

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 183 of 2017

STATE

v

PAULA NAVUKULA

Counsel : Ms. Shirley Tivao for the State
Ms. Namrata Mishra with Ms. Olive Grace for the Accused

Dates of Trial : 26-28 November 2018

Summing Up : 29 November 2018

SUMMING UP

Madam Assessors and Gentleman Assessor,

- [1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable.

You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.

- [4] Please remember that I will not be reproducing the entire evidence in this summing up. 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 reasoning.
- [5] In forming your opinions, 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] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the document tendered as a prosecution exhibit and any admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence 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 the credibility of witnesses, basically the truthfulness and 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 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 in a Court of law and may find Court environment stressful and distracting.
- [14] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has his or 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 alone 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] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems 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.
- [16] Ladies and Gentleman Assessors, 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.
- [17] Having placed considerations that could be used in assessing credibility and reliability 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.

- [18] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable 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 guilty of the charge. 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.
- [19] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [20] 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.
- [21] 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.
- [22] In order to illustrate this direction, I will give you a very simple 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 example you will understand the relationship between primary facts and the inferences that could be drawn from them.

- [23] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [24] 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. It is not his task to prove his innocence.
- [25] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [26] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [27] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, 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 reasonable doubt, then your duty is to find the accused guilty.
- [28] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant or anger or prejudice against the accused or anyone else. No such emotion should have 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 opinions.
- [29] Let us now look at the charge contained in the Information.
- [30] There is one charge preferred by DPP, against the accused:

COUNT ONE

Statement of Offence

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

Particulars of Offence

PAULA NAVUKULA, on the 29th day of May 2017, at Wainimakutu, Namosi, in the Central Division, had carnal knowledge of **SALANIETA VAKALOLOMA SAUNIYAKA** by inserting his penis into the vagina of **SALANIETA VAKALOLOMA SAUNIYAKA** without her consent.

[31] Section 207(1) of the Crimes Act No. 44 of 2009 (Crimes Act) reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

[32] Section 207(2) (a) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent;

[33] Therefore, when Section 207(1) is read with Section 207(2) (a) it would read as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent.

[34] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207(2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

[35] Therefore, in order for the prosecution to prove the count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 29 May 2017);
- (iii) At Wainimakutu, Namosi, in the Central Division;
- (iv) Inserted his penis into the vagina of Salanieta Vakaloloma Sauniyaka/penetrated the vagina of Salanieta Vakaloloma Sauniyaka with his penis;
- (v) Without the consent of the complainant; and

- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[36] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

[37] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[38] The fourth element involves the penetration of the complainant's vagina; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

[39] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.

[40] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

- (a) by force; or
- (b) by threat or intimidation; or
- (c) by fear of bodily harm; or
- (d) by exercise of authority; or
- (e) by false and fraudulent representations about the nature or purpose of the act; or
- (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

- [41] Apart from proving that the complainant did not consent for the accused to insert his penis, into her vagina, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not 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. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.
- [42] 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 25 years of age at the time of the alleged incident, and therefore, she had the mental capacity to consent.
- [43] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape is obviously considered a Sexual Offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.
- [44] If you are satisfied beyond any reasonable doubt that the accused, on 29 May 2017, at Wainimakutu, Namosi, penetrated the vagina of Salanieta Vakaloloma Sauniyaka with his penis, without the consent of the complainant and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the count of Rape.
- [45] If you find that the prosecution has failed to establish any of these elements in relation to the count of Rape, then you must find him not guilty of Rape.
- [46] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [47] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Admitted Facts*" without placing necessary evidence to prove them:
1. SALANIETA VAKALOLOMA SAUNIYAKA, 25 years old, is the complainant in this matter.
 2. The complainant resides at Wainimakutu, Namosi.
 3. PAULA NAVUKULA, 21 years old, resides at Nasoqo Village, Naitasiri and is also known as Tamana.

4. On the 29th of May 2017, Paula Navukula was at Wainimakutu.
5. Paula Navukula had gone to the complainant's home to see her brother namely Joji.
6. The complainant's brother was not at home.
7. The complainant asked Paula Navukula if she could take the phone to Suva and would return it to him.
8. Paula Navukula denied.
9. The complainant picked the phone and Paula Navukula pushed her right hand.
10. The next morning, Ratu Alipate Ratini called both the complainant and Paula Navukula and questioned them about the allegation against him.
11. The complainant was medically examined on 30 May 2017, at Navua Hospital.

[48] Since the prosecution and the defence have consented to treat the above facts as "*Final Admitted Facts*" without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[49] The prosecution, in support of their case, called the complainant, Salanieta Vakaloloma Sauniyaka, and Doctor Anaseini Maisema. The prosecution also tendered the following document as a prosecution exhibits:

Prosecution Exhibit PE1- Medical Examination Report of the complainant.

[50] Evidence of the complainant Salanieta Vakaloloma Sauniyaka

- (i) *The complainant testified that she is currently residing at Wainimakutu, in Namosi. She resides with her father, her step-mother and her two children (daughters). The eldest child is 6 years old and the second is 2 years old.*
- (ii) *On 29 May 2017, she was residing at Wainimakutu. At the time she was residing with her two children, her elder sister's daughter (her niece) and her brother. Ratu Joji Sauniyaka. At the time her niece was 5 years old.*

- (iii) She testified that Paula Navukula (the accused) was also known as Tamana. His mother is from Wainimakutu. She knew the accused when he was small.*
- (iv) The complainant testified as to what took place when the accused came to her house on 29 May 2017. At the time she was at home with her two children and her niece. Her children and her niece were sleeping at the time.*
- (v) Salanieta testified that she was at home lying down when she heard someone calling from the window. She had asked who it was. The person had said that he was Tamana. She asked him what he wants and he had replied that he wants to meet her brother Joji. He had wanted to meet Joji so that they could send songs on each other's phones.*
- (vi) The complainant had asked the accused to come to the door at the porch. Then, she had opened the door and accused had entered. Then she had told him to sit on the settee.*
- (vii) When asked as to why she invited the accused into her house, the complainant said "Because I know that he is my son from his mother's side and my brother Joji is his uncle." Later she clarified that the accused's mother is her cousin sister. That is why the accused is like a son to her.*
- (viii) Thereafter, the accused had come into the house, and was sitting down on the settee. Since the weather was cold at the time, she had told the accused to go and lie on her brother's bed, which was also in the living room. The accused had said that he will remain on the settee.*
- (ix) The accused had been playing a song on his phone. The complainant was lying down on the same bed with her children. Then she had asked the accused if she could use his phone to listen to the music. The accused had given the complainant his phone. The complainant had put her hand out from the mosquito net and taken the phone from the accused. After taking the phone from him she had scrolled through his phone looking for other music videos.*
- (x) The complainant explained to Court the layout of her house. She described that the house comprised of a living room and two bedrooms. She said that it was a big living room.*
- (xi) At the time, the complainant was scrolling the accused's phone, the accused had come and laid besides the bed on the floor. Therefore, the complainant had stood up and gone and lied down on her brother's bed.*

- (xii) *At this stage, the accused had taken the phone from her and told her to watch a movie. When she played the movie, she found that it was a blue movie. Since she didn't want to watch the blue movie, she had changed the movie.*
- (xiii) *The complainant then testified as follows: "Then I told him, did you come here to see Joji or did you come here to do something else?" The accused had replied saying that he had come to see Joji and that Joji knew that he will be coming. Joji had asked him to take the lead and that he (Joji) will follow later.*
- (xiv) *Thereafter, the complainant had got up from her brother's bed and gone to where the children were lying down. The accused had gone and lied down on her brother's bed. The complainant had asked the accused if she could take his phone and bring it back on Wednesday. The accused had said that the phone does not belong to him and it belongs to his uncle.*
- (xv) *The complainant had remained on the bed with the children and was listening to songs on the accused phone.*
- (xvi) *The complainant testified to the events which transpired as follows:*

Q. *What happened while you were playing the song on the phone?*

A. *I was lying down. It was not long after I slept I felt that he was standing beside the bed..... then I turned to him and asked him what he was doing here?*

Q. *What happened?*

A. *Then he told me that he wanted to lay down where we were lying down.*

Q. *What was your reaction to that?*

A. *Then I told him, you are my son. You cannot lie down with us. It is better for you to go and lie down on my brother's bed.*

Q. *What happened?*

A. *He didn't follow what I said. We had a mosquito net on my bed. Then he spread his arms to open the mosquito net and entered.*

Q. *What do you mean entered?*

A. *He forcefully opened the mosquito net. Then I stopped him. Then he forcefully opened the mosquito net and tore it.*

- Q. *You have to enter the mosquito net to get onto your bed?*
- A. *Yes.*
- Q. *Who was on the bed with you?*
- A. *Me and my children.*
- Q. *What happened after Paula had torn the mosquito net?*
- A. *He entered inside and he harassed me at that time.*
- Q. *When you said harassed me, can you explain?*
- A. *He held my body and tried to do something to me.*
- Q. *How did he hold your body?*
- A. *He lay on top of me and I pushed him. When I pushed him he grabbed my right hand. And I screamed. When I screamed he closed my mouth. And while I tried to push him away with my left hand, he used both of his hands to get hold of me..... Since my younger daughter was lying down beside me and was crying at that time, then I tried to push Tamana away. Since Tamana was very strong, I felt weak, my body felt weak. My children they were all awake.*
- Q. *While Paula was holding you, what else did he do to you?*
- A. *My body was weak. He forcefully held up my skirt, he pushed down my panty. Then he put his penis on my vagina.*
- Q. *How did you feel at that time?*
- A. *I felt embarrassed, I felt angry and I felt I did not like it.*
- Q. *Can you please elaborate when you said "he put his penis on my vagina"?*
- A. *It was not for long. About 2 minutes on my vagina.*
- Q. *Can you explain to us, how Paula's penis was on your vagina?*
- A. *He only wanted to satisfy himself.*
- Q. *Can you clarify what Paula was doing while his penis was on your vagina?*
- A. *He tried to put his sperm.*
- Q. *Where did he tried to put his sperm?*
- A. *On my vagina.*
- Q. *Can you clarify when you say "on my vagina"? Which particular place on your vagina?*
- A. *The whole (of my vagina).*

- Q. *When you say the whole, what are you referring to?*
- A. *The hole of my vagina. (the witness used the i-taukei term 'qora' to mean hole).*
- Q. *Can you tell us, "put his penis on my vagina" – what do you mean by that?*
- A. *He put his penis in the hole of my vagina. It was not for 2 minutes long that he pulled his penis out. He took his phone, he opened the mosquito net and he went out.*
- Q. *You said your younger daughter was crying at the time? Can you elaborate what happened?*
- A. *The reason why she cried was because I was lying on her also – on part of her.*
- Q. *What happened after Paula had taken his phone and left?*
- A. *Then I growled at him and told him the reason why you came here was not to send songs from Joji but to come and see me.*
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- Q. *You told he took his phone? From where?*
- A. *It was besides my pillow where I was lying down.*
- Q. *What happened after you growled at him?*
- A. *He ran outside and I growled at him from the back. Then I told him that I will go and inform his mother.*
- Q. *Did you go and inform his mother?*
- A. *At the time that I went to the house they live in, only his brother and cousin brothers were lying down.*
- Q. *On 29 May 2017, at about what time did Mr. Navukula come to your house?*
- A. *It was going towards morning.*
- Q. *Before all of this had happened – what time did Tamana come initially on 29 May 2017?*
- A. *About 1.00 o'clock (1.00 in the morning).*

Q. At what time did you go to his house to see his mother?

A. After 2.00 o'clock going to 3.00 o'clock (a.m).

Q. Early in the morning?

A. Yes

Q. Was this immediately after the incident had happened?

A. Yes

(xvii) Thereafter, the witness testified that she had gone to meet the village headman to inform him about what had happened at home. However, the village headman was sleeping and he did not respond when the complainant was calling him from outside his house.

(xviii) Thereafter, the complainant said that she went to Tamana's uncle's house (uncle named Semi). When she had called for his uncle and asked him to open the door, she found that it was not the uncle but Tamana who responded to her call. She had told the accused that she is going to report to the Police what he did to her. The accused had asked her not to do so.

(xix) The complainant testified that she had met her uncle Ratu Alipate Ratini. She had informed her uncle everything that had happened to her at her home.

(xx) Thereafter, the witness had gone and met a Police Officer to ask for the telephone number of the Navua Police Station.

(xxi) The complainant confirmed that she was medically examined on 30 May 2017, at the Navua Hospital.

(xxii) The witness was cross examined at length by the counsel for the defence and several suggestions were put to her by counsel.

(xxiii) The following questions and suggestions were also put to the complainant in cross-examination:

Q. You recall that you were lying down and it was not long after you slept that Paula was standing beside the bed?

A. Yes

Q. But you can confirm that you were lying on the mattress with your two children on the floor?

- A. Yes
- Q. *My instructions are that at no point in time had you fallen off to sleep on that particular day?*
- A. Yes
- Q. *I suggest that Paula never said that he wants to lie down where you were lying down?*
- A. Yes
- Q. *And I suggest that Paula never spread his arms and opened the mosquito net to your mattress?*
- A. *It's a lie.*
- Q. *And I suggest that Paula never entered inside the mosquito net and harassed you?*
- A. *It's a lie.*
- Q. *My instructions are that Paula never laid on top of you and grabbed your right hand?*
- A. *That's a lie.*
- Q. *My instructions are that Paula never held up your skirt and pulled down your panty?*
- A. *That's a lie, he did that.*
- Q. *I further suggest that Paula never put his penis on your vagina?*
- A. *That's a lie.*
- Q. *I suggest that Paula never put his penis in the hole of your vagina?*
- A. *That's lie.*
- Q. *My instructions are that Paula had actually gotten up from Joji's bed and came and asked you for his phone which you took from him?*
- A. No.
- Q. *And you had refused to give it back to him?*
- A. No.

- Q. *And that you had Paula's phone under your body whilst you were still lying on the mattress?*
- A. *That's a lie.*
- Q. *And Paula kept asking you for his phone, but you did not return it?*
- A. *That's a lie.*
- Q. *It was then that Paula pushed the left side of your body with both of his hands?*
- A. *He used both of his hands to hold me.*
- Q. *And it was only after Paula pushed you, that he was able to get his phone from you.*
- A. *That's a lie.*
- Q. *And after getting his phone, Paula started to leave your home?*
- A. *Yes. After all the things he had done to me.*
- Q. *And as Paula was leaving your home, you still kept asking his phone – but he didn't give it to you?*
- A. *No.*
- Q. *Just as Paula left your house, you then swore at him by saying "Caiti tamamu" meaning "Fuck your father"?*
- A. *Yes, because I was really angry.*
- Q. *I suggest to you that at no time, was your youngest child crying when Paula left the house?*
- A. *That's a lie. My child cried.*
- Q. *My instructions are that when he left your house, both your children had been sleeping?*
- A. *They were awake. That's a lie.*
- Q. *My instructions are that you had never gone to Paula's home to look for his mother?*
- A. *That's a lie. I went to their home.*

Q. *My instructions are that when you had gone to Paula's uncle's home, Paula had not responded to your call as you said so?*

A. *That's a lie.*

[51] Evidence of Dr. Anaseini Maisema

- (i) *The Doctor testified that she is currently based at the Navua Hospital. She had graduated in 2006 with a Bachelor of Medicine and Bachelor of Surgery Degrees. She has 11 years' experience in the medical field. She is a General Practitioner.*
- (ii) *The witness conducted a medical examination on the complainant, on 30 May 2017 at 14.45 hours, at the Navua Hospital. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE1.*
- (iii) *The Doctor explained the distinction between the external genitalia and internal genitalia of a female.*
- (iv) *She testified as to her specific medical findings (at column D12). She stated that the hymen was not visible. There were no injuries on the external genitalia of the complainant.*
- (v) *She then testified as to the vaginal examination conducted on the complainant. The vaginal examination has two components. The first, is where a speculum is used which is an instrument which opens up the passage of the vagina. The view goes right up to the cervix. The second is a bio manual examination, which involves the use of two fingers to fill in the passage (this examination had not been conducted in respect of the complainant).*
- (vi) *As per the speculum examination, the Doctor's finding was "normal vagina but minimum blood noted. According to patient it is not her time for menses yet".*
- (vii) *The witness testified as to the causes for such bleeding to be noted.*
- (viii) *As to her professional opinion, the Doctor has noted "cannot fully inspect up to cervix or to locate where blood could be coming from. Cannot rule out if any further injury deeper (into the passage)".*
- (ix) *As to the clinical management (at column D15), the Doctor testified that the complainant was not admitted to hospital. There were no further investigations done that day, but, the complainant was advised that she may need a scan in two months if her menstrual period did not come. She*

also explained the treatment she had prescribed to the complainant. The complainant had been given emergency contraceptives.

(x) The Doctor concluded that the examination findings "is not conclusive".

[52] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

Analysis

[53] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, Salanieta Vakaloloma Sauniyaka, and Doctor Anaseini Maisema, to prove its case.

[54] The prosecution relies upon the evidence of the Medical Officer, Dr. Anaseini Maisema. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.

[55] 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.

[56] As I have informed you earlier, the burden of proving each ingredient of the charge of Rape rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

[57] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.

[58] In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved. Based on the said agreed facts the identity of the accused, the date of incident (29 May 2017), and the place of incident (Wainimakutu, Namosi), are proved beyond reasonable doubt.


- [59] However, the prosecution must prove that the accused penetrated the vagina of Salanieta Vakaloloma Sauniyaka with his penis; and that the accused penetrated the vagina of Salanieta Vakaloloma Sauniyaka with his penis without her consent; and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [60] The accused is totally denying that the incident of Rape ever took place.
- [61] The position taken up by the defence is that the accused had gone to the complainant's house to meet her brother Joji. Since Joji was not at home at the time, he had waited for Joji to come home.
- [62] The accused's position is that he had gone to the bed (the mattress) where the complainant was lying on to get his phone from her. Since the complainant had refused to return his phone, he had to push her in an attempt to get his phone back. Only after he pushed the complainant, was he able to get his phone.
- [63] 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 of the count of Rape, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence of Rape, beyond any reasonable doubt.
- [64] In summary, and before I conclude my summing up let me repeat some important points in following form:
- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Rape;*
 - ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Rape has been established beyond any reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
- [65] Any re directions the parties may request?
- [66] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the count of Rape separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[67] Your possible opinions should be as follows:

Count One

Rape- Guilty or Not Guilty

[68] I thank you for your patient hearing.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT SUVA

Dated this 29th Day of November 2018

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