

IN THE HIGH COURT OF FIJI  
CRIMINAL JURISDICTION  
AT LAUTOKA

CRIMINAL CASE: HAC 37 OF 2013

BETWEEN : STATE

AND : SAMISONI BAUKARI

Counsel : Mr. Niudamu. J for State  
Mr. M. Fesaitu for the Accused

Date of Hearing : 5th of July 2016  
Date of Closing Submissions : 6th of July 2016  
Date of Summing Up : 6th of July 2016

SUMMING UP

1. It is my duty to sum up the case to you. 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 in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. You are to determine the facts of the case, based on the evidence that has been placed before you during the course of the hearing. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give you as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion. I say so because you are the sole judges of the facts.
4. You all have been chosen from the community and represent a pool of common sense, knowledge and experience of the conduct of human beings in our community. Accordingly, you are required to use your experience, common sense and knowledge of the community and the human conduct in your deliberating of facts of this case.
5. You must reach your opinion on evidence. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits and agreed fact. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel of the prosecution is 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. The closing addresses of the counsel of the prosecution and the accused are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, or 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, agreed facts and the

exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.

7. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form 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 I am not bound by your opinion, but I assure you that your opinion will assist me in reaching my judgment.
8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.
9. Matters which will concern you are the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
10. 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 then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his own evidence but also with other evidence presented in the case.

11. It is your duty as judges of facts to consider the demeanor of the witnesses, how they react to being cross examined and re-examined, where they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he testifying, his disinterestedness, his integrity, and his veracity in order to determine the credibility of the witness and his evidence.

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

12. I now draw your attention to the issue of burden and standard of proof. The accused person is presumed to be innocent until his is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused person is guilty for the offence.
13. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused person is presumed to be innocent until he is proven guilty. Accordingly, the burden of proof rest on the prosecution throughout the trial and it never shifts to the accused person. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
14. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused

person's guilt. If there is a riddle in your mind as to the guilt of the accused person after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused person beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

### Information

15. The Accused person is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars of the offence are before you. Hence, I do not wish to reproduce it in my summing up.
16. The prosecution alleges that the accused person came to the victim while she was sleeping and started to hug her in the early morning of 15th of February 2013. She woke up and found that it was the accused person who was hugging her. The accused is the uncle of her husband. He then asked her not to tell her husband about this. He then forcefully removed her cloths and had sexual intercourse with her without her consent.
17. The main elements of the offence of rape as charge in the information are that;
  - i) The Accused,
  - ii) Penetrated into the vagina of the victim with his penis,
  - iii) The victim did not consent to the accused to penetrate into her vagina with his penis,

- iv) The Accused knew the complainant was not consenting for him to insert his penis in that manner.
18. Prior to taking your attention to the main elements of the offence of Rape in detail, I kindly request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven facts by the prosecution beyond reasonable doubt.
  19. The accused person has admitted in the agreed facts that he had a sexual intercourse with the victim. The prosecution alleges that the victim did not give her consent to the accused person to have a sexual intercourse with her. However, the accused person claims otherwise. Accordingly, the main dispute in this matter is the consent of the victim.
  20. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven that the victim did not give her consent to the accused to insert his penis into her vagina.
  21. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the victim consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.
  22. If you are satisfied, that the accused had inserted his penis into the vagina of the victim 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 that the victim was freely consenting for this alleged sexual intercourse.

23. I must advise you that belief in consent is not the same thing as a hope or expectation that the victim was consenting. You must consider whether the accused knew either that the victim was not in a condition or a position to make a choice freely and voluntarily, or the victim had made no choice to agree to sexual intercourse. If you conclude that the accused believed that the victim was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that prevailed at the time of the alleged incident took place.
24. You must bear in mind that offences of sexual nature do not need the evidence of collaboration. It means that if you are satisfied with the evidence given by the victim and accept it as reliable and truthful, you are not required to look for any other evidence to support the account given by the victim.
25. One or more of you may have assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape or a rapist or a victim of rape.
26. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of 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 and the exhibits during the course the hearing.

27. It is your duty as judges of facts to assess the evidence in order to determine whether the accused penetrated into the vagina of the victim with his penis and she had not consented for this alleged sexual intercourse. In doing that, you must be mindful that 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 experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanor of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.
28. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

### **Evidence of the Prosecution**

29. The first witness of the prosecution is Kinisimere Vakayavu. She is the victim of this matter. She stated in her evidence that she was staying at Buabua with her husband in 2013. They were staying at a house, that was belonged to her husband's aunt. Her aunt was staying at Ba in the month of February 2013, leaving Kinisimere, her husband and the uncle who is the accused person in this matter at the house.
30. She recalls that her husband got a job and went to it in the evening of 14th of February 2013. She was with her uncle at the house. She went to watch movies at Jone's house after her husband left for work. Her uncle, the accused person was



drinking cava at another place. After he finished his drinking, the accused came to pick her. They both went home together. The house had only one bedroom. It was occupied by Kinisimere and her uncle slept in the sitting room. While she was sleeping, she felt that someone was hugging her. She was still closing her eyes. She then heard that someone was asking her "forgive me and do not tell Senitiki". She then opened her eyes and saw that it was her uncle, the accused person was on top of her. He pushed her hands on her forehead. He then forcefully removed her undergarment. He punched on her tights. He then pulled her trouser down and inserted his penis into her vagina. She tried to push him away. She told him that she wanted to visit the toilet, but he said that if she goes, she would run away. However, he released her, then she went into the toilet and stayed there for a while. She then came out and found that the accused person was still waiting for her. He then told her to come in to house and he will sleep at the living room. She then went into the room. The accused came again and started to kiss her from her back. She took her mobile phone. She found her t-shirt from the light of the mobile phone. She was dressed in a small strip top and sulu at that time. She found that the time was 3.25 a.m.

31. According to the evidence of Kinisimere, she then went out of the house. The accused also followed her and pulled her from her hand and asked her where was she going. She told him that she wanted to go. While they were talking, she ran away to the house where she watched movies in the evening. That house was situated about two kilometres away from her house. She ran through a sugar cane field to reach that house. The door of that house was open, though the occupants were sleeping. She then woke up Jone, who was sleeping at the house and told him what the accused had done to her. She requested Jone to take her

- home and locked the door of her room before he return. She then went back home with Jone. She locked the door of the room and Jone went back.
32. The accused person was stilling calling her to open the door. He asked her what she did at Jone's place. She was inside the room and did not tell anything in reply. The accused then told her that the house was not belong to them and it was Sala's house. She then told the accused that she will tell everything to Senitiki once he returns.
  33. On the next morning around 6.00 a.m. Kinisimere's husband came home. She told him about this incident. They then reported the matter to the police in the evening of 15th of February 2013. She stated in her evidence that she did not consent for the accused to have sexual intercourse with her.
  34. During the cross examination, Kinisimere stated that she did not consent to the accused person to have sexual intercourse with her. He did not ask her to have sexual intercourse with him. She further stated that he punched on her thighs and not touched them. He did not kiss her lips and neither she kissed him back. She stated that she was not lying on top of him when he performed oral sex on her. She said that she did not squeezed his penis while he was performing oral sex. Kinisimere further stated that she did not enjoy anything that the accused did to her. She screamed for help when he perfumed oral sex. She said that there is no nearby house. He inserted his penis into her vagina two times. She said that the accused was not at home when she woke up in the following morning.
  35. During the re-examination, Kinisimere stated that the accused only touched her vagina and did not perform oral sex.

36. The second witness of the prosecution is Jone Nawaqa. He in his evidence stated that he saw someone was sitting in his sitting room, when he woke up around 3 a.m. in the early morning of 15th of February 2013. It was Kinisimere. She told him that she was afraid to go back to her home. He then accompanied her back to her house. He did not enter into her house. On their way back to her house, she told him that while she was sleeping in the room the boy came and raped her. He found that the lights of the house was off.
37. The last witness of the prosecution is Senitiki Tekei. He is the husband of the victim. He in his evidence stated that he was staying with his wife at Buabua at his aunt's house in 2013. He found a job at Micky's shop. He left to his job in the evening of 14th of February 2013, leaving his wife with the uncle, who is the accused. He asked the accused to look after his wife while he was at work. When he returned home on the following morning, he found that his wife looked afraid and was shaking. He asked her three times what happened to her. She only told him when he asked it third time. She told him what the accused did to her in the night of 14th of February 2015. They then went to police station and reported this matter.
38. At the conclusion of the prosecution case, the accused person was explained about his rights in defence. The accused person opted not to give evidence on oaths. Neither to call any other witness for his defence. It is his rights to remain in silence. You must not make any adverse inference against the accused as he opted to exercise his right to remain in silence.
39. I have summarised the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important.

You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

### **Analyses**

40. The prosecution and the defence presented conflicting versions of events, which took place in private between the victim and the accused. The victim claims that the accused came to her while she was sleeping. He then forcefully removed her undergarments. He then forcefully had sexual intercourse with her without her consent.
41. The learned counsel for the accused person questioned the victim and suggested her that she consented to the accused to have sexual intercourse with her. Kinisimere, neither agreed nor adopted the proposition made by the learned counsel for the defence during the cross examination. The accused person in his caution interview has stated that he had a sexual intercourse with the victim with her consent. The caution interview of the accused person has been tendered as an agreed fact by the prosecution.
42. I must emphasise to you that the questions posed by the learned counsel for the defence during the cross examination are not evidence. What contents in those questions do not become evidence unless they are adopted or accepted by the witnesses in their respective answers.
43. You have heard the evidence that on the same night, Kinisimere went to the house of Jone and told him about this alleged incident. She then told her husband about this incident on the following morning. The prosecution adduced

the evidence of Jone and her husband to establish that she has told Jone on the same night and to her husband on the following morning about this incident respectively. The evidence of such nature is known as evidence of recent complaint. It is not an evidence as to what actually happened between Kinisimere and the accused person. Neither Jone nor the husband of the victim were present and witnessed what happened between Kinisimere and the accused person.

44. You are entitled to consider the evidence of recent complaint in order to decide whether or not Kinisimere has told the truth. The prosecution proposed you that Kinisimere's complain to Jone and to her husband is consistent with her account of this alleged incident and therefore she is more likely to be truthful. On the other hand, the defence proposed you otherwise. It is for you to decide whether the evidence of recent complaint helps you to reach a decision on the credibility and reliability of the evidence of the victim. It is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between Kinisimere and the accused person. It therefore cannot of itself prove that the complaint is true.
45. You might recall that the learned counsel for the accused person cross examined the victim about the inconsistent in her statements made to the police with the evidence given in court. She has told the police in her statement that the accused person pressed her tights. The victim in her evidence stated that he punched on her tights. The learned counsel for the accused proposed you that the statement made by the victim to the police is not consistence with the evidence given by her in the court. The evidence of the victim is what she told us in court on oaths. The statement made to the police is not evidence.


46. I now explain you the purpose of considering the previously made statement of the victim with her evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such a statement when you consider whether the victim is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents.
47. 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.
48. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, 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 your judgment of the reliability of such witness.
49. Ladies and Gentleman, it is your duty now to consider whether the evidence presented by the prosecution is reliable and truthful. If you accept them as reliable and truthful, then you can consider whether you accept them as proven facts. Likewise you have to consider the contents in the caution interview of the accused person, where he has admitted of having sexual intercourse with the victim. He claims that it was with her consent. The prosecution tendered the caution interview of the accused person as an agreed fact. It is for you to decide

whether you accept the explanation given by the accused person in his caution interview or not.

50. Having considered the evidence adduced during the course of this hearing, if you accept the version given by the accused person in his caution interview is true and reliable, the prosecution case then falls. You must find the accused person is not guilty for this charge.
51. If you neither believe nor disbelieve the version given by the accused person in his caution interview, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.
52. Even if you reject the version of the accused person that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.
53. Upon consideration of all evidence, if you believe that the count of rape is proved beyond reasonable doubt, you can find the accused is guilty of the charge. If you believe that that charge is not proved beyond reasonable doubt, then you must find the accused not guilty.
54. 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 on the charge against the accused person. You will be asked individually for your opinion and are not required to give reasons for your opinion. Once you have

reached your opinion, you may please inform the clerks, so that the court could be reconvened.

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

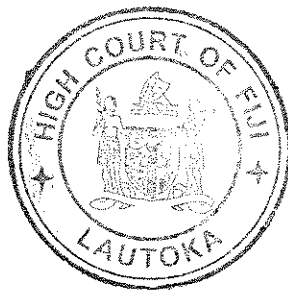


**R. D. R. Thushara Rajasinghe**

**Judge**

**At Lautoka**

**6th of July 2016**



**Solicitors : Office of the Director of Public Prosecutions  
Office of the Legal Aid Commission**