

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 090 OF 2013

STATE

VS

MOSESE VUETI

Counsel : **Ms J. Fatiaki for the State**
: **Mr P Tawake and Mr J. Korotini for the Accused**

Dates of Trial : **6th – 8th March 2017**

Summing Up : **14th March 2017**

SUMMING UP

Lady and Gentleman Assessors,

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

- [2] As the presiding judge, it is my task is to ensure that the trial is conducted fairly and according to law. As a 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 all questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of fact, 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 judgment, 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 Court room, 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 addresses made by the 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 her 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] Ladies and gentleman, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [21] Having placed considerations that could be used in assessing credibility of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [22] When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to

decide in order to reach your final conclusion, whether the accused is guilty or not. 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 offences charged.
- [24] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of Primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [25] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [26] In order to illustrate this direction, I will give you an example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [27] It does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.

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

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207(1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

MOSESE VUETI, on the 1st day of September 2012 at Mualevu Village, Vanuabalavu in the Central Division, had carnal knowledge of **JOHANNE MARIE**, without her consent.

- [36] I shall now deal with the elements of the offence of Rape. In order to prove a charge of Rape, the prosecution must prove beyond reasonable doubt that the accused penetrated Johanne Marie's or the complainant's vagina, with his penis. The slightest penetration is sufficient to satisfy this element.
- [37] Then we must consider the important issue of consent. 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 a reasonable doubt that the accused penetrated the complainant's vagina with his penis without her consent then you may find him guilty of Rape.
- [40] Apart from the elements of the offence of Rape, the identity of the person who is alleged to have committed this 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 as per the date mentioned in the information. There must be positive evidence as to the identification of the accused.
- [41] If you find that the prosecution failed to establish any of these elements in respect of this offence, then you must find the accused not guilty.
- [42] In our law, no corroboration is needed to prove an allegation of Sexual Offence. The offence of Rape is obviously considered as Sexual Offence.
- [43] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [44] The parties have agreed the following facts have already been proved beyond a reasonable doubt:

- 1.1 *THAT the Complainant in this matter is Johanne Marie.*
- 1.2 *THAT the Complainant is a domestic wife and residing at Mualevu Village, Vanuabalavu, Lau.*
- 1.3 *THAT the Accused in this matter is MOSESE VUETI, 30 years old at the time of the offence, also of Mualevu Village, Vanuabalavu, Lau.*
- 1.4 *THAT the alleged incident occurred on the 1st of September 2012 at Suka Vakacegu's house at Mualevu Village, Vanuabalavu, Lau.*
- 1.5 *THAT on the alleged date, the Complainant was assisting Suka Vakacegu to boil her voivoi, whilst the Accused with Suka's husband and friends were drinking homebrew underneath the mango tree, next to Suka's house.*
- 1.6 *THAT whilst boiling voivoi on the alleged date, the Complainant joined the Accused and the other men drinking.*
- 1.7 *THAT the Accused was interviewed under caution by PC 1129 Jitoko in the English Language on the 20th February 2013.*
- 1.8 *THAT the Accused was formally charged by D/CPL 2916 Lasarusa in the English Language on the 20th February 2013.*
- 1.9 *THAT when the Accused and the Complainant had sexual intercourse on the day in question, the sexual intercourse consisted of the Accused inserting his penis into the Complainant's vagina.*

Case for the Prosecution

[45] Evidence of the complainant

- (i) *It is her evidence that she was 48 years old in 2012 and is the mother of three children. She currently resides in Ba but was living in Mualevu Village in Vanuabalavu on 1st September 2012.*
- (ii) *She already knew the accused well since he is related to her husband. He is also her neighbour.*

- (iii) *The complainant said that on the day of the incident, she went to Suka's house. Suka is also related to the complainant through her husband. She then sat on the steps of Suka's house for a while. She saw Logavatu (Suka's husband), Jopeci and the accused were also there. She asked Suka whether she would join her to go to sea. Suka suggested that if the complainant helped her to cook pandanus leaves, she would give her \$5.00.*
- (iv) *Having agreed to help out Suka, the complainant then asked for a cigarette from the group of three males. The accused offered one cigarette and also gave her a glass of home brew to drink. They were drinking home brew. The accused then gave money to the complainant to buy a packet of cigarettes for them. She obliged the request and then was given another glass of home brew by the accused. He also gave her another cigarette.*
- (v) *Thereafter, the complainant helped Suka with the leaves preparing them to be boiled. Then the accused called her and gave another glass of home brew. She then attended to the leaves and Suka was in her house. At that time she was given another glass of home brew. She then overheard accused telling Logavatu that he would bring another jug of home brew from his home.*
- (vi) *The complainant saw Jopeci getting up and lay down on the hammock. He fell in to sleep. Later Suka called the complainant to come into her house and when she entered was asked to sit in the sitting room. She sat opposite side of the accused, who was serving drinks. He gave her a glass as she sat down. Little later Logavatu stood up and went to his bed room. Only the accused, Suka and the complainant remained in the sitting room. She noted that Suka then got up, went out and returned to sitting room.*
- (vii) *She was seated with her legs folded. She felt her head drooping and was falling off to sleep. She did not know for how long she slept, but was woken up when her body was rocking. When she opened her eyes she saw the accused was lying on top of her and she felt his penis inside her vagina. She then said, "Hey, what are you doing? Get off me." She also saw Suka coming into the house and going away at that time.*

- (viii) *She realised that she was being raped but her body was tired and she soon “blacked out” again. She then only recall of her daughter calling her. Her daughter told the complainant that she had no clothes on her body. Her daughter then helped her to get up, put on her top and tied the sulu around her waist. They then went home. She did not see the accused at that time.*
- (ix) *When the complainant sat down with the accused and two others she was wearing a blue top and pink bra. She had a pink panties and a pair of shorts on. Over these she had a sulu on her lower part of the body.*
- (x) *At her home she fell off to sleep. She woke up at midnight and noted that her bra and panties are missing and looked for them in her room. Following morning she recovered her bra and shorts from Suka’s house and was told that the accused had taken her panties with him. She then returned to her house.*
- (xi) *After this her husband came home and he told her not to go to Suka’s house again and he would not want her in their house. After some time Suka came to her house. The complainant told Suka not to reveal the incident to her husband. Later the complainant told him that the accused had “raped” her. Her husband asked her whether she wanted to report it and she said yes. They went to the Police post, but found no officer. She then told the officer’s wife of the incident. Later a report was made. She was then examined by a Doctor and the report prepared of the medical officer was tendered as **P.E. No. 1.***

[46] Evidence of Suka Vakacegu

- (i) *This witness said in her evidence in the morning of 1st September 2012, the complainant came to her house on her way to pick sea weeds. She asked the complainant to help with pandanus leaves for \$5.00. At that time her husband, the accused and Jopeci were drinking home brew under a mango tree. While attending to leave, the complainant asked for a cigarette and the accused gave her money to buy a packet. The complainant, while attending to leave with the witness, the complainant consumed home brew with the group. Then the group came into the house and sat in its sitting room.*
- (ii) *After some time her husband “blacked out” and the witness took him to their bedroom. Then the complainant also fully drunk and blacked out. She was sleeping while being seated there. The witness then*

brought a pillow and helped the complainant to lie on it. She then returned to her husband.

- (iii) When the witness returned to her sitting room, the accused was having sexual intercourse with the complainant. She told accused not to do it. The accused told her to shut up. She saw the complainant pushing the accused away. Then the accused went out and having returned, had sexual intercourse with the complainant for the 2nd time.*
- (iv) Having witnessed the “disgusting thing” the witness went out of her house and called a boy. He also came and looked at them. He then went away. After the accused went away, the witness talked to the complainant as she was frightened by what she saw. She then helped the complainant to wear her clothes and also return to her house.*

[47] Evidence of Uraia Logavatu

- (i) This witness is the husband of witness Suka. He too said they were having home brew under a mango tree on that day. He also said that his wife and the complainant were attending to pandanus leaves. The complainant also consumed home brew. After some time they shifted to their sitting room. Then after a while home brew was finished. The witness was drunk and was “knocked out”. He was helped to bed by his wife.*
- (ii) He could remember his wife waking him up and although he was drunk, he stood up. His wife took him to sitting room. He saw the accused lying down with the complainant trying to have sexual intercourse with her. He could not do anything as he was drunk. He then told the accused to stop as it was not a right thing to do. The witness did not explain as to why it is not a right thing to do.*

[48] Evidence of Viliame Mua

- (i) This witness is the husband of the complainant.*
- (ii) He recalls that on the day of the incident he returned to the village with his sons from the farm at about 12.00 noon for lunch. On their way they had to go past Suka’s house. He noticed that Suka’s husband, the accused and the complainant were drinking in the sitting room, through the main door of Suka’s house, which was left open. He*

then proceeded to his house, had his lunch and told his sons to return to farm. He then went to Suka's house at about 1.00 p.m.

- (iii) He then went to Suka's house and looked through the window. He saw the accused and Suka coming out of her bed room. Then Suka came up to the main door and closed it. The witness called out to Suka asking her where the complainant is. Suka's replied that she had already left for her house. The witness challenged this and said if that is the case he should have met her on his way. He told Suka to open the door, so that he could check it out himself. She refused.*
- (iv) Then the witness went around to the back of the house and peeped through a hole in the wall. He could see his wife lying down in the sitting room. She was naked on her top but had a sulu around her waist. He saw Suka covering the complainant with a blanket.*
- (v) When he saw the complainant did not have anything on top, he thought that she may have vomited and Suka would have taken it off to wipe the complainant clean.*
- (vi) He then told Suka that the complainant is lying down there and her to open the door. She did not open it for the witness. He had no idea that his wife was raped and then he proceeded to his farm.*
- (vii) Upon his return to his house, he saw the complainant lying down on a pillow in their sitting room and she was covered with a blanket. He spoke to the complainant only on the next morning and he was told that she was "raped" by the accused. The witness was angry and disappointed as the accused is a relation and also a neighbour. The accused used to come to their house and was in good terms with them before this incident.*

[49] That was the case for the prosecution. You then heard me explaining several options to the accused. I explained to him that he could give sworn evidence or call witnesses on his behalf or remain silent. 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. He opted to give evidence.

Case for the Accused

[50] Evidence of the Accused

- (i) *The accused said in his evidence he is 34 years old now and presently lives in Nakasi. He is married and is engaged in farming.*
- (ii) *In the morning of 1st September 2012, he was drinking home brew with Logavatu and Joeli Vuli a.k.a. Jopeci, under a mango tree. He saw the complainant and her husband on their way to plantation with children. He heard Suka calling the complainant to come in. He and the complainant exchanged greetings.*
- (iii) *She then asked for a cigarette. The accused then asked her to go and buy a packet for them. Joeli offered her a glass of home brew. The complainant left and returned after few minutes with the packet of cigarettes. She said home brew was good. She was then given two more glasses. They were left with home brew for only two glasses and then the accused said he would bring 2 bottles from his house.*
- (iv) *Suka then invited the complainant to help her out with the preparation of pandanus leaves.*
- (v) *When the accused returned with the two bottles of home brew, the group consisting of Logavatu, Joeli Vuli, the complainant and the accused, then shifted to the sitting room of Logavatu from the mango tree. At that time no one was drunk or intoxicated. They shared jokes whilst enjoying the music box and continued with drinking.*
- (vi) *At about 12.00 noon, the accused saw, the complainant's husband returning from his farm with his kids. By this time they have consumed one bottle out of the two. Then Logavatu excused himself and retired to his room. Suka also saw Mua coming to her house and then she closed the door to the sitting room. She then told the accused to come and hide inside the room. She then told the complainant to lie down and she will cover the complainant with a blanket. That is to prevent Mua seeing the complainant. Mua then asked Suka if she saw the complainant and was told that she already left. But Mua called out for the complainant several time and tried to open a window. He then left looking for the complainant.*
- (vii) *When Mua left, they continued with their drinking and three of them drank the other bottle of home brew. The group continued with their*

jokes. After a while Suka left the accused and complainant alone and went to her bed room, to be with her husband. Then the two joked at each other. Suka returned to sitting room saw them closer to each other and told them that they don't have to worry about anything. She checked whether the doors are properly locked. She then left.

(viii) Then the accused and the complainant started kissing each other and then the accused had sexual intercourse with the complainant who lay down on the floor. He was on top of her. She grabbed him by his back to move him closer. Then they heard footsteps from the bedroom. With the sound of footsteps, they were trying to stop their act and the complainant pushed the accused by his chest.

(ix) Suka saw them having sex. Then she opened the back door, went out, returned and locked the door. Then she said "no one outside, no one coming". She went back to her bed room. They had sex for about 20 minutes. The accused then finished sexual intercourse, picked up his clothes and went home.

(x) The accused denied the complainant's claim that he forcefully had sexual intercourse with her. He also denied that she was fully drunk and claimed was fully awake. He also said that when Suka entered the sitting room, the complainant never raised any alarm. The complainant did not refuse or resent or said no.

Analysis of all evidence

[51] The prosecution relied on the evidence of the complainant, her husband Viliame Mua, Suka and her husband Uraia Logavatu to prove its case, while the accused also offered evidence under oath.

[52] 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 charge 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 the identity of the accused beyond a reasonable doubt.

[53] You will recall that I have addressed you on the elements of the offence of Rape. The prosecution must prove them by credible evidence to the required standard. However, the accused has admitted having sexual intercourse. With that admission,

the element of penetration has already been proved. His identity is also not at dispute. Therefore, only trial issue you have to decide is whether the accused acted recklessly in relation to the consent of the complainant as the prosecution claims or the complainant consented for sexual intercourse as the accused claims.

- [54] In evaluating the truthfulness and reliability of evidence, it is appropriate for you to devote more attention to this factor.
- [55] 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.
- [56] In relation to considering the consistency of the prosecution evidence, I shall first direct you with the evaluation of evidence on the aspect known as recent complaint. What this consideration is whether the complainant consistently made the allegation of sexual aggression to the person to whom she disclosed it for the first time since the alleged incident. You could also consider whether she consistently maintained her allegation thereafter.
- [57] The prosecution lead evidence from the complainant that she did describe the alleged act of sexual aggression to her husband the next day. She explained the delay in complaining to him as she was sleeping to recover from her intoxicated state. She complained about the incident on the first available opportunity when she was sober and implicated the accused as the person who did it. Evidence of her husband reveals that she complained to him that the accused has “*raped*” her.
- [58] The complainant again repeated the details of the incident to the medical officer who examined her. The history given by the complainant is there in **P.E. No. 1**, under the heading D 10.
- [59] You could consider these items of evidence, in order to decide whether the allegation of sexual aggression is consistently made and also in what detail. The fact that she complained of “*rape*” to her husband should not be used by you to decide the charge of Rape as it is your responsibility to decide this issue after considering all the evidence. What she has said to others outside Court is not evidence. You could only use this complaint of “*rape*” in order to decide the consistency of the allegation.
- [60] However, I must again caution you that these items of evidence should not also be utilised by you to decide the issue whether they support the complainant's evidence before this Court. You could only consider these items of evidence to consider whether the allegation is consistently made and also it was made without undue delay, without leaving room for afterthought and fabrication.

- [61]** In addition, it is your duty to consider all the evidence led before this Court for its consistency. I shall first deal with the inconsistencies in the prosecution's case. Before I venture to refer to the inconsistencies, let me assist you by directing the manner in which you should consider the inconsistencies in determining truthfulness and reliability of a particular witness.
- [62]** In assessing credibility of the testimony of a witness on consistency means to consider whether the evidence of that witness differs from what has been already said by the same witness on the same issue in 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.
- [63]** You may have observed that, there were some inconsistencies of the evidence of the prosecution witnesses. In addition, the prosecution highlighted inconsistency in the accused's evidence with that of his statement to Police. What you have to take into consideration is only the evidence given by the accused in Court and not what he said in any other previous statement. The reason is what he said to Police is not evidence. The portion of the statement to Police could only be used to consider whether he said something different to what he said in Court. These portions only assist to decide whether he was consistent in that particular issue.
- [64]** However, this caution has no application to the inconsistencies among evidence. Evidence of one witness may be inconsistent with the evidence of another witness. Both these evidence would have to be treated as of equal value. If there is inconsistency among evidence, you have to consider the truthfulness and reliability of each witness and the weight to be attached to each of them, in view of the particular inconsistency. You may reject one portion of evidence and accept the other portion of evidence if you think it is appropriate to do so, having regard to all the circumstances.
- [65]** As I have already directed you earlier on in this summing up, 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.
- [66]** We now turn to consider the inconsistencies of the prosecution case as highlighted by the accused. One of the inconsistencies of the complainant's evidence as highlighted by the accused was in relation to the fact that what were the clothing returned to her by Suka. The complainant said in evidence that she recovered her pants from Suka's house and she was told by Suka that her pantie was taken by the

accused. Suka in her evidence said that she returned the pink panties, back to the complainant.

- [67] The accused also highlighted the inconsistency between the complainant and Suka in relation to the issue whether she was sleeping at that time or not. The complainant said that she dozed off to sleep after consuming alcohol. Suka said the complainant was awake and even has opted not to respond, when her husband called out her name.
- [68] In addition, the accused highlighted the inconsistency between the evidence of Suka and her husband. Suka has seen the complainant and the accused having intercourse and then decided to call her husband. He said in evidence what he saw was only the kissing.
- [69] Another inconsistency highlighted by the accused is that Suka said the accused had sexual intercourse with the complainant twice. The complainant only knew of one such incident.
- [70] As already directed, it is for you to decide whether these are inconsistencies and if it is so, then as to the extent to which they affect the credibility of that particular witness and the basic version of the prosecution. You will also have to decide what weight you attach to its evidence. You may have also to consider any other inconsistency in evidence which you may have noted.
- [71] I also mentioned to you that the manner of giving evidence is also an applicable consideration in evaluating witnesses for their truthfulness and reliability. You would have observed during the trial, as to how the prosecution witnesses and the accused have given evidence before you and faced their cross- examination.
- [72] In addition to the above mentioned considerations on evaluation of evidence; there is another factor in considering whether the evidence of the prosecution is truthful and reliable. That is the relative probability of the versions of event as presented by the parties. In this trial both parties have placed reliance on this aspect in evidence.
- [73] The evidence of the prosecution is that the accused had sexual intercourse with the complainant, when she was incapable of consenting to it due to her high level of intoxication. They say the accused acted recklessly when he knew that she is not in a position to consent or refuse sexual intercourse with the accused.
- [74] In challenging the prosecution version of events on relative probability, the accused wants you to consider the following circumstances as revealed by the evidence of the prosecution itself:

- i. *the complainant was a willing member of the drinking party when they were under the mango tree;*
- ii. *she continued with drinking in the company of the accused in the sitting room of Suka's house;*
- iii. *she told Suka not to tell her husband that she was there;*
- iv. *she enjoyed the company of the drinking party whilst sharing jokes;*
- v. *she did not call out for help when she saw Suka going out and coming in and also when her husband came to see what was happening;*
- vi. *Suka only said that the accused and the complainant had sexual intercourse and not rape, in spite of the fact that she was threatened by the Police,*
- vii. *when suggested by the accused that she consented, she replied " I don't think so" as it is probable that having said yes, as the accused claims, she now says that she did not consent;*
- viii. *she only had 5 glasses of homebrew and shared 2 bottles with four others whereas the accused was consuming home brew even before she arrived at Suka's house;*
- ix. *she was awake at the time of sexual intercourse as she claimed she pushed the accused away by placing both her hands on his chest;*
- x. *she complained rape, when she realised her daughter has seen her lying naked in the sitting room of Suka's house and to avoid the embarrassment she fabricated the claim of rape, if her daughter reveals it to her father;*
- xi. *she felt guilty and was in tears, as noted by the medical officer, as she consented to have sex with the accused. If she did not consent why should she feel guilty?*

[75] In relation to the count of Rape, the accused also wants you to consider the probability of not having any injury on her genitalia after a sexual intercourse by the accused. He claims that it also supports his position that it was a consensual sexual intercourse.

- [76] Having considered these probabilities, if you find that the claim of the accused raises a reasonable doubt in your minds, and then you must find the accused not guilty of the charge of Rape, since the prosecution has failed to prove its case. If you reject the claim of the accused that the complainant did consent to sexual intercourse with him, 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.
- [77] With this caution in mind, we could proceed to consider the claim of the accused for its probability of the version. The prosecution highlighted an inconsistency with his evidence. This inconsistency was in relation to the evidence of the accused in which he said that Suka, having checked out the surroundings and assured him that nothing to worry about and no one is coming. Then the prosecution invited his attention to the answer he has given in in his caution interview to Q 31, where he had said no one came during the intercourse to disturb them and Suka did not say anything.
- [78] In considering this inconsistency let me remind you of the caution that I already issued to you. You will note that the prosecution highlighted an inconsistency in the accused's evidence with that of his statement to Police. What you have to take into consideration is only the evidence given by the accused in Court and not what he said in any other previous statement. The reason is what he said to Police is not evidence. The portion of the statement to Police could only be used to consider whether he said something different to what he said in Court. These portions only assist to decide whether he was consistent in that particular issue.
- [79] The prosecution challenged his version of events on probability of version as well. The prosecution wants you to consider as to why Logavatu told only the accused to stop and not to both of them. They also want you to consider when the accused said Logavatu is not a friend as to why he then went into his house to consume home brew with them? They also want you to consider why would a woman lay down in someone else's sitting room with her upper body naked, unless she is not aware of what was happening? They also wants you to consider whether there is any motive to fabricate this allegation to a relation and a neighbour unless it did happen the way they described it?
- [80] I must caution you over one 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 he obtained consent from the complainant. That is wrong. He is under no duty to disprove the case for the prosecution. He is not even under a legal duty to offer evidence.

- [81] It is your responsibility is to consider the various probabilities as highlighted by the parties and evaluate them using your experience in life and commonsense.
- [82] So far, I have directed you on the assessment of credibility of the witnesses for the prosecution and the version of events as claimed by the accused. If you reject the claim of consent by the accused in having sexual intercourse with the complainant, 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 of Rape, beyond a reasonable doubt.
- [83] The prosecution tendered the medical report of the complainant as **P.E. No. 1** with the consent of the accused. The medical officer has not given evidence before us. Prosecution relied only on the part where the history given by the complainant. However, the accused, in his closing submissions referred to the contents of this report. In the circumstances, you may consider the contents of the report, as the accused wants you to consider the fact that the medical officer has recorded that the complainant felt guilty and was in tears. She also had no injuries to her genitalia.
- [84] Medical officers carry out examinations which are relevant to the issues you have to consider. This kind of evidence is tendered to help you with scientific matters about the medical officer has expertise. They are permitted to interpret results of the examinations for our benefits, and to express opinions about them, because they are used to doing that within their particular field of expertise. You will need to evaluate expert evidence for its strengths and weaknesses, *(if any)* just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [85] It is time we consider whether the prosecution has proved the elements of the offence they charge the accused with.
- [86] Let us consider the charge of Rape now. As already noted the complainant had clearly stated that when she woke up, the accused has already inserted his penis into her vagina. There is no dispute that there was penetration. With the admission of parties, the element of penetration has already been proved beyond a reasonable doubt. The identity of the accused is also not disputed as he admits to sexual intercourse.
- [87] I shall now direct you on the issue of consent. 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. 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.

[88] In this instance, the prosecution claims that the complainant was not in a position to consent as she was heavily intoxicated. Therefore, consideration of the issue, whether there was consent or not, does not arise out of the prosecution evidence. But the accused relied on the fact that she consented. If you reject his claim of consent, then you must consider whether the accused was reckless in relation to her consent.

[89] In view of this, what you must consider is whether the prosecution has proved the accused was reckless about the consent of the complainant. 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.

[90] Prosecution claims that the complainant was not in a position to consent as she was heavily intoxicated and had already dozed off when the accused penetrated her. The complainant said in evidence that after consuming several glasses of home brew, she dozed off, while seated with her legs crossed. She had all her clothing on. When she woke up, the accused had already penetrated her.

[91] Then, as she claims, there was no opportunity to obtain prior consent of the complainant to have sexual intercourse. She then blacked out again and came to her senses only when her daughter called her up. The prosecution wants you to accept their claim that that the accused was reckless about the consent of the complainant, under these circumstances.

[92] When you proceed to consider whether the accused might have been reckless as to whether she consented, you must consider, whether he genuinely believed she was consenting, when you consider these circumstances I have mentioned to you just now. If you think so, then you must find the accused not guilty of Rape. If you do not accept that he thought she was consenting when you consider all the circumstances, then you could convict him of Rape as other elements are already been proved.

[93] You will note that the accused is not before us at this stage of the proceedings and it is not for you to wonder why. I must direct to you now about making a determination of the charge in relation to an absent accused.

(a) You already have heard his evidence. Even though he offered evidence it would have been his right to remain silent and to require the prosecution to make you sure of his guilt; there is

no burden on him to prove anything. But you will consider evidence from him which meant to undermine, contradict or explain the evidence put before you by the prosecution.

- (b) You must not assume that an absent accused is guilty because he is not here. His absence does not help the prosecution to prove its case against him in any way at all.*
- (c) Similarly you must not speculate or guess as to the reasons for his absence, and you must not hold his absence against him.*
- (d) You determine whether he is guilty or not only according to the evidence, and you will assess both prosecution and accused evidence just as carefully as you would have done if the accused was here.*

[94] In summary and before I conclude my summing up let me repeat some important points. If the prosecution has proved the accused was reckless in consent beyond a reasonable doubt then you may find the accused guilty of Rape. If not, then you must find the accused not guilty of Rape. If you accept that she consented as the accused says, then also you must find him not guilty.

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

[96] Any re directions the parties may request?

[97] Lady and Gentleman assessors, this concludes my summing up of law and evidence. Now you may retire and deliberate together and may form your individual opinions. When you have reached your separate opinions on the charge of Rape you will come back to Court, and you will be asked to state your opinion on it.

[99] I thank you for your patient hearing.

ACHALA WENGAPPULI
JUDGE



At Suva

This 14th Day of March 2017

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