

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO. HAC 083 OF 2013**

**STATE**

**vs**

**SEMI TUBUDUADUA**

**Counsels : Mr M Vosawale and Ms L Bogitini for the State**  
**Mr Ravuniwa for the Accused**

**Dates of Trial : 1<sup>st</sup> – 3<sup>rd</sup> February 2016**

**Summing Up : 5<sup>th</sup> February 2016**

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**SUMMING UP**

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Madam and Gentlemen 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

both 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' demeanour 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. Consider also the likelihood or probability of the witness's account.
- [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 victim has 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 promptness or lateness of the complaint and what weight you attach to it.

- [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] Lady and gentlemen, 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 of Rape. 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 he is charged with.
- [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 offences charged. The fact that the accused has given evidence 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 allegations. 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 offences 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 offences 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 charge contained in the information.
- [35] There is only one charge preferred by DPP, against the Accused:

## **FIRSTCOUNT**

### ***Statement of offence***

**Rape** –Contrary to Section 207(1) and (2) (b) of the Crimes Decree No. 44 of 2009.

### ***Particulars of the Offence***

SEMI TUBUDUADUA on the 16<sup>th</sup> day of February 2013, at Lot 2, Velau Drive, Kinoya in the Central Division, inserted his finger into the vagina of MISTY DAWN VAREYA without her consent.

- [36] As you would have noted there is only single count of Rape. I shall now deal with the elements of the offence of Rape. In order to prove a count of Rape, the prosecution must prove beyond reasonable doubt that the Accused penetrated Misty Dawn Vareya's or the complainant's vagina, by his finger. The slightest penetration is sufficient to satisfy this element of the charge.

- [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 woman 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, she 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 finger without her consent, then you must find him guilty 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. You will hear more directions on this point as well.
- [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 to the charge.
- [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] During the trial, the parties consented to have the following facts to be treated as "agreed facts" of the case without placing necessary evidence to prove them;
- i. *The accused made a caution statement and it was recorded by DC 1853 Luke;*
  - ii. *The contents of the caution statement of the accused;*
  - iii. *Photocopies of the hand written caution statement and its typed version.*

[45] The prosecution, in support of their case, called the complainant, her daughter and partner.

### **Case for the Prosecution**

#### **[46] Evidence of the complainant Misty Dawn Vareya**

- (i) *It is her evidence that she is 34 years old and currently employed as a hair dresser. On 15th February 2013, she was living in Kinoya with her sister in law Eta. All the family members, including her brothers in law, sister in law and children of all the families, were there as usual for the weekend. There was also a police officer called George present among them. The accused who was adopted by her husband's family was also there. She knew him from very young age.*
- (ii) *They all gathered around in the evening and sat in the space between the kitchen and dining table. Then they consumed beer. The complainant too had consumed beer with her family and having finished one, another carton of beer had to be brought. She then got dressed up to go to a night club as her brother was to come there with his girlfriend. She was drunk by this time and asked from the group whether anybody wanted to go with her to the club. She also invited the accused to join her. While she was waiting for the taxi under the porch, her sister in law told her that she had a bad feeling that something would happen and asked the complainant not to go.*
- (iii) *She then decided against her idea of going to the club and had instead gone to her room to sleep. This particular bed room was located about 4 to 5 meters from the place where others continued to consume beer. Her daughter had already gone to sleep on the bed and the complainant too laid herself on a mattress.*
- (iv) *While asleep on the mattress, she felt somebody touching her. She could feel a hand touching her buttocks and between her things. At that time she was sleeping on her side hugging a pillow. She fell asleep again. Again she felt a hand touching her body. As she felt the touch she moved and twitched. Then the accused said to her ear "not to worry, it's OK don't worry. Just me". Thereafter he slid his hand along her panty line and had then touched her vagina. She felt fingers poking into her vagina as she felt the tip of the finger. He inserted his finger about an inch into her vagina. Then the hand was removed slowly.*



- (v) *Her response to the touch was to put her skirt down and moving of her body. She was conscious and was aware of what was happening although she was unable to get up or to call out for help due to heavy intoxication. When she turned her head she did not see the accused in the room.*
- (vi) *In relation to the voice identification of the accused, the complainant said when he spoke in to her ear, she made sure as to whom she was listening to and she could distinguish the accused's voice from the voices of other males who were there drinking beer. She also heard the voice of her sister in law. The complainant was shocked with the experience but soon fell asleep again. When she woke up the following morning she had called up her husband who was at Nadi at the time and informed him of the last night's incident. She also told her sister in law.*

**[47] Evidence of Adi Funaki**

- (i) *This 13 year old witness said that the complainant is her mother. She also says the older members of her family were drinking beer on the day of the incident and having played with other kids, she had gone to sleep in the bed room. At one point she woke up and had seen her mother lying on the mattress. She had then gone back to her sleep.*
- (ii) *She was woken up again when she felt something on her buttocks and she saw the accused lying beside her. She also noticed her mother's skirt was up to her stomach. She saw and identified the accused from the light coming from the porch, kitchen and street lamps. The accused was just ½ feet away from her and there was nothing to impede her vision to see clearly. Then her aunt had called up the accused. Then again she fell back into her sleep.*
- (iii) *In the morning she was called up by her mother and enquired her about the happenings in the night.*

**[48] Evidence of Jackson Yavala**

- (i) *This witness is the complainant's partner and father of witness Adi and other two of her siblings. He was employed at Nadi at the time of the incident. He had received a phone call from the complainant on 16<sup>th</sup> February 2013 at about 9.00 am and she complained to him that the accused had touched her private parts.*

[49] That was the case for the prosecution. You then heard me explain 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. But he opted to offer evidence under oath and also to call a witness on his behalf.

### **Case for the Accused**

#### **[50] Evidence of the Accused**

- (i) *In relation to the allegation of rape, the accused said in his evidence that he is innocent. He stated in evidence that he would visit his cousin Eta's house on a weekly basis and some of his personal belongings such as clothes and phone charger are kept there.*
- (ii) *He further says that on 15<sup>th</sup> February 2013, he too had gone to her house and had started to consume beer with the group of men at about 6.00 pm. The first carton of beer was consumed and he and another had brought another and had consumed two bottles from it.*
- (iii) *He recalled a conversation he had with the complainant. She had asked him to accompany her to a night club repeatedly. He declined as all cousins were there and her husband was away. Her husband was like a brother to him and was brought up in their family. They always counted him as one of their own brothers.*
- (iv) *After that the complainant did not participate in drinking and had retired to her bed room. It's door was kept open. He admitted going into this bed room once to pick his phone charger as his battery went down as he talked to his girl friend. He charged his phone and slept in the living room. He told one of his cousins to wake him up after drinking session is over as he intended to join him.*

#### **[51] Evidence of Tevita Maraiwa**

- (i) *He says he too joined the drinking session upon an invitation of his younger brother at about 10.00 p.m. He had come in a taxi. He could see the door to the bed room in which the complainant slept and it was kept open. The accused had slept in the living room and left with him at about 1.00 a.m.*

### **Analysis of all evidence**

- [52] The prosecution relied on the evidence of the complainant, her daughter and partner to prove its case.
- [53] Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses 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 single 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 the elements of the offence of Rape and also identity of the accused, beyond reasonable doubt.
- [54] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution also on the evidence of the accused. You must consider his and witnesses' evidence also for its consistency and also for the probability of his version. If you find the evidence presented by the accused is truthful and reliable, then you must find the accused not guilty of the single charge, since the prosecution has failed to prove its case. However, I must caution you that if you reject the evidence of the accused and his witness as not truthful and also unreliable that does not mean the prosecution case is automatically proved. They have to prove their case independently of the accused and that too on the evidence they presented before you.
- [55] With this caution in mind, we could proceed to consider the evidence of the prosecution as well as that of the accused for truthfulness and reliability.
- [56] 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 the consistency of the evidence.
- [57] In dealing with the issue of consistency, I shall first refer to the prosecution's case and particularly to the evidence of the complainant. It is revealed in evidence that she felt the accused's finger inserted into her vagina. It is also her evidence she had fell back into sleep after this experience and only in the following morning and that too at about 9.00 a.m. Then only she had complained about the offending act of the accused to her partner who was employed at an establishment located in Nadi. She had thereafter reported the matter to police in the same evening.

- [58]** Evaluating this evidence for its truthfulness, you have to consider whether this allegation was consistently made. The complainant's partner admitted that she did complain of the incident to him over the phone. He learnt from her that the accused had touched her private parts. In addition the witness called by the accused also admitted that on the following morning he too had learnt the offending act of the accused and he had even assaulted him over that allegation. It is for you to consider whether her allegation is consistently made, upon consideration of these items of evidence.
- [59]** The fact that her partner repeated in his evidence what he was told by the complainant on that morning should not be taken as a factor confirming her evidence on the point. You must keep in mind, in considering her partner's evidence on this point; you should consider it only on for consistency of the version of the complainant. It should only be used to decide whether the complainant was consistent in making her allegation against the accused.
- [60]** Another factor in considering the truthfulness of her evidence is the consideration of the fact that how promptly the allegation was made against the accused. It is not clear from the evidence as to the time of the alleged act of penetration. However, considering her evidence on the point it may have happened around midnight. The complainant revealed her experience to her partner only the following morning. Her explanation was that she was drunk at the time and though she attempted to get up, she couldn't. The prosecution wants you to consider this aspect of her evidence in explaining her conduct.
- [61]** The accused, however, wants you to consider that she had failed to make the allegation on the first available opportunity. According to the accused, she should have complained to her friend, the policeman who was there when the alleged incident occurred. The accused also suggests that she should have called someone as it happened. You may consider these two propositions and decide whether her complaint was made promptly or not.
- [62]** The accused, during cross examination of the complainant elicited evidence regarding whether she had looked back when she felt someone touching her body and whispering into her ear. She first said that she only tried to look up and later changed it to admit that she in fact looked back. She changed her evidence when the accused invited her attention to her statement to Police where she has said she twisted her neck to see her daughter. She says what she said to the police was not recorded accurately and was assured that she would get an opportunity in Court to tell her story. It is for you to decide whether it is an inconsistency and if so the weight to be given to this inconsistency.

- [63] These are the inconsistencies in the prosecution case. However, it is your responsibility to assess them and decide to which extent they affect the truthfulness of the prosecution evidence.
- [64] Similarly you have to consider any inconsistency in the accused's evidence and decide its effect on truthfulness of his evidence. The accused said in his evidence that he had gone into the bed room where the complainant was sleeping only once and that too was to collect his phone charger. During cross examination, it was elicited that he had stated to Police he had gone into the bed room twice. The accused too claimed that though the statement was made available he was shown only some portions of his statement. In this situation too, it is your responsibility to assess his explanation and decide the extent to which it affects the truthfulness of the accused's evidence.
- [65] During the trial, the caution statement of the accused was marked as an agreed fact. A photo copy of the statement recorded in English was tendered along with its typed version for your perusal. You may consider its contents for consistency of his evidence and decide the weight you attach to it.
- [66] The accused also says he helped the Police with their investigations. Prosecution challenged this claim by eliciting evidence that after an assault only the accused was taken to Police by his aunt.
- [67] In addition to the 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.
- [68] The prosecution says that the complainant treated the accused as her own brother and posed the question as to why would she make such a serious allegation against him, if not for the genuineness of the complaint. On the other hand, the accused wants you to consider that it is all a figment of imagination and the complainant may have dreamt this sexually oriented dream as she had admitted in her evidence that she had seen such dreams.
- [69] On the question of relative probabilities, I wish to place the following considerations also for your consideration.
- [70] It is claimed by the complainant that on that night, when the accused did this offending act, the other family members were busy drinking alcohol. The bed room itself had no source of light and had its door kept open. She was fast asleep in a state of intoxication. The accused then committed the offending act.

- [71]** The accused says that;
- i. the door was open and any one could see inside of the bed room;*
  - ii. the group of their relatives sat near the entrance to the bed room;*
  - iii. the accused, having collected his charger from the room, had gone to sleep in the living room, asking the defence witness to wake up him. This is supported by the witness for the accused;*
  - iv. when the complainant turned her head after hearing the whisper, she saw no one, the accused asked, is it possible to insert finger, whisper to ear and to disappear thereafter?*
  - v. When her daughter woke up in the night she did not see the accused with or even close to her mother;*
  - vi. the complainant is not sure whether it's a bad dream or not;*
  - vii following morning the complainant had coached her daughter to make a false story of seeing the accused that night, and therefore his denial is more probable as the complaint is based on a bad sexually oriented dream, perhaps induced by alcohol.*

**[72]** 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 one is the more probable one, based on your common-sense.

**[73]** Another consideration in evaluating evidence for its truthfulness and reliability is the manner of each witness in giving evidence.

**[74]** You will recall when the complainant, in her examination in chief, had no apparent difficulty in giving evidence. You would have observed her manner of giving evidence during cross examination. Similarly you must consider the manner in which the accused gave evidence and faced his cross examination.

**[75]** However, 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 it was due to bad dream or due to the complainant's figment of imagination that she made this allegation against him. 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 could have remained silent. However, when he does give evidence, then, as already directed, it must first be evaluated for its credibility and reliability.

- [76] So far, I have directed you on the assessment of credibility of the witnesses for the prosecution and of the accused. If you reject the evidence and preferred to accept the prosecution evidence as truthful and reliable then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence beyond reasonable doubt.
- [77] The complainant said the accused inserted his finger into her vagina. She felt the tip of his finger. She used the word he “*poked*” his finger into her vagina. If you accept it as sufficient proof of digital penetration of the complainant’s vagina, then in addition, the prosecution must prove that it was the accused who had digital penetration and that he had no consent of the complainant or was reckless about it.
- [78] 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 the woman must freely and voluntarily be given. She must have the necessary mental capacity to give consent. It is important to note that mere submission to sexual act without physical resistance by the woman cannot be considered as 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. You have to consider whether due to the level of intoxication the complainant was capable of consenting at that time. In addition, there is evidence that she tried to cover her legs by pulling her skirt down and she moved her body when she felt the hand poking in.
- [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] If you are not sure that he would have realised she was not consenting then you must proceed to consider whether the accused might have been reckless as to whether she consented. As already noted, the complainant was under a state of intoxication although there is no clear evidence as to the amount of alcohol she consumed. The accused knew that. She had retired to bed and was fast asleep. Complainant, in her evidence before us, says she did not consent. In considering these circumstances, it is for you to consider whether the complainant was in a fit mental condition to consent.

- [82] Consider the legal provisions already mentioned in light of these items of evidence presented by the prosecution and you must then determine whether the complainant has consented for digital penetration of her vagina.
- [83] In doing so, you must also consider whether the accused genuinely believed she was consenting by the way she behaved. If you think she was, then you must find the accused not guilty to the count of Rape. If you do not accept that he thought she was consenting on that occasion when you consider all the circumstances, then you could convict him of the count of Rape if you find the other elements also have been proved.
- [84] I shall now direct you on a very important issue of the case. You will recall that I have already directed you on this topic by referring to the identity of the accused. It is a vital component of the prosecution case and if it had failed to prove the fact that it was this accused and no other had digital penetration of the complainant's vagina without her consent, then you must find the accused not guilty to the count of Rape.
- [85] The prosecution relies on the complainant's evidence to prove that it was the accused and no other who digitally penetrated her vagina.
- [86] It is clear that the prosecution has only evidence of identification by voice to connect the accused to the offending act. When the accused whispered into the ear of the complainant that *"not to worry, just me"*, she says she identified the accused. The complainant did not see the accused in the room, even though there was light coming from porch, kitchen and street lamp. The complainant was confident that she had properly identified the voice that whispered into her ear that night and she attributed it to the accused, whom she knew from his early childhood. Being in a state of intoxication and unable to move her body in spite of the attempts she made, she says she identified the accused by voice.
- [87] It is a very important question of fact for you to decide whether the complainant made a positive identification of the accused by his voice. In determining this question of fact, you must also consider the possibility of her having a sexually oriented dream as the accused suggested or whether she made a mistaken identity under the circumstances. She could genuinely believe that she made identification but at the same time could be mistaken. Please consider these factors before you determine this question of fact.
- [88] The evidence of the daughter of the complainant also had to be considered in this respect. She says she had seen the accused close to her. She had not seen him close to her mother. The accused admits going once into the bed room when both of them were sleeping. It is for you to decide whether this witness also made a positive identification of the accused. The accused is a known person to her. She had seen



him in close proximity. Whether there was sufficient light to properly identify the person on that occasion and whether this witness had clear mental comprehension to make the identity and whether there is a mistake in identifying the person are questions of fact you have to consider and decide in the light of available evidence.

**[89]** You must also consider if this witness did positively identified the accused than whether that identification helps the prosecution to prove that it was this accused who inserted his finger into the vagina of the complainant. The prosecution must prove identity of the accused beyond a reasonable doubt by truthful and reliable evidence. If they have failed then you must find the accused not guilty.

**[90]** I must also direct you to disregard the evidence led by the prosecution through the daughter of the complainant to show the conduct of the accused towards her. You will only use her evidence, if you think it is credible, to consider the fact that the accused was seen in the room. She did not see the accused with her mother. The accused admitted going into the room once. You should not entertain any adverse inference against him for this alleged inappropriate conduct towards the daughter of the complainant. There is no charge against the accused on that. Therefore, I direct you to erase that evidence concerning conduct of the accused from your memory and exclude it from your considerations.

**[91]** 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 denial, then you must find the accused not guilty to the count of Rape;*
- ii. If you reject the accused's denial, 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 to the count of Rape;*
- iv. If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Rape were proved beyond reasonable doubt. If so only you must find the accused guilty to the count of Rape. If not you must find the accused not guilty to the count of Rape.*

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

[93] Any re directions the parties may request?

[94] Madam and Gentlemen assessors, this concludes my Summing up of Law and Evidence. Now you may retire and deliberate together and may form your individual opinions on the count of Rape leveled against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinion.

[95] I thank you for your patient hearing.



AchalaWengappuli  
JUDGE



**Solicitors for the State** : **Office of the Director of Public Prosecution, Suva.**  
**Solicitor for the Accused** : **Legal Aid Commission, Suva.**