

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: HAC 112 OF 2014**

**STATE**

**-v-**

**SIMIONE TUI**

**Counsel :**                      **Ms. J. Fatiaki for the State**  
  
   **Mr. Jitoko with Ms Qiowasa for Accused**

**Dates of Trial:**                **8<sup>th</sup> ,9<sup>th</sup> ,10<sup>th</sup> August 2016**

**Date of Summing Up:**      **11<sup>th</sup> August, 2016**

**SUMMING UP**

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.

3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. 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.
5. The counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the Accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. 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 or read about this case, outside of this Courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.

10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As Assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
12. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.
13. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to. I will deal with the law as it is applicable to the offences with which the accused-person is charged, in a short while.
14. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witnesses.

15. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a Complainant in a rape case such as this should react to the experience. Any person who has been raped, will have undergone trauma whether the accused were known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in Court or at the Police Station. 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.
  
16. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreed facts of this case are:
  - I. That Radilaite Marama (hereinafter referred to as the “Complainant”) of Lawaqa, Sigatoka was at the material time employed as a barmaid at Deep Sea River View Club.
  - II. That Simione Tui (hereinafter referred to as the “Accused”) of Korotogo Back Road, was at the material time employed as a Security Officer at the Deep Sea River View Club.
  - III. That on the 16<sup>th</sup> of August 2014 the Accused was at work.
  - IV. That on the 16<sup>th</sup> of August 2014 the Complainant was at work.
  - V. That after they completed their respective shifts on the said date the Accused along with the Complainant and other work colleagues consumed alcohol together within the bar area.
  - VI. That the abovementioned persons then proceeded to Room 107 and continued drinking with another group of people who were already there.
  - VII. That the Complainant went to Room 105 to have her shower.
  - VIII. That the Accused followed the Complainant to Room 105.
  - IX. That the Complainant at the material time was menstruating.
  - X. That the Accused and the Complainant had sexual intercourse on a bed.

17. I now turn to elements of the offence with which the accused is charged. The count against accused is as follows:

**FIRST COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**SIMIONE TUI** on the 17<sup>th</sup> day of August 2014 at Sigatoka in the Western Division, had carnal knowledge with a woman namely **RADILAITÉ MARAMA** without her consent.

18. I will now deal with the elements of the offence of Rape in this case. A person rapes another person if the person has carnal knowledge with or of the other person without other person's consent.
19. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man of the vagina of a woman to any extent. So, that is Rape under Section 207 (2) (a) of the Crimes Decree.
20. So, the elements of the offence of Rape in this case are that:
- a. the Accused
  - b. penetrated the vagina of Complainant to some extent with his penis
  - c. without her consent
21. Consent as defined in Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a woman with a necessary mental capacity to give such consent.
22. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a Complainant who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence as to what she saw, heard or felt.

23. In evaluating evidence, you should see whether the story related in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence; whether the witness is capable to testify to a particular fact or he or she has any interest in the matter in hand. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.
24. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. 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 demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.
25. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.
26. In testing the credibility of a witness, you can consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If the complaint is prompt, that usually leaves no room for fabrication.
27. Please remember, there is no rule in Fiji for you to look for corroboration of Complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of Complainant, depending on how you are going to look at her evidence.
28. I will now deal with the summary of evidence in this case. In doing this I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.

## CASE FOR THE PROSECUTION

### **Complainant, Radilaite Marama**

29. Complainant Marama is now married. In 2014, she was employed at the Deep Sea River View Club in Sigatoka.
30. On the 16<sup>th</sup> August 2014, she was told to do a morning shift from 9.00 am – 6.00 pm. Since the pub was full on Saturday, she agreed to do the afternoon shift to help the night shift staff Taina and Radini.
31. After the shift work, she decided to clean up the club and have a few drinks at the Bottle Shop just beside the Club. They bought 6 bottles each for Taina and Simione Tui (accused), a security man. After drinking there for a while, they moved to room 107 in the upstairs and continued drinking. When they went there, 3 boys and a girl were already drinking in the room. They joined them in drinking. While they were drinking, she was sitting with Taina. She followed Tania every time she went to visit the toilet.
32. She went down to the Club with Taina to buy 6 more bottles of Rum and Cola. While they were drinking she noticed that Taina had left. Simione Tui came and sat beside her. After the drinks had finished, everyone had left and she was in the room with Simione Tui. Tui asked if she had a boyfriend. She said 'yes, he is staying in Lautoka'. Then he said he wanted her. She told him that she didn't like to go out with boys who deal with marijuana.
33. Whilst they were talking, she noticed Tui going to the door to lock the room. As soon as he came back there was a knock on the door. She saw two friends Pate and Adi at the door. As soon as they came, she quickly rushed out without talking to them.
34. She went back to the Club where they bought the drinks from and noticed that Taina was sleeping there. She lied down with Tania for 15 minutes. She was supposed to go to Lautoka that day.

35. She packed her clothes and went up in Room 105 to have a bath before heading to Lautoka. She went to the room upstairs and took off her clothes, and locked the window and the door before going to the bathroom. On her way out from the bathroom, she saw Simone Tui inside the room. She looked around to see the window open. It's a slide window with an opening to the balcony common to rooms 104 to 105 or 106.
36. She asked Tui what he was doing inside the room and then Tui said he wanted to have a conversation with her. She was scared. She then agreed to listen to what he wanted to say. While they were talking, he said he wanted her.
37. She was wearing just a towel. She told him that she wanted to reach out to put on her t-shirt. She told him that there is no conversation to be made because she had to go to Lautoka. She walked straight to open the door. He ran out to reach the door before her and asked her to wait. He then told her that he wanted to have sex with her on the King size bed.
38. She told him that she was having menstruation. By then, his hands were on her shoulders and pushing her down to lie down. She was so scared and helpless. She could feel his penis in her. She passed out.
39. The next thing she recalled was Ana waking her up. When she was woken up she noticed she was naked and Simone Tui beside her. She started to cry and tried to reach out for her towel to cover herself. She did not cry because she was scared. She noticed that Simone Tui had raped and forced her. She was scared that something would happen to her since she just had a surgery which had her left tube removed. For her safety, she had been advised not to have an intercourse for 6 – 7 months or a year.
40. Under cross examination, Complainant said that she followed Tania everywhere she went. She followed Tania to buy drinks but she returned to the room first. Tania had not returned to the room. She denied she had a crush on the accused. She also denied that, whilst drinking, she lectured accused as to his appropriate way of doing his work at the hotel. However, she admitted having said to the accused that she did not like people



selling marijuana and told him to leave marijuana. She said that she cared for the accused and all the staff.

41. When he forced her to have sex, she didn't shout out or yell. The music was on so loud that even if she shouted others in the club wouldn't be able to hear. He was close to her. She didn't run down or up because she was helpless.
42. He denied that she had consented nicely to having sex.
43. Complainant denied that she was in a lesbian relationship with Ana. She also denied that she made up a story with Ana after Ana saw her with the accused.
44. Complainant admitted that it was not the first time that they drank together in a room in late night although they were not allowed to do that.
45. That is the case for the Prosecution. At the closure of the Prosecution case, you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
46. As you are aware, accused elected to give evidence and called a witness on his behalf. That is his right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove his case to you beyond reasonable doubt. Burden of proof remains with the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. Even if you don't believe a single word accused person says, you must still be sure that he is guilty of the crime that he is charged with.

## **DEFENCE CASE**

### **Accused Simone Tui**

47. Accused said that he worked as a security at the River View Night Club. He started his shift on the 17<sup>th</sup> August, 2014, at 5 p.m. and ended up at 1.a.m. After work shift had finished at 1 a.m. Ropata invited him for a drink and went to Room 107. Samu, one of his friends, Semi, Taina, and the Complainant were already drinking in the same room.
48. Whilst drinking, Samu and his friend left. He, Taina, Complainant, Semi, Ropate and another girl were still in the room. Then Ropate and the girl also left. He, Complainant, Semi and Taina were left in the room. Then Taina also left. Finally, when the drinks finished Sami also left, only he and the Complainant were left in the room. Complainant was sitting next to him exchanging words. She lectured and kept insisting him to listen to her and advised him not to sell marijuana and not to bring any other girl in the room. Because she was drunk, her behavior changed and became talkative, like bossing around with him. The things she talked about are generally told by a wife to a husband. He felt like being advised by a wife.
49. She then said that she was going to have a bath because she had to go to Lautoka. She took a shower and came out. She saw him sitting on the bed.
50. Tui later said that he was sitting on a bed of room No. 105. Then he explained to us how he came from Room 107 to Room 105. She had told him that she was going to have her bath in Room 105. While he was cleaning up Room 107, he was still thinking about the things she had told him. He wanted to know the truth from her. Then he came to Room 105 through the back door. She was still having her bath when he entered Room No. 105. He was sitting on the king size bed waiting for her to finish her bath.
51. She came out from the bathroom and asked him what happened. Then he told her that he wanted to ask her again of the things that she had told. She told him that what she had told him was the truth. Then he asked her to show the truth that she really loved him.
52. She told him that she liked him. Then they kissed lip to lip. She kissed showing that she really loved him. When he asked her about the truthfulness of the relationship, she told him that she is having her menses.

53. Then I told her that, if she doesn't want him to sell marijuana or bring any other girl into the room, she should show it to him. She told him to wait for her for one week. He accepted that as she was having her menses.
54. He did not force her. They lied down and undressed herself. She told him to use the small bed because the King size bed was clearly visible if somebody was outside. She was wearing a panty with a pad and her towel. He was wearing his pants and a t-shirt.
55. He stood up and undressed himself, then, he had sexual intercourse with her consent on the small bed for about an hour. Then he described various forms of sexual activities they performed during that period. He used even his tongue on her vagina despite she was having menstruation. She liked the way he performed.
56. Then they kissed each other again and lied down on his arm and slept until Ana came and woke them up. Ana told her to dress up. He turned around and slept again.
57. He came back to town at 5.00 pm. Staff reported to him that Police Officers were looking for him for a Rape charge. He went to the police station and inquired about the allegation. He was interviewed by police. At the interview, he only admitted that he had sexual intercourse.
58. Under cross examination, accused admitted that he was interviewed a few days later. He also admitted that Complainant was in a good relationship with him prior to this allegation.
59. He also admitted that he entered Room 105 uninvited while Complainant was still having her shower. During sexual intercourse, she informed him to do it slowly because she had a surgery on her stomach.

**Semi Nagata**

60. Nagata is a Security Officer and a working companion at Deep Sea Nightclub. He finished his shift around 1.00 a.m. and started drinking with the Complainant and the

accused with some other friends including Taina in Room 7 on the top floor of the Club. Taina left for downstairs with Marama. After that only Marama came running up to the room and joined them in drinking. Simi (accused) and Marama were talking and hugging each other.

61. He stood up and went home leaving the couple behind. When he was in town, he was thinking of Marama and decided to come back to the Club and see her. When he entered room number 7 of the Club, it was empty. He looked towards room 105. Then he saw Simione Tui and Marama inside the room having sex.
62. He saw Marama was facing towards him. After a while he saw her going down taking off her trousers. They went to the single bed and lied down on the bed. You heard from him what he saw over a period of one hour.
63. When the Simione reported to work he informed Simione that a report had been lodged in regards to him staying with Marama that night and told him to go straight to the police station.
64. Under Cross-examination, witness admitted that, in 2014, he was well aware that the accused was being questioned by police with respect to this matter. However, he did not go to the police station to make a statement because Police didn't come to him looking for any witness who saw the incident.

That is the case for the Defence.

## **ANALYSIS**

65. Ladies and gentleman assessors the accused Simione Tui is charged with one count of Rape. You should be fully satisfied on whether or not the accused is guilty on the count.
66. There is no dispute as to the identity of the accused. Accused admits having had sexual intercourse with the Complainant.

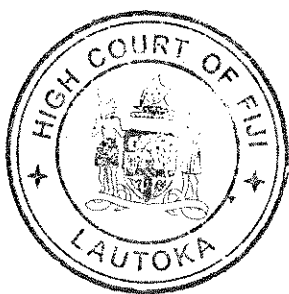
67. Prosecution says that accused forced the Complainant and the sexual intercourse took place without complainant's consent. Accused denies the allegation. He says that the sexual intercourse took place with her consent. Conflict is dramatic and turns on one word against the other.
68. Prosecution based its case entirely upon the evidence of the Complainant. As I have told you, her evidence alone is sufficient to find the accused guilty if you believe her evidence to be truthful.
69. You must decide whether you are sure the Complainant did not consent to sexual intercourse with the accused. That will require an assessment by you of the Complainant's evidence.
70. We all know that alcohol and atmosphere she was exposed to can lead to disinhibited behaviour including sexual behaviour. There appear to be an assumption behind defence Counsel's questioning that this young woman, because she was having drinks with men in a hotel room late night, would have been prepared to engage in sexual activity with the accused, especially in the context that he was known to her. You consider is the realistic position this; a woman may or may not be prepared to engage in sexual activity with a particular man, depending upon the circumstances of the encounter and the mutual feelings between them. What you should not do is to judge the intentions or inclinations of the complainant on this occasion by the application of generalised assumption about people's behaviour. What you should do is reach conclusions based upon evidence.
71. You also heard Complainant saying that she does not like people who deal with marijuana and she advised accused to leave that drug. Accused himself admitted that he takes marijuana. You must not draw any negative inference against the accused and must not assume because of his addiction, he would have been prepared to engage in sexual activity with the Complainant.
72. The offence charged requires proof that the Complainant did not consent. The offence may or may not be accompanied by force or the threat of force, but please note that it is

no part of the Prosecution's obligation to prove that the accused used force or the threat of force.

73. During the course of Complainant's evidence it was suggested to her that she could have yelled and otherwise objected to what the accused was doing. You heard the Complainant's explanations. In his closing argument Defence Counsel submitted to you that her failure to protest, demonstrates that she was not telling the truth. This is an argument which you should consider with care when you do, you should not assume that there is any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the Courts is that people who are being subjected to nonconsensual sexual activity may respond in variety of different ways.
74. Prosecution says that Complainant's version is credible and consistent because she took help from Ana and was determined to go to the police station and she made a prompt complaint within hours and went for a medical examination.
75. Complainant said that she was having menstruation and also had undergone an operation and was under medical advice to refrain from sexual intercourse. Accused admitted that she was under those conditions. You consider whether she actually consented to sexual intercourse under those conditions.
76. You heard from the accused and his witness Mr. Nagata. Prosecution says that the accused was giving self-serving evidence to protect his own skin. It also says that witness Nagata was a working companion of the accused and he testified in Court even without making a statement to police of what he said is the truthful eye witness account.
77. In deciding the credibility and consistency of the Defence version you may compare the evidence of the accused with that of his witness Nagata who is said to be an eye witness.
78. Defence took up the position that Complainant was in a lesbian relationship with Ana and Ana did not like her partner being in a relationship with the opposite sex and that is why this story was made up with the instigation of Ana.

79. It is up to you to decide whether you could accept the version of the Defence and it is sufficient to establish a reasonable doubt in the Prosecution case.
80. If you accept the version of the Defence you must find the accused not guilty. Even if you reject the version of the Defence and do not believe a single word accused told in Court, still the Prosecution should prove its case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the accused at any stage of the trial.
81. The accused is not required to prove his innocence or prove anything at all. In fact, he is presumed innocent until proven guilty.
82. If you accept the Prosecutions' version of events, and you are satisfied that the Prosecution has proved the case beyond reasonable doubt, so that you are sure of accused's guilt you must find him guilty of the charge.
83. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

Any re-directions?



  
**Aruna Aluthge**  
**Judge**

**AT LAUTOKA**

**11<sup>th</sup> August, 2016**

**Solicitors for State:**

**Office of the Director of Public Prosecution**

**Solicitors for Accused:**

**Office of Messrs Qarcia for Accused**