy some groceries in the morning of that particular day. Since the groceries she wanted to purchase were not available at Vilma's canteen, Vilma had told the Complainant to go back to her house. When the Complainant came out, she saw the accused was standing near the drain, in front of his house. The accused was standing about ten meters from the place where she was standing. She was standing near the pole of the clothes line. The accused had called the Complainant, but she had refused. The accused then approached her and blocked her mouth with his hand. He then dragged her towards his house from her hand. She had screamed, but the sound did not come out as her mouth was blocked by the accused.
  
29. During the cross-examination, the Complainant explained that the accused had dragged her to the drain and then lifted her with his hand to the house. He was still blocking her mouth with his other hand. While still blocking her mouth with his hand, the accused had locked the door with his other hand. He then put her on the blanket, which was on the floor. He grabbed a piece of cloth and tied her mouth with it. The Complainant had screamed, but the sound did not come out as her mouth was tied with the cloth. The accused then removed his shorts and also the shorts and undergarment of the Complainant. He then started to lick her vagina. The Complainant's hands were free, but she did not untie the cloth as it was tightly tied up. The accused then pulled her t-shirt up and started to suck her breast. While doing that, he penetrated the vagina of the Complainant with his penis. The Complainant had tried to push him away with her hands and legs, but he was heavy. Irrespective of her resistance, the accused had continued the sexual intercourse for about 5 to 10 minutes. He then removed his penis from her vagina and breathed heavily. He smiled at her, telling her to put her clothes on and go home. She had felt pain in her vagina. The Complainant said that she did not consent to the accused to penetrate her vagina with his penis and tongue.



30. After the incident, she had gone home and had her bath. The Complainant had not informed anyone else about this incident. The accused had threatened her twice that if she tells anyone about this incident, he will hurt her. The Complainant was scared of the accused. You heard that the Complainant said during the re-examination that she did not want to tell her school friend or the friends at the Sunday school about this incident because they would spread this in the community. She was scared that her family would blame her if she told them.
31. One of her grandmothers came and told her mother about the rumours of the accused and the Complainant. The mother then asked the Complainant about this. The Complainant then explained to her mother everything that the accused did to her. On the following day, they had gone to the Totogo Police Station and reported the matter. The statement given to the police by the Complainant states that this incident took place on the 29th of June 2018. However, she had made another statement on the 30th of July 2018, saying that she could not correctly recall the date of this incident.
32. In her evidence, the Complainant said that she is aware of the dispute between the family of the accused and the family of Kaerua. Kaerua had gone to the Lami Police Station to report this incident before the Complainant reports it to the Totogo Police Station. The wife of the accused and the Complainant are related as cousins. According to the Complainant, she only visited the accused' house with her parents. The accused's wife had confronted the Complainant about this allegation, and the Complainant had told her that what she alleges is true.
33. The second witness of the Prosecution is Nikoia Rotan, the mother of the Complainant. One Baitepure came and told her about the rumours that she heard from Kaerua about her daughter and the accused. She then asked the Complainant about it. The Complainant explained everything that the accused did to her. The Complainant had told that this incident took place on the 29th of June 2018. They had then gone to Totogo Police Station and reported the matter. According to Ms. Rotan, she is unaware that Kaerua had

gone and reported this matter to Lami Police Station. According to Ms. Rotan, the Complainant usually goes to the accused's house with her young siblings.

### **Evidence of the Defence**

34. After the Prosecution's case, the accused was explained about his rights in Defence. The accused opted to give evidence and also called one witness for his Defence. I will now proceed to summarize the evidence presented by the Defence briefly.
35. The accused, in his evidence, denied this allegation, stating that it is a false allegation. The accused explained about the dispute he and his wife had with Kaerua and his wife. The accused had first heard about this allegation from one police officer Toji, a neighbour of Kaerua. He had then gone and confronted Kaerua about this allegation.
36. You have heard that the accused said, during the cross-examination, that his family and the Complainant's family were in the good term before this allegation. The Complainant and her family had nothing to do in the dispute between the accused's family and Kaerua's family. The Complainant and her family were not involved in that dispute. Therefore, the Complainant had no reasons to make up this allegation. However, the accused said that he did not do this crime.
37. The first witness of the Defence is Vilma Low. She is running a small canteen in the village since December 2019. Her house is situated about seven to ten meters away from the accused's home. The clothesline and the pole are located in front of her house. She could recall that in December 2019, the Complainant had come to her canteen several times. One of those occasions, she had told the Complainant that the items she came to purchase were not available.
38. I have summarized the evidence presented during this hearing. However, I might have missed some. It is not because they are not important. You have heard every item of

evidence. I only wanted to draw your attention to the main items of evidence and recall yourself of the evidence.

### **Analysis and Directions**

39. The Prosecution alleges the accused had committed these offences as stated in the information. The Defence claims that the accused had never done such a crime to the Complainant. Accordingly, you have to decide whether this alleged incident took place as claimed by the Prosecution. To do that, you have to determine the reliability and credibility of the Prosecution and the Defence's evidence.

### **Evaluation of the Evidence**

40. I now take your attention to the direction of evaluation of the evidence. The evolution of evidence consists of two main steps, the determination of the reliability and the credibility of the evidence.

### **Reliability of Evidence**

41. You must be satisfied that you can rely on the evidence as reliable evidence. To do that, you have to be satisfied that evidence is free from mistakes, errors, and inaccuracies. If you find the evidence is free from such mistakes, errors, and inaccuracies, you can consider the evidence as reliable evidence.

### **Credibility of Evidence**

42. The assessment of the credibility of evidence does not concern the unintended inaccuracy, mistakes, or errors. It focuses on the lies or inaccurate facts that are intentional and motivated attempts to deceive.

43. Evaluation of the reliability and credibility of evidence will help you determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to decide whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
44. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear, and or feel what the witness is talking in the evidence. You must then consider whether the witness's evidence is probable or improbable, considering the circumstances of the case. Apart from that, you are required to consider the witness's consistency not only with his or her evidence but also with other evidence presented in the case.
45. It is your duty to consider the witnesses' demeanour, how they react to being cross-examined, and re-examined and were they evasive to decide the witness's credibility. Moreover, you must bear in mind that 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 accurate in another thing.

### **Case of the Defence**

46. Let me now take your attention to the defence of the accused. The accused is not obliged to prove his innocence and also not required to give evidence. However, in this hearing, the accused not only elected to give evidence on oath but also called a witness to give evidence for the Defence. Therefore, you have to take into consideration the evidence adduced by the accused and his witness when you determine the issues of fact of this case.
47. Accordingly, it is for you to decide whether you believe the evidence given by the Defence. If you consider that the account given by the Defence is or may be true, you must find accused not guilty.

48. If you neither believe nor disbelieve the version of the Defence, yet, it creates a reasonable doubt in your mind about the Prosecution's case. You must find the accused not guilty.
49. Even if you reject the version of the Defence that does not mean that the Prosecution has established that the accused guilty to these offences. Still you have to satisfy that the Prosecution has established on its own evidence beyond reasonable doubt that the accused has committed these offences as charged in the information.

### **The Dispute between the Accused's family and Kaerua Family**

50. As I explained to you before, you have to make your opinion based on the evidence presented during the hearing. You can make inferences of some facts and incident based on the evidence you have accepted as true. Drawing of inference is a process by which you find from evidence which you regard as reliable, that you are driven to a further conclusion of fact. It is not a process of speculation or guessing.
51. The Complainant does not dispute the dispute between the accused's family and the Kaerua's family. The Complainant did not dispute that Kaerua had gone to Lami Police Station regarding this incident. However, in his evidence, the accused stated explicitly that his family and the Complainant's family were in the good terms before this allegation. The Complainant and her family had nothing to do in this dispute. The Complainant and her family were not involved in that dispute. Therefore, the Complainant had no reasons to make up this allegation.
52. There is no evidence or suggestion by the Defence to establish or for you to make any inferences that the Complainant had made up this allegation because of the dispute between the accused's family and the Kaerua's family. Therefore, if you accept the evidence regarding this dispute as true, it can only establish that Kaerua had informed the Lami Police Station about this matter and nothing else.

### **Evidence of Recent Complaint**

53. You have heard that the Complainant had told her mother about this incident. The Complainant's mother, Ms. Rotan, gave evidence explaining how the Complainant related this incident to her and the subsequent steps that she took in this regard. This form of evidence is known as evidence of recent complaint. It is not evidence as to what actually happened between the Complainant and the accused. The mother of the Complainant was not present and witnessed what happened between the Complainant and the accused.
  
54. You are entitled to consider recent complaint evidence to decide whether or not the Complainant has told the truth. The evidence of recent complaint helps you determine the consistency of the Complainant's evidence and assess the reliability and credibility of her evidence. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. You must still understand that recent complaint evidence is not independent evidence of what happened between the Complainant and the accused.

### **Contradiction and Inconsistencies**

55. You have heard the Complainant's evidence regarding her visits to the accused's house and talking to the accused. She initially said that she has never been to the accused's home and has never spoken to the accused. However, as she continued in her evidence, she said that she had visited the accused's house on a few occasions with her parents. The complainant's mother said that the complainant usually accompanied her siblings when she visits the accused's house. Moreover, you have heard the Complainant's evidence regarding this alleged incident where she explained the manner the accused had dragged and carried her to his house. Initially, she said he dragged her to his house, but then explained that he carried her to the house from the drain. If you find these evidence contradicting or inconsistent, you could consider it when you evaluate the Complainant's evidence.

56. Moreover, you have heard that the learned counsel for the Defence cross-examined the Complainant about the inconsistent nature of her evidence given in the Court with the statement that she made to the police. The first statement, made to the police, states that this incident occurred on the 29th of June 2018. However, in her second statement, she had said that she could not correctly recall the exact date of this incident. The Complainant confirms the second statement's position during her evidence, stating that she could not recall the precise date of this incident. Moreover, it has not been recorded in the first statement that the accused had carried her to the house from the drain.
57. You are allowed to consider such inconsistencies when you consider the credibility and reliability of the evidence given by the Complainant. However, previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the Court.
58. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible, and you might not expect every detail to be the same from one account to the next. The victims of rape react differently to the trauma and the experience they have gone through, especially in revealing those incidents to another person. Such traumatic incidents happen suddenly without any prior warning. Therefore, it is difficult for the victim to observe and remember every detail of the ordeal she had gone through. The Complainant explained that it was her first such a traumatic experience, and she was frightened and scared during this incident.
59. If you find an inconsistency, it is necessary first to decide whether it is significant and whether it affects the reliability and credibility of the issue you are considering. If it is substantial, you will next need to 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 in your judgment of the reliability of such witness.

## Delay

60. You may recall that the learned counsel for the Defence emphasized the delay in reporting this matter to the police. He suggested that the long delay in reporting this matter could affect the truthfulness of the complaint against the accused.
61. The Complainant had not informed anyone until her mother asked her about the rumours. She had then explained to the mother about this incident. The Complainant explained in her evidence the reasons for not reporting this incident to anyone else. It is a matter for you to consider and resolve. You have to decide whether there was a delay. If so, then you have to determine whether the delay was substantial. You can then determine whether such a delay would affect the reliability and credibility of the evidence of the complainant.
62. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The Courts' experience is that victims of sexual offences can react to the trauma they have faced in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go-to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise, an immediate complaint does not necessarily demonstrate a true complaint.

## Final Directions

63. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count one, you can find the accused guilty of the said offence of Rape.



64. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count one, you must find the accused not guilty of the said count of Rape.
65. If you are satisfied that the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count two, you can find the accused guilty of the said offence of Rape.
66. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count two, you must find the accused not guilty of the said count of Rape.
67. If you are satisfied that the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged under count three, you can find the accused guilty of the said offence of Sexual Assault.
68. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged under count three, you must find the accused not guilty of the said count of Sexual Assault.

### **Conclusion**

69. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the Court could reconvene.

70. Learned counsel of the Prosecution and the accused, do you have any redirections to the assessors?



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe", written over a horizontal dotted line.

**Hon. Mr. Justice R.D.R.T. Rajasinghe**

**At Suva**

21<sup>st</sup> January 2021

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Office of Law Solutions for the Accused.