

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 174 of 2013

STATE

V

PAULA SOLI

Counsel : Ms. S. Naibe and Ms. R. Uce for the State.
: Ms. V. Narara and Ms. N. Sharma for the
Accused.

Dates of Hearing : 21, 22, 24, March, 2017
Closing Speeches : 24 March, 2017
Date of Summing Up : 27 March, 2017

SUMMING UP

Madam and Gentlemen Assessors

[1] It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

[2] In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are

matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

- [3] So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
- [4] You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
- [5] State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
- [6] Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
- [7] You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

- [8] As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
- [9] The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are

sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.

- [10] Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
- [11] You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.
- [12] Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

- [13] The accused was initially charged with a count of Rape after the prosecution closed its case on 22 March, 2017, I ruled that the accused had a case to answer for the offence of attempt to commit rape.
- [14] To prove the offence of attempt to commit rape the prosecution must prove the following elements of the offence beyond reasonable doubt:
 - (a) The accused;
 - (b) Attempted to penetrate the vagina of the complainant "SL" with his penis;
 - (c) Without her consent.

AMENDED ADMITTED FACTS

- [15] In this trial the prosecution and the defence have agreed to certain facts which have been made available to you. This means you should consider these facts as proven beyond reasonable doubt.

[16] The admitted facts are as follows:

1. **PAULA SOLI** is the Accused in this case.
2. The Accused is 25 years of age and a Diver.
3. The Complainant in this case is “**SL**”, 17 years of age and from Bukama Village in Yasawa.
4. The Complainant and the Accused are known to each other.
5. The Accused and the Complainant were in Yasawa on the 10th May 2013.
6. On the 10th of May, 2013, the Complainant and the Accused were at Teci Village in Yasawa at a birthday.
7. Both the Complainant and the Accused with others had walked back to Bukama Village from Teci Village after the birthday.
8. The Accused was arrested on the 24th of August 2013 after the matter was reported to the Police on the 12th of June 2013.

[17] You have been given copies of the document titled Amended Agreed Facts. The Agreed Facts are part of the evidence and you should accept these Agreed Facts as accurate, truthful and proven beyond reasonable doubt.

[18] In this trial the accused has denied committing the offence of attempt to rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had attempted to penetrate the vagina of the complainant with his penis without her consent.

[19] The first element of the offence is concerned with the identity of the person who allegedly committed the offence. There is a dispute in respect of the identity of the person who allegedly committed the offence. The accused is denying that on 10 May, 2013 it was him who had attempted to commit rape on the complainant as alleged.

- [20] The second element is the attempt to penetrate the complainant's vagina by the accused with his penis.
- [21] This leaves you to consider the third element of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
- [22] If you are satisfied that the accused had attempted to penetrate the vagina of the complainant with his penis and she had not consented, you are then required to consider whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
- [23] You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
- [24] Before you can convict the accused you must be satisfied beyond reasonable doubt of two things:-
- (a) Firstly that the accused intended to commit rape. The offence of rape is committed when a man has carnal knowledge of another person without the consent of that person. Carnal knowledge means penetration of the vagina by the penis to any extent.
 - (b) Secondly with the intention to commit rape the accused did something which was more than mere preparation for that offence
- [25] It is for you to decide what the intention of the accused was and what he did was more than mere preparation. The identification of the accused is in dispute, together with whether it was the accused who:-
- (a) Intended to rape the complainant; and
 - (b) What he did was more than mere preparation.

- [26] Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events.
- [27] If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of attempt to rape, then you must find the accused not guilty of the offence of attempt to rape.
- [28] As a matter of law, I have to direct you that an offence of sexual nature as in this case does not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
- [29] I will now remind you of the evidence led by the prosecution and the defence. In doing so it would not be possible for me to go through the evidence of every witness in detail. I will therefore summarize the relevant aspects of the evidence. If I do not mention a particular witness or a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your decision in this case.

PROSECUTION CASE

- [30] The prosecution called three (3) witnesses to prove its case against the accused.
- [31] The complainant informed the court that in 2013 she was 17 years of age and a year 8 Student. On 10 May, 2013 the complainant with her aunty, step-mother and another woman went to a birthday party at Teci Village from Bukama Village where she was staying. They arrived at Teci Village at 9pm.

- [32] At about 11pm the complainant left the birthday party to go back to her Village with her aunt's cousin Nai and her husband Esira. It was moon lit night and the weather was fine. While walking back home they were accompanied by the accused. The complainant knows the accused since they were from the same village and that the accused's father was her cousin and both go to the same church.
- [33] Complainant knows that the accused likes her and on two occasions the accused had asked her if she was committed to someone her reply was she was available because she was still at school.
- [34] Whilst walking home Esira and Nai were walking in front and the accused and the complainant were following. It takes about an hour to walk from Bukama Village to Teci Village on foot.
- [35] After sometime the accused pulled the complainant's blue backpack saying that they should follow the couple. According to the complainant this made her afraid because by this time Esira and Nai had gone far ahead.
- [36] The accused forcefully made her lie down on the grass by pulling her backpack. She felt pain and was afraid when the accused removed her sulu, shorts and panty. After taking off his shorts the accused was about to insert his penis into her vagina she felt pain on both her thighs and her vagina. The complainant felt his penis and also saw the penis of the accused was outside his shorts. She pushed the accused and ran away.
- [37] The complainant ran to Esira and Nai who were not far away but nearby. She went to the house of Esira and Nai had her dinner and slept. She did not tell Esira or Nai of what had happened to her because she was afraid that they might tell others and they will be rumours in the Village also she was embarrassed.

[38] According to the complainant she told her sister Sioana of what had happened to her two days later. The complainant further informed the court that her uncle had beaten her because she did not tell him about what had happened to her. The reason why the complainant did not tell her uncle was because she was embarrassed.

Madam and Gentlemen Assessors

[39] Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for a child of 17 years to not complain to Esira and Nai. According to the complainant she had informed her sister Sioana of what had happened to her after two days of the incident. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or respect for an elder or shyness when talking about matters of sexual nature.

[40] The complainant said that she did not consent to what the accused had done to her. She further informed the court that she did not scream that night because some people would have heard her and spread bad rumour about her in the Village.

[41] In cross-examination the complainant stated that she was about 1 ½ meters behind Esira and Nai when they were walking home to Bukama Village from Teci Village. There were other people walking behind them, however, they were far away.

[42] The complainant did not scream when the accused pulled her backpack and pushed her to the ground, this push was hard enough for the complainant to fall to the ground. She fell on the ground face up and she felt pain on her back.

- [43] The complainant said the accused did not remove her clothes then thereafter changed her position to say that the accused removed her clothes, firstly her sulu, followed by her shorts and then her panty but not her T-shirt. Whilst the accused was doing this it took him a minute at this time Esira and Nai were in front and she was able to see the couple.
- [44] The complainant agreed that her mouth was not blocked yet she did not call out to Esira and Nai and her hands were not tied as well. According to the complainant the accused took off his belt and shorts but she had not told the accused to do this. At first the complainant did not agree that the accused took off his shorts but then changed her position to say that he took off his clothes but she did not tell him to do so.
- [45] When the accused was taking off his shorts she felt pain and was afraid since the accused was pressing both her thighs with his hands still she did not call out to Esira and Nai. When the complainant felt pain in her thighs the accused was pressing her thighs and forcing himself on her. Thereafter the accused was pushing her down by pressing both her arms. She pushed the accused away stood up and went towards Esira and Nai.
- [46] The complainant maintained that the first person she spoke to about the incident was her sister Sioana and the only thing she told her sister was that the accused had taken off her clothes and nothing else.
- [47] The matter was reported on her behalf to the Police the same day she had told her sister. The complainant agreed that she gave her statement to the Police voluntarily which contained her true statement on 12 June, 2013 about a month after the incident.
- [48] The complainant was referred to the second page of her police statement which was:

"The next morning I then went home but I never told anyone what happened until Sunday 9 June, 2013 when my uncle Sevanaia beat me up at home after he heard rumors about what happened on that night. The village nurse namely Tubetube had spread the rumors of what happened in the village and that was how the matter was reported to the Police."

- [49] The complainant agreed that because of the rumours the matter was reported to the Police and that she was forced to say that the accused had forcefully taken off her clothes after she was beaten by her uncle. The complainant never intended to report the matter to the Police although she was angry with the accused.
- [50] The complainant disagreed that at no time during that night the accused was alone with her. She also told the court that she did not meet Mere Tubetube that night.
- [51] In re-examination complainant clarified that when the accused pulled her bag she did not scream because she was embarrassed and that she only felt pain in her thighs. She also clarified that she was beaten by her uncle because he wanted to know the truth whether the accused had taken off her clothes or not.
- [52] The reason why the complainant did not report the matter to the Police was because she was afraid. Also she did not call out to Esira and Nai because they had gone far ahead and she had to run after them.
- [53] The second prosecution witness was Mere Tubetube the Village Nurse who informed the court that she was at Teci Village attending a birthday party. At about 8pm the witness left the birthday party to go to Bukama Village with her three sisters and daughter. The weather was good and it was moonlight.
- [54] On her way from Teci Village after going past Dalomo, on the beach the witness saw a white t-shirt. A torch light was shone on the t-shirt. At this

time Mere recognized Soli (the accused) with another person with him wearing a blue UNICEF bag. Mere called out to the accused for him to wait so that all could walk together. When Mere first saw the accused the distance between them and the accused was about 12 metres.

- [55] When Mere told the accused to wait he told Mere and her sisters to go faster. Upon reaching the accused, Mere noticed that the other person with the UNICEF bag was not there when she questioned the accused who was with the UNICEF bag he denied he was with anyone. Thereafter Mere looked for the person with the UNICEF bag and saw it was the complainant who was walking with Esira and Nai. The complainant is Mere's cousin sister. Mere did not speak to the complainant that night.
- [56] Since Mere was worried about the complainant who was a Student to be seen with a married man went and told Sioana the complainant's sister what she had seen that night. Mere suggested that Sioana should talk to the complainant. Mere identified the accused in court.
- [57] In cross examination Mere agreed that she had given a police statement on 14th June, 2013 which was given voluntarily. Mere agreed that it was not in her police statement that she had asked the accused to wait so that they could go together.

Madam and Gentlemen Assessors

- [58] The learned counsel for the accused in this regard was cross-examining the complainant and Mere Tubetube about some inconsistency in the statement they gave to the Police with their evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant and Mere Tubetube with their evidence given in court. You are allowed to take into consideration the inconsistency in such a statement when you consider whether the witness is believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.

- [59] It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
- [60] If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witnesses.
- [61] Mere further stated that she was carrying a torch which was shone on the accused and the person with UNICEF bag. When this was done the person wearing the UNICEF bag went in front of the accused trying to hide. Mere maintained that she saw the complainant that night and she knew it was the complainant because of the UNICEF bag.
- [62] The final prosecution witness was Sioana Kemoni, the complainant is her uncle's daughter. Sioana went to Bukama Village in July, 2013 to baby sit her elder brother's child. The complainant was staying at Sioana's house at Bukama Village. On one occasion the complainant was having stomach pains upon inquiry by Sioana the complainant told her that on the night she had left the birthday party at Teci Village with Esira, Nai and the accused at Bukama Airstrip the accused had forced the complainant to lie down. He then took off her panty and tried to have sex with her and also the accused had told the complainant not to tell anyone. According to Sioana the complainant was crying when she was telling all this.
- [63] You are entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The Prosecution says the complainant's complaint to her sister Sioana although late by two months is consistent with her account of the alleged incident and

therefore she is more likely to be truthful. On the other hand, the defence proposed that the complainant did not inform her sister immediately after the incident so should not be believed.

- [64] It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.
- [65] In cross examination Sioana told the court that she was at Bukama Village on 10 May 2013 but she did not attend the birthday party at Teci Village. Sioana disagreed that the complainant had told her about the incident in July, 2013 or two days after the incident. Sioana maintained that the complainant had told her about the incident in 2013 and that she could not remember the month and time, however, it was not in May, 2013.
- [66] Before the complainant had told Sioana about the incident Sioana had met Tubetube. Tubetube only told Sioana that she had shone a torch light on the complainant and the accused on that particular night.
- [67] Sioana maintained that the complainant had told her that the accused forced her and removed her clothes. Sioana also told the court that the complainant had told her about the alleged incident after Tubetube had told her what she had seen that night. Sioana agreed that Tubetube did not come to see her but she went to see Tubetube since she had taken her brother's child for the baby clinic.
- [68] At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.

- [69] He could have remained silent but he chose to give sworn evidence and be subjected to cross-examination.

Madam and Gentlemen Assessors

- [70] I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath in his defence. The accused is not obliged to give evidence. He is not obliged to call any witnesses. He does not have to prove his innocence in effect he does not have to prove anything.

- [71] However, the accused decided to give evidence on his behalf. You must then take into account what the accused adduced in evidence when considering the issues of fact which you are determining.

DEFENCE CASE

- [72] The accused informed the court that on 10 May, 2013 he attended the birthday party at Teci Village. He walked from Bukama Village with his cousin Pita to Teci Village and it takes about 1 ½ hours on foot. When he reached Teci Village the birthday party had not started.
- [73] The accused left the birthday party at 10pm with his brothers Peceli and Mosese on foot behind them were Esira, Nai and complainant about 30 metres away but he was not able to see them.
- [74] On his way back to Bukama Village the accused did not meet anyone he reached Bukama at 10.30pm. The accused knows the complainant but did not meet her on his way back to Bukama that night. The accused also did not meet the Village Nurse Tubetube that night as well. The accused denied attempting to rape the complainant that night.

[75] In cross examination the accused agreed that he was related to the complainant and that she was his father's cousin. During church service he used to meet the complainant. He denied speaking to the complainant during or outside church service but the accused knows the complainant was a Primary School Student. The accused did not meet the complainant at the birthday party and maintained that he did not leave the birthday party with Esira, Nai and the complainant. The accused denied all the allegations put to him in respect of the offence of attempt to commit rape.

[76] That was the case for the defence.

Madam and Gentlemen Assessors

[77] It is for you to decide whether you believe the evidence of the accused. If you consider that the account given by the defence through the evidence is or may be true, then you must find the accused not guilty.

[78] You heard the evidence of all the witnesses if I did not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your decision.

ANALYSIS

[79] The Prosecution's case is that at about 11pm when the complainant was returning to Bukama Village after a birthday party with a couple namely Esira and Nai together with the accused, the accused pulled the complainant's backpack saying they should walk behind the couple. This made the complainant afraid since by this time the couple had gone far ahead of them.

[80] The accused forcefully made her lie down on the grass by pulling her backpack. She felt pain and was afraid when the accused removed her sulu, shorts and panty. After taking off his shorts the accused was about to insert his penis into her vagina she felt pain on both her thighs

and her vagina. The complainant felt his penis and also saw the penis of the accused was outside his shorts. The accused had forced himself on her by pushing her down pressing her thighs and also her arms when she was trying to get up. Finally the complainant pushed the accused and ran away.

- [81] The prosecution says the above act of the accused shows that he intended to commit rape and with that intention he did something which was more than mere preparation for that offence and that the complainant did not consent to what the accused had done to her.
- [82] The accused on the other hand says that he has been wrongly accused he did not meet the complainant that night and that he had walked from Teci Village to Bukama Village with his brothers and no one else. The complainant on the other hand says that she knows the accused and the accused accompanied her, Esira and Nai when they were walking back to Bukama Village after the birthday party.
- [83] The prosecution further says Mere Tubetube the Village Nurse informed the court that she met and spoke with the accused whilst on her way to Bukama Village. A torch light was shone on the accused and Mere recognized the accused. The prosecution says paragraph 7 of the Amended Admitted Facts states that both the complainant and the accused with others had walked back to Bukama Village from Teci Village after the birthday.
- [84] According to the accused the complainant should not be believed. If whatever she has described to you was the truth the complainant would have screamed out to Esira and Nai who were about 1 ½ meters ahead of her since the complainant's mouth was not blocked. Furthermore the complainant did not tell Esira or Nai of what had happened to her that night when she met them and went with them to their house. The accused also says the complainant was forced to say that the accused had forcefully taken off her clothes after she was beaten by her uncle.

[85] The complainant never intended to report the matter to the Police. The matter was reported to the Police on 12th June, 2013 as per the police statement of the complainant but she told the court that the matter was reported to the Police the same day she told her sister Sioana of what had happened to her which was two days after the incident. However, according to Sioana she had gone to the Bukama Village in July, 2013.

Madam and Gentlemen Assessors

[86] You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence. In testing the credibility of a witness, you can consider whether there is a delay in making a complaint to someone or to an authority or to Police on the first available opportunity about the incident that is alleged to have occurred. If the complainant is prompt that usually leave no room for fabrication.

[87] Bear in mind 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 case the complaint made to Sioana is genuine and what weight you attach to this.

[88] Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

[89] In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about

which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

[90] You will have to evaluate all the evidence and apply the law as I explained to you when you consider the allegation against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

[91] It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.

[92] If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence and do not believe a single word accused told in court still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.

[93] The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

[94] Your possible opinions are:-

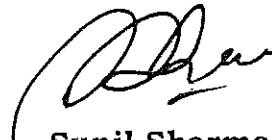
Attempt to commit Rape:

GUILTY OR NOT GUILTY

Madam and Gentlemen Assessors

- [95] This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.
- [96] Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.




Sunil Sharma
Judge

At Lautoka
27 March, 2017

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.