

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 142 of 2013

STATE

V

ILIESA RAGIGIA

Counsel : Mr. A. Singh for the State.
: Ms. L. Vateitei for the Accused.

Dates of Hearing : 19, 23, 25 May, 2017
Closing Speeches : 29 May, 2017
Date of Summing Up : 30 May, 2017

SUMMING UP

[The name of the second prosecution witness is suppressed, she will be referred to as "AB".]

Ladies and Gentleman 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. 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.
- [6] 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.
- [7] During the closing speeches the learned State Counsel told you to think about why the 27 year old complainant would have an affair with a 50 year old man and what benefits does she get out of this relationship. It is unfortunate that the learned Counsel is asking you

to speculate upon an issue in arriving at your opinion. I direct you to disregard this submission you are not required to speculate on anything.

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 person'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 is charged with the following offences: (a copy of the information is with you).

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (c) of the Crimes Act 2009.

Particulars of Offence

ILIESA RAGIGIA on the 1st day of July, 2013, at **NADI** in the **WESTERN DIVISION**, used his penis to penetrate the mouth of **TEMALESI BULIVOU**, without her consent.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009

Particulars of Offence

ILIESA RAGIGIA, on the 1st day of July, 2013 at **NADI** in the **WESTERN DIVISION**, used his penis to penetrate the vagina of **TEMALESI BULIVOU**, without her consent.

- [14] To prove Count One the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:

- (a) The accused;
- (b) Penetrated the mouth of the complainant Temalesi Bulivou with his penis;
- (c) Without her consent;

(d) The accused knew or believed the complainant Temalesi Bulivou was not consenting or didn't care if she was not consenting at the time.

[15] To prove Count Two the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:

- (a) The accused;
- (b) Penetrated the vagina of the complainant Temalesi Bulivou with his penis;
- (c) Without her consent;
- (d) The accused knew or believed the complainant Temalesi Bulivou was not consenting or didn't care if she was not consenting at the time.

[16] The slightest of penetration of the complainant's mouth and vagina by the accused penis is sufficient to satisfy the act of penetration.

AMENDED ADMITTED FACTS

[17] In this trial the prosecution and the defence have agreed to certain facts which have been made available to you.

[18] The amended admitted facts are as follows:

1. *In the year 2013, Temalesi Bulivou was living with her defacto partner at Tunalia, Nadi.*
2. *In the year 2013, Temalesi Bulivou with her defacto partner was renting a house, owned by Iliesa Ragigia.*

3. *In the year 2013, Iliesa Ragigia's house was very close to Temalesi Bulivou's house.*

4. *On the 1st of July, 2013, Iliesa Ragigia and Temalesi Bulivou had oral sex and later had sexual intercourse (penis penetrating the vagina) inside the house of Iliesa Ragigia.*

5. *One of Iliesa Ragigia's daughter's name is Jackie Campbell.*

[19] From the amended admitted facts you will have no problems in accepting the above as proven beyond reasonable doubt and you can rely on it.

[20] The only issue that needs to be determined is whether the complainant consented to the penetration of her mouth and vagina by the accused with his penis on 1st July, 2013.

[21] In this trial the accused has denied committing the offences of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the mouth and the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time that is on 1st July, 2013.

[22] The first element of both the offences is concerned with the identity of the person who allegedly committed the offences. There is no dispute that it was not the accused as alleged. You are to consider this element of the offence as proven beyond reasonable doubt.

[23] The second element is the act of penetration of the complainant's mouth and vagina by the accused with his penis. Like the first element there is no dispute that it was not the accused who had

penetrated the mouth and the vagina of the complainant as alleged. You are to consider this element of the offence as proven beyond reasonable doubt as well.

- [24] This leaves you to consider the third element that is 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.
- [25] If you are satisfied that the accused had penetrated the mouth and the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
- [26] 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.
- [27] If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's mouth and vagina without her consent then you must find the accused guilty as charged.
- [28] If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offences he is charged with.

[29] As a matter of law, I have to direct you that offences of sexual nature as in this case do 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.

PROSECUTION CASE

[30] The prosecution called three (3) witnesses to prove its case against the accused.

[31] The first witness was the complainant who informed the court that in the year 2013 she was renting a house owned by the accused at Tunalia, Nadi with her husband. The accused was living about 8 meters away furthermore she stated that she was not in any relationship with the accused and that she respected him like her father.

[32] On 1st July, 2013 at about 1pm whilst on her way to wash the clothes of the accused's children she met the accused who informed her that he was going to check something about his land. The reason for going to wash the children's clothes was that the wife of the accused had asked the complainant to look after the children before she left the house of the accused. The complainant felt sorry for the children and was helping them.

[33] After hanging the clothes to dry as the complainant was going to her house near the bathroom she saw the accused standing wearing a blue and white stripe towel without a t-shirt. At this time the Accused's daughter "AB" was present as well.

- [34] The accused chased his daughter by saying that he wanted to speak with the complainant. According to the complainant his daughter looked frightened and left.
- [35] After "AB" left, the accused pulled both the complainant's hands and pulled her into the bathroom. The complainant said that she begged the accused by saying in the itaukei language "*tau kerekere*" meaning for the accused to stop what he was doing.
- [36] The accused did not stop but pulled and dragged the complainant into the bathroom. The bathroom was a small one the accused pushed the complainant down where a small bucket was and then pushed her head down. The accused then locked the bathroom door. There was no one around.
- [37] In the bathroom the accused opened his towel and forced his penis into the complainant's mouth for 10 minutes. At this time the complainant was struggling with the accused, crying and the accused was pushing her hands away.
- [38] The complainant did not shout because she was frightened and afraid that the accused would do something to her. According to the complainant in her words "*everything breakdown*" she did not know what was happening.
- [39] The complainant further stated that she did not consent to what the accused had done to her inside the bathroom. The complainant said that she begged the accused to stop after which the accused opened the bathroom door. The complainant tried to run outside but the accused was standing in front of her and pulled her hand. Thereafter the accused after putting on his towel dragged the complainant to his

bedroom which was about 8 metres away from the bathroom by holding her hand tightly.

- [40] At this time the complainant was crying and afraid but she did not shout as she was feeling weak, there was no one around.
- [41] In the bedroom the accused locked the door and told her not to shout, the accused pulled the complainant towards him and then pushed her to the floor. The complainant was wearing pink top and long pants. The accused was trying to take out her top, the complainant was struggling to push the accused away but he kept on pulling her hand. The accused managed to pull her top up the complainant kept on crying and begging him to stop. To cover her body the complainant sat on the floor with her legs crossed. The accused tried to pull one side of her pants on the right leg and was able to remove her pants and her top. According to the complainant the accused was holding her tightly and she could not push him away.
- [42] The accused then forced himself into her when she struggled to push him away he held her tightly. Thereafter the accused forced his penis into the complainant's vagina for 30 minutes. The complainant told the accused that she was a married woman and that she respected him but the accused did not stop. He told her that he has been admiring her for a long time. When the accused was penetrating the vagina of the complainant he asked her twice if she had reached orgasm the complainant replied yes so that he would leave her after a while she felt wetness inside her.
- [43] After this the accused stood up put on his towel and went away. The complainant after wearing her clothes ran outside the bedroom crying. On her way out she met the accused's daughter "AB" who

asked the complainant what happened the complainant in her evidence said:

"I didn't tell her, she asked me what happened and I said nothing."

- [44] At her house the complainant was crying waiting for her husband then she saw her brother Bale and called him. She informed her brother that the accused had done something to her. The complainant's brother was angry and took her to his house. The reason why she did not tell her brother in detail about what the accused had done to her was because she was ashamed. Next day the matter was reported to the Police.
- [45] In cross examination, the complainant did not agree that she was in a relationship with the accused for more than a year and that was the reason why she went to wash his children's clothes at his house.
- [46] The complainant also stated that she did not shout to get the attention of the children playing in front of the house because she was shocked and that the children were yelling in front of the house.
- [47] The complainant maintained that she did not consent to what the accused had done to her. To the suggestion that her medical examination did not mention any bruises or abrasions in the vaginal area or her hands and body the complainant agreed there should have been marks seen since she was struggling and defending herself.
- [48] The complainant was referred to her police statement dated 2nd July, 2013 in particular she had told the Police:

"I have been residing at the above mentioned address for the past 2 years with my defacto husband, Hector Lobendhan."

- [49] The complainant agreed that the above statement was true that she was living in Tunalia, Nadi for the past two years prior to the alleged incident and not from 2013 as stated in her evidence.
- [50] The next witness was "AB" the daughter of the accused who was 14 years of age. This witness informed the court that she was 10 years of age at the time of the alleged incident. In the afternoon of 1st July, 2013 the witness was at home she didn't go to school that day because her mother was not at home and there was nobody to cook their lunch. She was playing in front of the house with her other siblings when her father called her to give him soap.
- [51] The witness went and gave the soap to her father who was in the bathroom. At this time she did not know where Temalesi was. After sometime "AB" was near the kitchen she saw Temalesi and her father coming out of the bedroom. The witness saw Temalesi crying she asked Temalesi what had happened, Temalesi kept on crying and didn't say anything.
- [52] There was no one else in the house at this time. The witness saw Temalesi coming out of the bedroom first when Temalesi was crying her father did not say anything. Thereafter Temalesi served food to everyone and sat beside her father. After this Temalesi went and washed her clothes and went away.
- [53] In cross examination "AB" informed the court that Temalesi would come to her house a lot to use the water tap or to serve them food. Temalesi would also come when her mother would be at home.

According to the witness Temalesi and her mother sometimes had a good relationship.

[54] According to the witness her mother was not happy that Temalesi would be talking to her father. On one occasion the complainant invited her father to her house for a drink. The witness saw Temalesi holding her father's hands both came home in the night and Temalesi kissed her father's cheek.

[55] The witness further stated that when she was inside the house near the kitchen she did not hear Temalesi scream or shout for help.

[56] The final prosecution witness was Pajilai Bale who informed the court that in 2013 he was residing at Tunalia, Nadi and that the complainant was his cousin sister.

[57] On 1st July 2013 he went to Town and returned at around 3 o'clock in the afternoon. When Pajilai got off the bus the complainant called him from her house. The witness saw the complainant crying he told her to wait so that he could leave his groceries at home which was only 5 minutes away.

[58] The witness went to the complainant's house and asked her what had happened to which the complainant replied that the accused had touched her. The witness saw the complainant was crying who showed him red marks on her arm. According to the witness the marks were dark red marks. The complainant told him that the accused had caused those marks when he pulled her into the house. Other than this the complainant told him nothing.

[59] The witness took the complainant to his house he noticed the complainant was frightened and crying. Later the complainant's husband came from work and both left.

[60] In cross examination the witness was referred to his police statement which he had given to the Police two days after the incident that is on 3rd July 2013 the witness agreed that there was no mention in his police statement of any red marks seen by him on the complainant. The witness stated that the marks were there but it was not in his police statement. The witness was then referred to line 10 of his police statement as follows:

"I came back to Tema's place she told me that "o Ragigia Tarai au" meaning that one Ragigia touched her." She was not specific with her explanation. When I see her I can figure it out that something happened to her."

[61] It was suggested to the witness that he made it up that the complainant had told him about the red marks as a result of the accused pulling her. The witness disagreed that he was making up anything.

[62] The witness agreed that the evidence he gave in court was after 4 years and the version he gave to the Police was the true version.

Ladies and Gentleman Assessors

[63] The learned counsel for the accused in this regard was cross-examining the complainant and the final prosecution witness Pajilai Bale about some inconsistencies in the statement they gave to the police immediately after the incident when the facts were fresh in their mind with their evidence in court. I will now explain to you the purpose of considering the previously made statement of the

complainant and the final prosecution witness Pajilai Bale with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.

[64] 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.

[65] 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.

Ladies and Gentleman Assessors

[66] 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 the complainant not to complain to the accused's daughter and in detail to her brother of what had happened to her. 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. Here according to the complainant she did not tell anything to the accused's daughter but told her brother that the accused had done something to her. The reason why she did not tell everything in detail to her brother was because she was ashamed.

[67] 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 complained to her brother although not in detail immediately after the alleged incident when she went home and to the Police is more likely to be truthful. On the other hand, the defence says that the complainant did not complain to the accused's daughter immediately after the alleged incident and also to her brother in detail at her home so she should not be believed.

[68] 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.

[69] This was the prosecution's case.

DEFENCE CASE

Ladies and Gentleman Assessors

[70] At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove

anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent but opted to call witnesses that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent.

[71] I now draw your attention on the evidence adduced by the defence during the course of the hearing.

[72] The first defence witness was Solomoni Cavu Lotawa who informed the court that the accused is his friend and they are neighbours. The witness always visits the accused, he knows the complainant who was a tenant of the accused so whenever he visited the accused he would see the complainant.

[73] From the behaviour of the complainant and the accused towards each other the witness suspected they were having an affair. According to the witness the complainant had familiarized herself with the accused's house and they used to drink together.

[74] In cross examination the witness stated that the accused was his friend of 8 years and that he had approached the accused after the accused was arrested by Police and told him if needed he was willing to give evidence of what he had seen.

[75] The witness further stated that his observation of the complainant and the accused when the wife of the accused was not around was that the complainant was very confident in being beside the accused when drinking together.

[76] The witness maintained that he did not make up his evidence and was also not lying and that he told the court what he saw.

- [77] The second witness for the defence was Doctor Vineet Vijay Chand, who had examined the complainant on 2nd July, 2013. Dr Chand has 8 years' experience in general practice having graduated with MBBS Degree from University of the South Pacific. Dr Chand also has a post graduate Certificate and Diploma in Public Health. Dr Chand is currently based at Tavua Hospital.
- [78] The witness recognized and confirmed the Fiji Police Medical Examination Form which he had completed after physically examining the victim. This document is marked as Defence Exhibit 1.
- [79] The Doctor informed the court that his specific findings were:
- “(a) Nil bruises or abrasions noted in the vaginal area.*
- (b) Nil bruises on hands/body.”*
- [80] The history noted by the Doctor of what the complainant had narrated to him was at D (10) of the Medical Examination Form as follows:
- “Raped by landlord yesterday after 1pm. Forced by grabbing hands and then raped. Victim washed her private parts after rape happened.”*
- [81] The Professional Opinion of the Doctor at D (14) of the Medical Examination Form was that there was a history of sexual assault and rape.
- [82] According to the Doctor if a victim of rape or sexual assault has been sexually active no injuries or bruises can be found in the vaginal area of such victims.

[83] The Doctor also informed the court that he had examined the victim after about 29 or 30 hours of the alleged incident and it is possible any red marks on the victim would not be visible unlike blood clot which would have been visible.

[84] In cross examination the Doctor stated that his initial impression of the victim was noted at D (11) as:

"Distressed and fearful."

[85] The Doctor maintained that not all rape victim's received vaginal injuries and this case was one of them. At D (15) as part of his recommendation the Doctor noted the following:

"Victim is very scared and distressed. She is depressed and needs support from family."

[86] The Doctor came to the above recommendation after speaking to the victim and taking into account the history given by her and upon his observations that she was very depressed and afraid.

[87] You have heard the evidence of Dr Chand who has been called as an expert on behalf of the defence. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The Medical Report of the complainant is before you and what the Doctor said in his evidence as a whole is to assist you.

[88] An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful

consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the Doctor.

[89] You should remember that this evidence of the Doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.

[90] This was the defence case.

ANALYSIS

Ladies and Gentleman Assessors

[91] You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.

[92] The Prosecution alleges that the accused on 1st July, 2013 penetrated the mouth and the vagina of the complainant with his penis without her consent.

[93] The complainant gave evidence that on 1st July, 2013 at about 1pm after hanging the accused children's clothes she saw the accused standing near his bathroom wearing a blue and white stripe towel without a t-shirt.

[94] The accused pulled both the complainant's hands and pulled her into the bathroom. The complainant said that she begged the accused by

saying in the itaukei language "*tau kerekere*" meaning for the accused to stop what he was doing.

[95] In the bathroom, the accused opened his towel and forced his penis into the complainant's mouth for 10 minutes. The complainant did not shout because she was frightened and afraid he would do something to her.

[96] Thereafter the accused dragged her by holding tightly onto her hand to his bedroom after putting on his towel. At this time the complainant was crying and afraid but she did not shout as she was feeling weak.

[97] In the bedroom the accused locked the door and told her not to shout, the accused pulled the complainant towards him and then pushed her to the floor. To cover her body the complainant sat on the floor with her legs crossed. The accused was able to take off her pants and was also able to remove her top.

[98] The accused then forced his penis into the complainant's vagina for 30 minutes. When the accused was penetrating the vagina of the complainant he asked the complainant twice if she had reached orgasm the complainant replied yes so that he would leave her, after a while she felt wetness inside her.

[99] After this the accused stood up put on his towel and went away. The complainant put on her clothes and ran outside the bedroom crying. On her way out she met "AB" who asked the complainant what happened in reply the complainant said "nothing".

[100] At her house the complainant was crying waiting for her husband she saw her brother Bale and called him. She informed Bale that the

accused had done something to her. The reason why she did not tell her brother in detail about what the accused had done to her was because she was ashamed. The matter was reported to the Police the next day.

[101] The next witness for the prosecution was "AB" who informed the court that she was playing in front of the house with her other siblings when her father called her to give him soap.

[102] When the witness gave the soap to her father he was in the bathroom at this time the witness did not know where Temalesi was.

[103] After sometime "AB" was near the kitchen she saw Temalesi and her father coming out of the bedroom. The witness saw Temalesi crying and she asked her what had happened, Temalesi kept on crying and didn't say anything.

[104] The final prosecution witness Pajilai Bale informed the court on 1st July 2013 after he returned from Town the complainant called him from her house.

[105] The witness went to the complainant's house and asked her what had happened to her. The complainant replied that the accused had touched her. The complainant showed the witness red marks on her arm. The complainant told him that the accused had caused those marks when he had pulled her into the house.

[106] The accused on the other hand says that he had penetrated the mouth and the vagina of the complainant with his penis but with her consent.

[107] The defence says the complainant and the accused were in a relationship Solomoni Cavu Lotawa who used to visit the accused after observing the behaviour of the complainant and the accused suspected that they were having an affair. Solomoni also noticed that the complainant had familiarized herself with the accused's house and they used to drink together and when the wife of the accused was not around the complainant was very confident in being beside the accused when drinking together.

[108] Furthermore the Doctor, who examined the complainant on 2nd July, 2013 did not see any bruises or abrasions in the vaginal area or on the hands and body of the complainant.

[109] The defence says if the complainant was raped she would have shouted or screamed for help. In respect of what happened in the bedroom any call for help by the complainant would have been heard by the witness "AB" who was in the kitchen. The defence also says the complainant would not have served food to everyone and sat beside the accused as per the evidence of the second prosecution witness "AB".

Ladies and Gentleman Assessors

[110] 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 complaint is prompt that usually leave no room for fabrication.

- [111] 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 the complainant's brother and the Police is genuine and what weight you attach to this.
- [112] 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.
- [113] 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.
- [114] You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused have been 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.

[115] 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.

[116] If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence 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.

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

[118] In this case the accused is charged with two (2) counts of rape, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

[119] Your possible opinions are:-

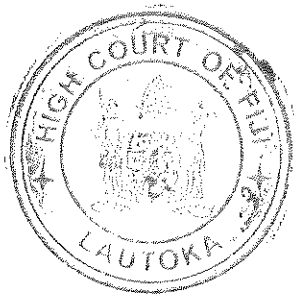
COUNT ONE: **RAPE** ACCUSED - GUILTY OR NOT GUILTY


COUNT TWO: **RAPE** ACCUSED - GUILTY OR NOT GUILTY

Ladies and Gentleman Assessors

[120] 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.

[121] 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
30 May, 2017

Solicitors

Office of the Director of Public Prosecutions for the State.

M/s. Asta's Law for the Accused.