

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC. 14 of 2015

STATE

v.

EPELI TUTE

Counsel: Ms. S. Tivao with Ms. Navia for State
Mr. K. Vuki and Mr. P. Tawake for Accused

Dates of Hearing: 18th, 19th, 20th July 2016

Date of Summing Up: 22nd July 2016

SUMMING UP

[Name of the victim is suppressed. The victim will be referred to as ['R.R']]

[1] Lady Assessor and Gentlemen Assessors,

It is now my duty to sum up this case to you. I will direct you on matters of Law which you must accept and act upon. On matters of fact however, which witnesses to accept as reliable, which version of the evidence to accept, these are matters for you to decide for

yourselves. So if I express my opinion to you about the facts of the case, or if I appear to do so it is a matter for you whether you accept what I say, or form your own opinions. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.

- [2] You decide what facts are proved and what inferences you properly draw from those facts. You then apply the Law as I explain it to you and form your opinion as to whether the accused is guilty or not guilty.
- [3] The Counsel for the Defence and Prosecution made submissions to you about the facts of this case. That is their duty as Defence Counsel and State Counsel. Their submissions are not evidence. It is a matter for you to decide which version of the facts to accept or reject.
- [4] You will not be asked to give reasons for your opinions, but merely your opinion themselves, and your opinions need not be unanimous but it would be desirable if you could agree on them. Your opinions are not binding on me but I can tell you, that they will carry great weight with me when I deliver my judgment.

- [5] On the question of proof, I must direct you as a matter of law that the burden of proof lies on the prosecution throughout the trial and never shifts. There is no obligation on the accused person to prove his innocence. Under our criminal justice system, accused person is presumed to be innocent until he is proved guilty.
- [6] The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
- [7] Your decisions must be solely and exclusively upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you might have heard about this case, outside of this courtroom.
- [8] Your duty is to find the facts based on the evidence apply the Law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
- [9] The written agreed facts are before you. Those facts are agreed by the parties, and you may accept them as if you have heard them led in evidence from the witness box unchallenged and that they have been proved beyond reasonable doubt.

- [10] You have a copy of the information with you. The accused is charged with one count of rape. Offence of rape is defined by Law. A person rapes another person if the person has carnal knowledge of a woman or girl without her consent.
- [11] The particulars of the offence in count No. 1 say that the accused had carnal knowledge of the complainant 'R.R.' without her consent. Therefore the elements that the prosecution has to prove beyond reasonable doubt to find the accused guilty are;
- 1 The accused had carnal knowledge of the complainant,
 - 2 Without her consent,
 - 3 He knew or believed that she was not consenting or did not care if she was not consenting.
- [12] Carnal Knowledge is the penetration of the vagina by the penis. It is not necessary for the prosecution to prove that there was ejaculation, or even that there was full penetration. Extent of the penetration is immaterial.
- [13] Where the consent is obtained through fear or by threat, then that is not consent. Consent must be given freely and voluntarily and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. However, it is not enough for you to be satisfied that the complainant was not

consenting. You must be satisfied beyond reasonable doubt that the accused knew or believed that she was not consenting and was determined to have sexual intercourse with her anyway.

The Evidence

- [14] Prosecution called the complainant 'R.R' to give evidence first. She had gone to collect mangoes with Lanieta and Epeli. When they went up Epeli had given a plastic to Lanieta and had told Lanieta to go back home. After Lanieta left, Epeli had gone with her to Vunimaqokoki. Epeli had made her lie down, she said. Then he had taken her pants off and had inserted his penis into her vagina. Then she had heard her father's voice calling her. Then she had tried to stand up. She said that she struggled. She had then come to the road where her father was. Epeli also had come around. She said that her father asked her what Epeli did to her. She said that she was crying. Then they had come down.
- [15] On Sunday morning, her mother had asked them to get ready to go to church. When they were getting ready her mother had looked at her and she had fainted. Then her father had got suspicious and had asked her what Epeli did to her. Then she had said that Epeli had intercourse with her. She had told that to her father and mother.

- [16] Then they have told her to go to Vunimaqokoki with them. When they got there, father had seen fallen trees and had asked her "Did you guys do it here?" Then she had told them what happened there. She had told them that Epeli took off her pants and put his penis into her vagina. When she was asked about the surroundings of that place, she said that there are trees, some have fallen and no buildings.
- [17] She said that she could recall going to the hospital. Her mother and father had taken her to hospital. She said that she was examined by a doctor. She also had told the police what Epeli did to her, when the police officer asked her.
- [18] In cross examination she said that she did not mention to police in her statement that she was crying. She said that she did not mention to police that she fainted and her father got suspicious.
- [19] When she was asked whether she consented for the doctor to examine her, she said that the doctor told her to lie down and the doctor saw a little blood in the vagina. She said that the doctor told about that to her mother and father. She said that Epeli took off her panty when she was lying down. He had removed her shorts and panty both. She said that when her father called, Epeli was standing behind her. She said that when she went to the father she was

wearing clothes. She had not told the father anything when he asked her whether Epeli had done something to her. She had been crying.

- [20] She could not remember the day of the week Epeli did this to her. She said that on a Monday she had gone to Kalivuti with Epeli when he had told her that he had picked up mangoes. When she was asked about that place she said Kalivuti is a different place from Vunimaqokoki. She said that she did not yell or scream when Epeli did those things to her.
- [21] In re-examination, she said that she did not tell her father what Epeli did because she was crying for what Epeli did to her. She said that she did not scream or yell when Epeli did those things to her because when she tried to scream he blocked her mouth.
- [22] The next witness was Dr. Sajneel Prasad who medically examined the complainant. You heard in evidence his qualification and experience as a medical doctor that was unchallenged.
- [23] On 10/11/2014 he had medically examined the complainant 'R.R.'. When he examined her private part (genitalia) he had found that the hymen was not intact. There had been no bruises or lacerations in her private part. The medical report prepared by him was produced in evidence as (PE1).

- [24] He said that the rupture of the hymen can be caused by any penetration to vagina. He said that he mentioned that the complainant was mentally slow in her report. He said that it was what the complainant's mother told him.
- [25] In cross examination he said that he did not see any blood in the vagina.
- [26] Prosecution called complainant's father Leone Domonakibau to give evidence next. He said that 09/11/2014 was a Sunday. In the morning Epeli had been in the kitchen with his wife. When Epeli told him that he had gathered mangoes he had called 'R.R.' and La to go with Epeli to get the mangoes.
- [27] After 5 minutes, after realizing that Epeli went with his daughter, he said that he ran after them. He had met La coming back alone. After asking from La about 'R.R.' he had ran about 100 meters. He had called 'R.R.' 3 times. That had been the place he thought they went to collect mangoes. As there was no response, he had moved further about 10 meters and had called her again. Then he had moved further 30 meters and had called. Then 'R.R.' had answered back from the 1st place where he started calling her. Then he had gone to 'R.R.'. When he got to her, he said that he knew what had happened. He had not done anything to her, he kissed her and they had gone to the village.

- [28] After going to church and after lunch, mother and daughter had been resting. He said that he was surprised and shocked when 'R.R.' started talking in her sleep. Then he had woken her up and had asked her, "What did Epeli do to you?", she had said that Epeli had sexual intercourse with her. Thereafter his wife had taken 'R.R.' behind a curtain and had checked her for any injuries.
- [29] Thereafter he had gone to the place where the incident had taken place with 'R.R.' and his wife. That place is called Nabunireya, he said. 'R.R.' had pointed them the place. Then 'R.R.' had told him that she heard him calling her, she struggled, got away from Epeli and ran to the road. Then he had returned to the village and had gone to see the village headman. Monday the next day he had gone to police station with 'R.R.' and wife.
- [30] In cross examination he said that 'R.R.' did not faint that day. When he was asked whether Nabunireya is different from Vunimaqokoki, he said that Vunimaqokoki is a name of a tree and not a place. He said that when he called 'R.R.' when he went to look for her, he called her loud. She had been nearby when he first called, he said.
- [31] He said that he got angry that Epeli had sexual intercourse with 'R.R.' as 'R.R.' is his daughter. He said that he could not believe that Epeli had sexual intercourse with 'R.R.' and that he blamed Epeli for

that. He said that he does not know how they came to have sex that morning and that only Epeli and 'R.R.' were there.

[32] The last witness for prosecution was PC4444 Rupeni Koroilagilagi. He had caution interviewed the accused on 10.11.2014. Interview has commenced on 10/11/2014 at 17.00 hours, suspended at 5.30pm, resumed at 12.00 hours on the 11th and concluded at 1.20pm.

[33] He said that the accused was given his rights and the accused cooperated. He said that the accused was never threatened or assaulted. Accused had not made any complaint or request during the interview. The witness was not cross examined by the Defence.

That was the evidence for the prosecution.

[34] Lady and Gentlemen assessors,

At the end of the prosecution case you heard me explain several options to the accused. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains on the prosecution at all times. He could have remained silent. He chose to give sworn evidence and to subject himself to cross examination. You must give his evidence careful consideration.

- [35] Accused giving evidence said he was 29 years old in 2014. He had been residing at Vatulele village. He said that he knew 'R.R.'. She had been residing at Nabuna village.
- [36] On 09/11/2014 he had gone with 'R.R.' to collect mangoes from Vunivasa District School. They have gone to bring heaps of mangoes he had already gathered. He had climbed up a mango tree to pick some more and 'R.R.' had been under the tree. He had heard 'R.R.'s father's voice calling 'R.R.'. He had told 'R.R.' that her father was calling. Then 'R.R.' ran taking the mangoes, he said. He had climbed down and had followed 'R.R.'. They had gone to Nabuna. He had also gone back to 'R.R.'s house and picked some mangoes, he said. He said that the allegation that he had sexual intercourse with 'R.R.' is not true. He said that he admitted it at the police station, as the officer Sevuloni punched him on his ears with his fists.
- [37] In cross examination he said that he was interviewed by Rupeni. He said that when he was assaulted by Sevuloni, Rupeni was just sitting beside him. He said that he forgot to complain about this assault to the Magistrate or the Judge. He said that he did not go to the hospital after returning from the police station although it was a 5 minute walk. He said that he admitted so that Sevuloni would stop punching him. He denied forcefully inserting his penis into 'R.R.'s vagina without her consent.

[38] In re-examination he said that from the police station he was taken home by the police to Vatulele. He said that from Vatulele village to Health Centre in Koro is about 30 minutes – 1 hour drive in a vehicle and about 3-4 hours if you walk.

That was the evidence for defence.

[39] Lady and Gentlemen assessors,

You heard the evidence of many witnesses. If I did not mention a particular witness or a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in coming to your decision.

[40] You may have observed that when some witnesses gave evidence there were some inconsistencies between the evidence before this court and the statement given to the police. For example in her evidence the complainant said that she cried when she saw her father and also that she fainted at home. However, she had not told that in her statement to the police. What you should take into consideration is only the evidence given by the witness in court and not any other previous statement given by the witness. However, you should also take into consideration the fact that such inconsistencies between the evidence before court and statement to police can affect the credibility of the witness. When you decide on

the credibility you may also consider the circumstances under which the witness made the statement to police and the age of the witness.

- [41] A witness can give evidence on his observations, like what he heard, what he saw, and what he perceived. Only on certain circumstances court would allow witnesses to give their opinion on a matter. Those witnesses should be experts on that particular subject. For example you get experts on medical field, experts on finger prints, experts on fire arms, drug analysis etc. Now in this case the medical doctor Sajneel Prasad gave evidence on his medical examination of the complainant. You heard his evidence on his qualifications and experience in the medical field. His expertise on the relevant field was not challenged by the defence. Therefore the opinions he gave on his examination of 'R.R.' is admissible. What weight you give to his evidence is a matter for you.
- [42] You may remember that when Doctor Prasad gave evidence, on referring to paragraph D(15) of the medical report P1, he said that he has mentioned that the 'patient is also mentally slow'. He said, that was what the patient's mother told him. However, mother of 'R.R.' did not give evidence in court. I must tell you as a matter of law, that the mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called to give evidence, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. In this case doctor said

that the patient's mother told him that the patient was mentally slow. To that extent you can consider his evidence in relation to what was told to him by the mother. It is for you to decide whether the mother of 'R.R.' in fact told the doctor what he said in court or not. Even if you decide that the mother had told him that, you should not go on to consider the truth of that statement purported to have said by the mother, as the mother did not give evidence.

[43] You may remember that when the father of the complainant Leone gave evidence he said that one Vilikesa a relative of the accused came to reconcile the matter and that he refused to reconcile. That person Vilikesa did not give evidence in court and also the prosecution never put that to the accused when he gave evidence. Therefore, there is no evidence to show that Vilikesa's coming to the witness Leone to reconcile has any connection to the accused or that the accused had any hand in it. Therefore, even if you find that Vilikesa came to reconcile as Leone said, you must not assume that the accused committed the crime merely because one Vilikesa came to reconcile.

[44] The caution interview statement of the accused was admitted in evidence and it was produced through the police officer Rupeni who recorded the statement. He said that the accused made the statement voluntarily and that the accused was never assaulted or threatened. His evidence was not challenged by the defence by cross examining

him. However, the accused in his evidence said that he was assaulted by the officer Sevuloni in the presence of Rupeni and that he admitted because he was assaulted and to stop him being punched. That position was never put to the witness Rupeni by the defence when Rupeni gave evidence. You heard the evidence of all witnesses for the prosecution and the accused. You decide whether what the accused said in his statement was the truth and what weight you would give to the caution interview statement the accused made.

- [45] It is evident that the complainant did not immediately tell her father when she met him on the road immediately after the incident. She said that her father asked her but she was crying. However, she had told her mother and father the same day. It is for you to decide whether her not telling the father when she met him on the road was justified or not. However, if you find that the complainant told the father the same day as both father and the complainant testified and that it was without unreasonable delay, that may enhance the credibility of the complainant. When deciding that, you may also consider the complainant's age and the social background. Children do not have the same life experience as adults. Their understanding may be severely limited for number of reasons such as their age and maturity. They may be embarrassed and feel guilty about what happened to them. You may consider those factors when evaluating her evidence.

[46] You decide whether 'R.R.' is a reliable witness or not. If you decide that she is not a reliable witness you must find the accused not guilty of Rape. If you find that she is a reliable and credible witness, then you need not seek for corroborative evidence and you may find the accused guilty of rape.

[47] Lady and Gentlemen assessors,

The law says when a person is charged with an offence, and facts are proved which reduces it to a lesser offence, the person may be convicted for the lesser offence although he was not charged with it.

[48] Now I will explain to you about the offence of Defilement. A person commits the offence of defilement if he unlawfully and carnally knows of any person being of or above the age of 13 years and under the age of 16 years. It is not a defence for defilement to say that the victim consented to sexual intercourse. In this case it is an admitted fact that the complainant 'R.R.' was 14 years old on 9th November 2014. Therefore she was between 13 and 16 years of age on the day of the alleged incident. Therefore first you decide whether the accused had sexual intercourse with the complainant or not. If you find that the accused had sexual intercourse with the complainant, then you go on to consider whether she consented or not. If you find that she did not consent then you may find the accused guilty of rape as charged. However, if you find that she consented to sexual

intercourse then he is not guilty of rape but is guilty of the lesser offence of Defilement because 'R.R.' was between 13 years and 16 years of age.

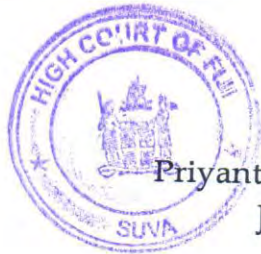
- [49] The complainant says that the accused had sexual intercourse, she struggled and that the accused blocked her mouth when she tried to scream. The accused says that he did not have sexual intercourse with the complainant. He says that he was on a mango tree plucking mangoes when the complainant's father called her. In his caution interview statement he has said that he had sexual intercourse because the complainant wanted it. However, this position that the complainant wanted it, was never put to the complainant by the defence when she gave evidence.
- [50] Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in Court. You decide which witnesses were forthright and truthful, and which were not. Which witnesses were evasive or straight forward? You may use your common sense when deciding on the facts. Observe and assess the evidence of all witnesses and their demeanor in arriving at your opinions.
- [51] I have explained the legal principles to you. You will have to evaluate all the evidence and apply the law as I explained to you,

when you consider the charge against the accused have been proved beyond reasonable doubt.

[52] Your opinions on the count of Rape will be either guilty or not guilty. If you find the accused not guilty of Rape, you will be asked whether the accused is guilty or not guilty of the lesser offence of Defilement.

[53] Lady Assessor and Gentlemen Assessors,

This concludes my summing up of the Law. Now you may retire and deliberate together and may form your individual opinions on the charge against the accused. When you have reached your separate opinions you will come back to court and you will be asked to state your separate opinion.



Priyantha Fernando
Judge

At Suva

22nd July 2016

Solicitors

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