

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 148 OF 2013

STATE

VS

PENIASI TABAKANAVANUA

Counsels : **Ms Puamau S.** for the **State**
Ms Rigsby T. for the **Accused**

Dates of Trial : **2nd May – 4th May 2016**

Summing Up : **5th May 2016**

SUMMING UP

Madam and Gentleman Assessors,

- [1] We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear more. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the presiding judge, it is my task to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give you on matters of law. It is also important to note that, if I give you a caution, you have to take it also into consideration, in coming to your opinion.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful and reliable. You will then apply relevant law, to the facts as revealed by such credible evidence. In that way you arrive at your opinion.
- [4] During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent view.
- [5] In forming your opinion, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] It is also important to note that, in forming your opinion on the charge against the accused, it is desirable that you reach a unanimous opinion; that is, an opinion on which you all agree, whether he is guilty or not guilty. However, the final decision on questions of fact rests with me. I am not bound to conform to your opinion. However, in arriving at my judgement, I shall place much reliance upon your opinion.
- [7] I have already told you that you must reach your opinion on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] The evidence is what the witnesses said from the witness box, the documents, the things received as prosecution or defence exhibits and any admissions made by the parties.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since

this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have heard in this Courtroom also are not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening and closing submissions made by Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, another matter which will be of concern to you is the determination of truthfulness of 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 correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.
- [14]** The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every such victim has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15]** The experience of the Courts is that victims of sexual offences can react to the trauma 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. Victim's reluctance to report the incident could be also due to shame, coupled with the cultural taboos existing in their society,

in relation to an open and frank discussion of matters relating to sex, with elders. There is, in other words, no classic or typical response by victims of Rape.

- [16] A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in this matter before us, the lateness of the complaint and what weight you attach to it. It is also for you to decide when she did eventually complain as to its genuineness.
- [17] Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question.
- [18] In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Credibility concerns honesty. Reliability may be different. A witness may be honest enough, but have a poor memory or otherwise be mistaken.
- [19] Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.
- [20] Madam and gentleman, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [21] Having placed considerations that could be used in assessing credibility of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.

- [22] When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the charge. I have used the term “*question of fact*”. A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [23] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence.
- [24] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of Primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [25] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [26] In order to illustrate this direction, I will give you an example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that you will understand the relationship between primary fact and the inferences that could be drawn from them.

- [27] It does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [28] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove. That burden rests on the prosecution to prove the guilt of the accused.
- [29] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. Whether the accused has given evidence or not is immaterial in this regard and it does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [30] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or level of proof, as expected by law?
- [31] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond reasonable doubt. This means that in order to convict, you must be sure that the prosecution has satisfied beyond reasonable doubt of every element that goes to make up the offence charged. I will explain these elements later.
- [32] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence and the other matters of which you must be satisfied, such as identity, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such doubt, then your duty is to find the accused guilty.
- [33] You should dismiss all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion has any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinion.
- [34] Let us now look at the charges contained in the information.
- [35] There is only one charge preferred by DPP, against the accused:

FIRST COUNT

Statement of Offence

RAPE : Contrary to Section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009

Particulars of the Offence

PENIASI TABAKANAVANUA between the 21st and 22nd day of February 2013, at Ono-i-Lau in the Central Division had carnal knowledge of **RUCI LIKUSAUAFU CATI** without her consent.

- [36] As you would have noted there is only one count of Rape. I shall now deal with the elements of the offence of Rape. In order to prove the count of Rape, the prosecution must prove beyond reasonable doubt that the accused penetrated the complainant's vagina by his penis without the complainant's consent. The slightest penetration is sufficient to satisfy this element of the charge of Rape.
- [37] Then we must consider the important issue of consent in relation to Rape charge. It must be proved that the accused either knew that she did not consent or was reckless as to whether she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting but carried on anyway when the circumstances known to him it was unreasonable to do so. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond reasonable doubt.
- [38] A person of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was over 13 years of age and therefore, had the capacity to consent. More directions on the issue of consent will be made as we proceed.
- [39] If you are satisfied beyond reasonable doubt that the accused penetrated the complainant's vagina with his penis without the complainant's consent in the instance as the information revealed, then you must find him guilty to the count of Rape.
- [40] Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence must also be proved by the prosecution. What it means is that it was this accused and none other had penetrated the complainant's vagina on that date and time. There must be positive evidence as to the identification of the accused. However, in this matter identity of the accused is not disputed.
- [41] If you find that the prosecution failed to establish any of these elements in relation to the count of Rape, then you must find the accused not guilty.
- [42] In our law, no corroboration is needed to prove an allegation of Sexual Offence; and Rape is obviously considered as a Sexual Offence.
- [43] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[44] The parties have consented to treat the following facts as “*agreed facts*” without placing necessary evidence to prove them:

1. *Ruci Likusauafu Cati is the complainant (hereinafter referred to as the “the complainant”) in this matter and was residing at Nukuni Village in Lau at the material time.*
2. *Peniasi Tabakanavanua is the accused in this matter.*
3. *The alleged rape occurred in the early morning of 22nd February 2013 at Solove.*
4. *The complainant was 31 years old at the material time.*
5. *On or about 21st February 2013 at around 10.00pm, the complainant drank homebrew with Tagi, Susan, Gade, Orisi and the accused at Solove.*
6. *On or about 24th February 2013 the complainant was medically examined by Doctor Lice Volaisaya.*
7. *On or about 25th February 2013 the complainant reported the alleged rape to the police at Lakeba Police Station.*
8. *On or about 1st March 2013, the accused was Caution Interviewed by PC 4646 Tevita Ledua.*
9. *On or about 4th March 2013 the accused was charged by PC 4329 Jone Seru.*

[45] The prosecution, in support of their case, called the complainant, the Police Officer who interviewed the accused and an Aunt, who is also a nurse practitioner.

Case for the Prosecution

[46] Evidence of the complainant Ruci Likusauafu Cati.

- (i) *It is her evidence that she is originally from Ono i Lau and currently lives with her family in Colo i Suva. She is not married and has no children of her own.*
- (ii) *She returned to Ono i Lau on 1st February 2013 to spend her holidays. She went there with Tagilala Waqa. They stayed in the Nurse’s Quarters with Orisi. She say that Orisi and Tagilala are sexual partners. She indicated her sexual preference as “homosexual”.*

- (iii) *She spent her holiday by fishing, catching mud crabs, collecting coconuts and firewood. In the evenings she would drink grog and were joined by Orisi, Susan, Tagilala and Gade.*
- (iv) *On 21st February 2013 too she spent her evening with them in the Nurse's Quarters and were "yarning". Then they were joined by Mudu and Ben. The complainant knew Mudu already. She knew that Ben was from Nausori but was not formally introduced to her at that time. But she has seen him in the island before that evening. She later identified Ben as the accused. Both Mudu and Ben appeared drunk and they smelt of alcohol. Ben was wearing a red T shirt and blue ¾ pants. They invited the group to drink some home brew and the group agreed. The complainant also joined them as her group has decided to go the accused and Mudu.*
- (v) *The accused then went away and returned with a 22 litre bucket of home brew. She thought it is a lot of home brew for the group. The group went down to the market and have consumed it. As it was beginning to be too noisy, the complainant and Orisi suggested that they move. The group was there for about half an hour.*
- (vi) *Thereafter they shifted to Solove, about 40 meters away. They sat down and commenced drinking again. Only moon light was there. During this time the accused made advances to the complainant. He flirted with the complainant but she did not respond as she found him irritating and not attractive. He also touched her thigh and she pushed his hand away.*
- (vii) *In relation to the incident concerning the count of Rape, the complainant said that after some time Orisi, Gade and Susan left. By then Tagilala was knocked out. The complainant also dozed off to sleep and was lying down on her back. She woke up when she felt something on her vagina. She saw the accused performing oral sex on her. She had then punched the accused on his head and pushed it away. She told him to stop and swore at him.*
- (viii) *The accused reacted by punching her thigh. He then put his penis into her vagina. The complainant then shouted "Kere veivuke" and then swore "kua magaijinamu". She also screamed for help twice. The accused punched her on her face and covered her mouth. He bit her*

neck on both sides. She struggled to resist and tried to push him away. He continued with his act while she struggled.

- (ix) He then went away while the complainant remained lying on the ground. She was shocked. She cried and was in pain. No one came to assist her. She woke up Tagilala after struggling for 5 minutes then returned home with him.*
- (x) The complainant woke up again at 11.00 a.m. as she found it difficult to go to sleep due to her experience. She smelt blood and discovered that there was mucus with blood in her vagina. On 24th February 2013 she was examined by Nurse Practitioner. She reported the incident to Lakeba Police on the following day.*

[47] Evidence of Lice Volaisaya

- (i) It is her evidence that at present she is attached to Ono I Lau Health Centre as a Nurse Practitioner. She has graduated from Lautoka Nursing School in 1977 and had since undergone number of training courses. In 1999 she received Advanced Diploma in Nursing Practice and is qualified to assess, diagnose, treat and prescribe medications to patients. Ordinary nurses are only qualified to do clinical work. She had performed vaginal examinations of over 1000 women in her capacity as a midwife. She also has treated over 100 cases for physical injury to face and body. She resides in the Doctor's Quarters at Ono i Lau in the absence of a doctor.*
- (ii) The complainant is her husband's niece. The witness described the complainant as an independent person and would not mingle with most of people. In February 2013, the complainant came to Ono i Lau and spent her time by fishing, crabbing, cooking and she would have grog in the night. She came with Tagilala and stayed at the Nurses Quarters but would come to the witness only for her meals.*
- (iii) On 24th February 2013 at about 2.15 p.m. the complainant came up to the witness and asked whether she would see her at the Health Centre as she had a problem. The complainant then complained to the witness of vaginal pain and painful urination for the past three days. She appeared depressed as she was in tears and was slow to respond to a question. The complainant was ashamed to share her story with*

the witness but revealed that she was raped by a man two days ago, on early morning of the Friday before.

- (iv) *Upon this history, the witness had conducted a physical examination of the complainant from “her head to toe”. She observed a swelling and discoloration of the right eye, marks on the neck, swelling with discoloration of right thigh. Vaginal examination of the complainant revealed two lacerations in the vagina due to direct application of force.*

[48] Evidence of DC 4646 Tevita

- (i) *This witness has served in the Police for past 16 years. He stated that the accused was arrested on the 1st March 2013 on board a vessel. According to him, the accused first stated his name as Peni Tavaga and a routine checking done subsequently revealed that his name is Peniasi Tabakanavanua.*
- (ii) *Referring to his caution statement, in Q21 when asked by the witness “after Liku pulled down her trousers, then what you do?” the accused replied “We have sex; I use my tongue in her vagina.” In Q24, the witness asked “what happened next” and the accused answered “I pull down my trousers to have sex with her”.*
- (iii) *These two questions and corresponding answers were marked as **P. E. No. 1A and 1B** by the prosecution with the consent of the accused.*
- (iv) *The witness then tendered the Birth Certificate of the accused marked as **P.E. No. 2**.*

[49] That was the case for the prosecution. You then heard me explaining several options to the accused. I explained to him that he could remain silent or give sworn evidence and call witnesses on his behalf. He could also address Court. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests on prosecution at all times. The accused opted to remain silent, exercising his legal right to do so.

Analysis of all evidence

[50] The prosecution relied on the evidence of the complainant, her Aunt and a Police Officer to prove its case while the accused opted to exercise his right to silence.

- [51] Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty to the count of Rape, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved all the elements of the offence of Rape, beyond a reasonable doubt.
- [52] At the beginning of this summing up, I described some considerations you might want to apply to the evidence in order to satisfy yourselves as to the truthfulness and reliability of the evidence. One such consideration is whether the complainant complained about the act of sexual aggression without a reasonable delay. If a prompt complaint is made, although not necessarily, it supports the proposition that opportunity to fabricate a false allegation is less, as there is little opportunity to the complainant to carefully think it over.
- [53] The evidence of the complainant is that after the alleged act, she had returned home and slept. She woke up at about 11.00 a.m. on the following day. The complainant said that after discovering blood and mucus, she had told what happened to her to Orisi and Tagilala. However these two witnesses have not given evidence. After this, the first person she complained about this incident is her Aunt and that too on the 24th February 2013 at about 2.15 p.m. There is a delay of two days. She appeared depressed and tearful when she narrated the incident and did not mention the name of the accused. She merely said a man had raped her. The complainant said she was embarrassed when she saw bite marks on her neck as people in the village would talk about it.
- [54] It is for you to consider whether there is any delay in making the allegation. Promptness of her complaint could, of course, enhance credibility of the complainant as a truthful and reliable witness. However, if you consider that she made her allegation promptly having considered the circumstances, you must also remember that this is not an accurate indication of the truthfulness of the allegation.
- [55] Another consideration would be the consistency of her allegation. In dealing with the issue of consistency, I shall first refer to the evidence of the complainant since she is the main witness for the prosecution. It is revealed in evidence that she stayed with her family at Colo I Suva. During her cross examination, it was elicited that in her statement to Police she stated that she stayed with her Uncle in Ono i Lau.
- [56] It was also elicited during the cross examination of the complainant that she complained to her Aunt two days after the incident. Her Aunt, in her evidence said that according to what the complainant said the incident happened three days ago.

- [57] These are the inconsistencies in the prosecution case. Considering these items of evidence, it is your responsibility to decide whether the complainant was consistent in her evidence and; whether and to what extent these admitted inconsistencies affect her truthfulness and reliability as a witness.
- [58] Similarly you have to consider any inconsistency in the version advanced by the accused and decide its effect on truthfulness of his claim. I must caution you, that It is important to remember that the accused elected to exercise his right to remain silent and as a result there is no evidence placed before us by the accused, other than the suggestions put to the prosecution witnesses. You must be careful not to draw any adverse inference against the accused in exercising his legal right. But you have to consider his suggestions, as the version of events he wants you to take note.
- [59] The accused, during his cross examination of the complainant suggested that it was consensual sexual intercourse. It is also revealed from the Police officer's evidence that the accused had told Police that the complainant had pulled down her trouser. It was also elicited that the accused has said to Police that *"We have sex; I use my tongue in her vagina."*
- [60] When dealing with the contents of his statement made to Police, I must caution you how to use them. What the accused said to Police can only be used to evaluate whether he was consistent on his claim or not. You cannot use the contents of the statement to determine any questions of fact as they are not evidence before us.
- [61] The prosecution claimed that the accused had given a false name and had therefore uttered a lie to the interviewing Police officer. By this item of evidence, the prosecution wants you to consider the position advanced by the accused could not be relied upon as he had lied. The accused points out that it was natural to iTaukei people to have many names, which are used by relatives and friends as a form of address and the Police officer only says that the name given by the accused is different to the name of the accused, recorded in his birth certificate and therefore, it need not necessarily be a lie.
- [62] It is your responsibility to consider these conflicting claims and then decide whether in fact he lied to the Police, and if he did; then the effect of that on his version of events. If you conclude that he did not lie but it was due to a misunderstanding, then you must consider the weight you attach to the accused's version.
- [63] As you did with the complainant's evidence, you must employ same yardstick in evaluating the truthfulness of the position advanced by the accused. Here also it is your responsibility to consider whether the position advanced by the accused is consistent and if it is or not, then to what extent it affects truthfulness of the position advanced by the accused.

- [64] In addition to above mentioned considerations on evaluation of evidence; there is another factor in considering whether the evidence of the prosecution and the accused are truthful and reliable. That is the relative probability of the versions of events as presented by the parties.
- [65] The evidence of the prosecution is that complainant had dozed off to sleep after consuming some home brew. She woke up again when she felt something on her vagina. Then she opened up her eyes and saw the accused engaged in oral sex with her. She had then swore at the accused. She punched him on his head and pushed it away. Then the accused, having punched her thigh, had then put his penis into her vagina. He closed her mouth and punched her on the face. She struggled and had screamed twice calling for help. The accused had overpowered her and had continued with the act. Thereafter, he left her. She had then woken up her cousin who was "*knocked out*" and laid beside her, and headed home.
- [66] The accused presents a slightly a different picture. Through the suggestions he put to the complainant, he denied committing Rape. It is his claim that the complainant was consenting to sexual intercourse. Upon seeing the bite marks on her neck, being embarrassed by it, she has made up this claim that he raped her without her consent.
- [67] On the question of relative probabilities, I wish to place the following considerations also for your consideration.
- [68] The accused wants you to consider the complainant should have woken up when her garments were pulled down. When they had sex, Tagilala was just at arm's length away and if she screamed he could have heard it. Why he did not hear her shout was that she never shouted. In addition, she could have simply woken him up, when the accused had forced himself upon her. She did nothing. Then after the act she could have complained to her cousin as to what the accused did. She did not complain. She discovered blood only on the next day although she walked home soon after the incident. The bite marks on the neck of the complainant are love bites resulted after consensual sexual activity.
- [69] The prosecution on the other hand wants you to consider that the complainant was of a different sexual orientation and had no interest in the accused. In fact she found him irritating. There was heavy consumption of alcohol by the group and the accused made use of the opportunity when she became isolated from the group and dozed off to sleep due to intoxication. The prosecution wants you to consider as to why the complainant would fabricate an allegation of Rape as there were no witnesses to the admitted sexual act, except for the bite marks on the neck.

- [70] There could be many other probabilities you would like to consider arising out of the evidence placed before us. You may consider all these probabilities and should decide which version is the more probable one, based on your common-sense.
- [71] Another consideration in evaluating evidence for its truthfulness and reliability is the manner of each witness in giving evidence.
- [72] You will recall the complainant paused for some time before she answered to the suggestions that anyone would wake up if someone were to pull her pants down, if she screamed then Tagilala should have woken up and she could have woken Tagilala up simply by touching him, who was at arm's length. Please consider her demeanour in the witness box in relation to truthfulness and reliability of her evidence.
- [73] The prosecution called the complainant's Aunt, a Nurse Practitioner who had issued a medical report, after examining the complainant's body. In evaluating her evidence for truthfulness and reliability, you must consider two aspects. Firstly whether she is a competent witness to express an opinion on the injuries she has seen on the complainant, in the absence of any Doctor? Secondly was her evidence on the events and her professional findings are tainted with partiality due to her relationship with the complainant? You have to consider both these aspects and must decide what weight you attach to her evidence if you find it truthful and reliable.
- [74] This witness also repeated what she was told by the complainant about the incident. You cannot consider this witness's evidence on this point as supporting evidence to the complainant's evidence. You could only use this evidence to decide whether the claim of the complainant is consistent or not.
- [75] I must caution you over one other important matter. When I present the accused's version, alongside the version of the complainant, you might get an impression that the accused must prove that the complainant had fabricated this allegation against him due, to her embarrassment. That is wrong. He is under no legal duty to disprove the case for the prosecution. He is not even under a legal duty to offer evidence. He remained silent.
- [76] So far, I have directed you on the assessment of credibility of the evidence for the prosecution and of the accused. If you reject the version of the accused and preferred to accept the prosecution evidence as truthful and reliable account of the incident, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of Rape beyond a reasonable doubt.

- [77] As already noted the complainant had said, in relation to the count of Rape, that the accused put his penis into her vagina. We do not have medical evidence from a medical doctor but from a nurse practitioner, who says that she saw two lacerations on her vagina. If you accept this evidence as sufficient proof of penetration of the complainant's vagina on that occasion, then you must find the accused guilty of Rape. If you are not satisfied that penetration had occurred, then you must find the accused not guilty to the charge of Rape.
- [78] In addition to penetration, the prosecution must prove lack of consent. I shall direct you on the issue of consent before proceeding to the issue of identity of the accused. It is our law that consent of a person must freely and voluntarily be given. She must have the necessary mental capacity to give consent.
- [79] Even if there is consent, if that consent is obtained by force, threat, fear of bodily harm, or exercise of authority then also it cannot be considered as consent acceptable to law. The prosecution wants you to believe that the complainant by her conduct resisted the sexual aggression of the accused. She screamed for help, punched the accused, swore at him said no. The prosecution says these are the indications that she did not consent for the act of sexual intercourse by the accused.
- [80] In relation to the issue of consent, there is another aspect you must consider. As I have already directed you earlier on my summing up, the prosecution must prove that there was no consent by the complainant or the accused was reckless about it. What that means is whether the accused realised that there was a risk that she was not consenting but carried on with his act anyway when in the circumstances known to him it was unreasonable to do so.
- [81] You must consider whether he genuinely believed she was consenting under the circumstances. If you think so, then you must find the accused not guilty to the count of Rape. If you do not accept that he thought the complainant was consenting on that occasion, but carried on regardless when you consider all the circumstances, then you could convict him to the count of Rape; if you find the other elements also have been proved.
- [82] The identity of the accused too must be proved by the prosecution beyond a reasonable doubt. However, the accused through cross examination and also in his closing address admitted that he had consensual sexual intercourse with the complainant. In the circumstances, identity is not disputed and therefore need not be proved by the prosecution.
- [83] In summary and before I conclude my summing up let me repeat some important points in the following form:

- i. *If you accept the accused's claim that the complainant consented to sexual intercourse, then you must find the accused not guilty to the count of Rape;*
- ii. *If you reject the accused's claim of consensual sex, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iii. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty.*
- iv. *If you find the prosecution evidence is both truthful and reliable then only you must consider whether elements of the charge of Rape, namely penetration and lack of consent have been proved beyond a reasonable doubt. If it is so you must find the accused guilty to the count of Rape.*

[84] If you have any reasonable doubt about the prosecution case as a whole or an element of the offence, then you must find the accused not guilty.

[85] Any re directions, the parties may request?

[86] Madam and Gentleman assessors, this concludes my summing up of law and evidence. Now you may retire and deliberate together and may form your individual opinions. When you have reached your individual opinions you will come back to Court, and then you will be asked to state your opinion.

[87] I thank you for your patient hearing.



Achala Wengappuli
JUDGE



Solicitor for the State : **Office of the Director of Public Prosecution, Suva**
Solicitor for the Accused : **Rigsby Law**