IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 190 OF 2016

STATE

v

ANDREW MARK ROD

Counsel:	**Ms. R. Uce for State**
	Ms. K. Vulimainadave with Ms. J. Manueli for Accused
Dates of Trial:	**19th 20th 21st March, 2018**
Date of Summing Up:	**22nd March, 2018**

SUMMING UP

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be

recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.

2. I will direct you on matters of law which you must accept and act upon.

3. Matters of facts however, are a matter entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions. In other words you are the judges of fact. All matters of fact are for you to decide.

4. The Counsel for Prosecution and Defence made submissions to you about the facts of this case. That is their duty as Counsel. You are not bound by their submissions. However, you may properly take their submissions into account when evaluating evidence.

5. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.

6. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.

7. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. Remember if you have any doubt, it must be reasonable. You cannot speculate. These doubts must be based solely on the evidence or lack of evidence that you have seen and heard in this court room.

8. Your opinions must be solely and exclusively based upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this court

room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial.

9. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw reasonable inferences from facts proved by evidence. Approach the evidence with detachment and objectivity.

10. An incident of rape and sexual assault would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to.

11. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witness.

12. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a complainant in a rape case such as this should react to the experience. Any person, who has been raped, will have undergone trauma whether the accused was known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in court or at the police station. The

experience of the courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.

13. As Assessors you were chosen from the community. You, individually and collectively represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in a trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

14. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreed facts of this case are:

I. *That Vinaisi Niurua (hereinafter referred to as the 'victim') at the material time resided at M.T. Khan, Waiyavi, Lautoka and was 18 years of age.*
II. *That Andrew Mark Rod (hereinafter referred to as the 'accused') at the material time resided at Abaca Road, Tavakubu, Lautoka and was 28 years of age.*
III. *That the victim is originally from Nokonoko Village in Ra and came to attend school in Lautoka.*
IV. *That the victim resides with her uncle and aunt namely Susana Ana in Lautoka.*
V. *That the accused is a close friend of the victim's uncle.*
VI. *That the victim and the accused attend the same church.*
VII. *That on the 7th of September, 2016 at about 10 am, the victim left home to buy detergent from Anil Shop.*
VIII. *That on the same day, the accused was driving a twin cab four wheel drive registration number DO 634 with one Saimoni Dua.*
IX. *That the accused had sexual intercourse with the victim at the house in Abaca Road.*
X. *That the matte was reported to the Police and the accused was arrested, interviewed under caution and charged accordingly.*

15. I have given you a copy of the Information which contains one count of Sexual Assault and two counts of Rape. The charges against Accused are as follows:

First Count

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ANDREW MARK ROD on the 07th day of September, 2016 at Lautoka in the Western Division, unlawfully and indecently assaulted **VINAISI NIURUA**.

Second Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ANDREW MARK ROD on the 07th day of September, 2016 at Lautoka in the Western Division, inserted his finger into the vagina of **VINAISI NIURUA** without her consent.

Third Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ANDREW MARK ROD on the 07th day of September, 2016 at Lautoka in the Western Division, inserted his penis into the vagina of **VINAISI NIURUA** without her consent.

16. I will now deal with the elements of the offence of Sexual Assault. A person commits the offence of Sexual Assault if he,

(a). Unlawfully and indecently,

(b). Assaults another person.

17. For the assault to be indecent it must be accompanied by a circumstance of indecency. A conduct is unlawful when it is done without a lawful excuse. A conduct is indecent when it is as such that ordinary people would so describe it, in light of prevailing standards of morality and, more specifically, in light of whether the victim has consented to the conduct in question. However, Prosecution is under no burden to prove that the particular assault took place without the consent of the victim so long as it constitutes an unlawful and indecent act.

18. The 2nd count of Rape is based on the allegation that the Accused penetrated the vagina of the Complainant with his finger, without her consent. In order to prove the 2nd charge of Rape, the Prosecution must prove beyond reasonable doubt that the Accused penetrated Complainant's vagina, with his finger without her consent.

19. The 3rd count of Rape is based on the allegation that the Accused penetrated the vagina of the Complainant with his penis without her consent. In order to prove the 3rd charge of Rape, the Prosecution must prove beyond reasonable doubt that the Accused penetrated Complainant's vagina, with his penis without her consent.

20. On the issue of consent in respect of all Rape charges, the Prosecution must prove that Accused knew or believed that the Complainant was not consenting, or he was reckless as to whether or not she was consenting. Accused is reckless if he was aware of the substantial risk that complainant was not consenting but carried on anyway, when the circumstances known to him, it was unjustifiable to take that risk.

21. Insertion of finger or penis fully into vagina is not necessary. A slightest penetration is sufficient to satisfy this element.

22. Consent as defined in Section 206 of the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.

23. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence as to what she saw, heard or felt.

24. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.

25. In testing the consistency and credibility of a witness you should see whether the witness is telling a story on the same lines without variations and contradictions. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.

26. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witnesses' demeanor 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? But, please bear in

mind that many witnesses are not used to giving evidence and may find court environment distracting.

27. In testing the credibility of a witness, you may consider whether there is delay in making a prompt 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 there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.

28. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. There can be a reasonable explanation for the delay. It is a matter for you to determine whether, the lateness of the complaint and what weight you attach to it. It is also for you to decide, when complainant did eventually complain, whether it was genuine.

29. Victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response by victims of Rape.

30. You may also consider whether there is a reason or motive on the part of the witness to make up an allegation against the accused. If he or she had such a motive, then you may think that this allegation has been fabricated.

31. The offence of Rape requires proof that the complainant did not consent. The offence may or may not be accompanied by violence, force or the threat of force, but please note that it is no part of the prosecution's obligation to prove that the accused used force or the threat of force.

32. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.

33. If you find accused guilty of one count you must not jump to the conclusion that he should be guilty of other counts also. Each count is separate. You are supposed to consider evidence against each count separately.

34. I will now remind you evidence led in the trial. I will only summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant.

Case for Prosecution

PW 1 Vinaisi Niurua (The Complainant)

35. In the year 2016, Vinaisi was residing at her uncle's place at Waiyavi Stage 5, Lautoka, attending Lautoka Central School in Form 6. On 7th of September, 2016, at around 10.00 a.m., she was doing laundry at her uncle's house. Her aunty gave $5.00 for her to go to the shop to buy washing powder. While she was walking on her way to the shop, which is 5 minutes' walk away from home, a twin cab driven by Adriu stopped by. Adriu asked her, *where are you going?* She said she is going to the shop. Adriu asked her to board the vehicle as she was going to the shop. She boarded the twin cab and sat on the back seat with the driver's friend Saimoni. Adriu and Saimoni were known to her for 5 months. Adriu is a mechanic by profession and he used to attend the same church and visit home to see her uncle.

36. The vehicle did not stop at the shop and went straight to town. She asked Adriu to stop at the shop but he said that they will go to town and do the shopping in town. At Ravouvou Street, Saimoni got off and another lady boarded the vehicle. Then they went towards town. Cruising around town making 3 -4 rounds, he then proceeded to drop the lady off.

37. After dropping off the lady, he proceeded to Saru Flame Tree Road. He went past a bridge and stopped the vehicle. He then got off and boarded at the back. He then started kissing her and made a love bite on her neck. She did not like it.

She was also scared. She tried to push him away but she couldn't. After a while, a white vehicle came by, it was going slowly, and the three Fijian passengers were looking at them. Adriu was disturbed. He got out from the back seat and went back to the driver's seat and followed the same road. When they reached Tavakubu, he accelerated the speed, may be because he saw the Tavakubu Police Post.

38. When questioned by the Prosecutor, Vinaisi said that she could not ask for help from the vehicle that passed by because he was lying on top of her turning his back to the white cab. She said that the doors of her cab were closed and the windows wound up.

39. Then he drove the vehicle to an isolated house where he dropped her off around 6 pm. They went inside the house. He informed her to cook rice and dhal for dinner. She kept on asking Adriu that she wants to go home, still he informed her to cook dinner. She had no choice but to cook dinner. They had dinner. After that he was informing her about his family life, he informed her that he was separated from his wife and that he was paying maintenance. While they were talking she kept on asking him that she wants to go back home. He then informed her, *don't worry, you will go back home.* After that he informed her that he will go home and bring her clothes. She did not do anything, she was staring at him. He was trying to show that he wanted her to stay with him together.

40. He informed her to look for a place for her to lie down. She entered a room where she could see two beds inside that room. While she was still standing inside the room, he came from the back and pushed her on the bed. He started kissing her and was trying to remove her clothes, t-shirt, a wrap-around *sulu*, underwear and bra. She tried to stop and kicked him on his shoulder. She shouted and cried, but nobody came to help. After that he removed her clothes and started kissing her legs. He moved upwards and started licking her vagina. After licking her vagina, he inserted his finger into her vagina. She could feel the pain. She cried.

41. He came on top of her, removed his clothes and tried to force her to suck his penis. She did not like it. She kept her mouth closed. He then rubbed his penis on her lips and pressed on her mouth for her to open the mouth, but he couldn't

open the mouth. Then he removed her t-shirt, lied on top of her and started having sexual intercourse with her. He inserted his penis into her vagina. She tried to push him away but she couldn't, he was very strong. She cried.

42. They were having sexual intercourse for about half an hour. After that he stood up, sat in front of her and started smoking. She tried to stand up but she couldn't because she was weak. Then he lied beside her. They slept till the next morning.

43. Adriu woke her up in the morning and informed her to prepare breakfast. She could not stand up because her body was paining. She forced herself to stand up and prepared breakfast. Then she was lying down on the sofa in the sitting room while he was lying in the room. She felt weak and fell off to sleep. She said she wanted to go back home. He informed her that she will stay with him.

44. When she woke up, he informed her to cook rice and fry some tomatoes in the afternoon. She stood up and cooked. She then went to have a shower and had their dinner. She went in the room and slept on the bed. After a while he came and lied beside her on the same bed, nothing happened.

45. The next morning he boiled water and called her to have breakfast. Then he had a shower and informed her that he will go to Natabua to look for a transport. He went to look for a transport leaving her alone in the house. She went out of the house. She could not see anybody or anything. It was getting dark. She was awaiting Adriu.

46. When she was in the room, she heard someone calling from outside. She thought it was Adriu. He called *Adriu.. Adriu..* but, Adriu was not there. After a while she could hear a stone being landed on top of the roof. She could hear someone kicking the back door very hard. She was scared. She ran outside from the front door, and ran down the road that goes upwards. She could see one woman standing at the front porch of her house. That woman called her by name thinking that she was one of the girls from that village. She came back towards the woman and asked for help. She informed the woman of everything that happened. As she went down to sleep in woman's house, the police came. Then she came with the police to the Lautoka Police Station.

47. She said that she did not consent to have sexual intercourse with Adriu or for him to insert his finger into her vagina.

48. Under Cross-examination Vinaisi admitted that, in 2016, September, she was 18 years old. She denied that she was in a girlfriend- boyfriend relationship with Adriu. She admitted boarding his vehicle on her own free will. She admitted that when Adriu came and sat beside her in the vehicle, he was smelling liquor.

49. Vinaisi said that she could not make any gesture to indicate to the three iTaukei boys who passed by in the twin cab that something unpleasant was being done to her because Adriu was lying on top of her. She did not shout. All the windows of the vehicle were wound up. If they stopped she could have asked for their assistance or help. The white cab went and turned around and came back towards where they were and moved slowly.

50. She did not punch or push the driver in front or open the door of the cab because she feared that they might get hurt or have an accident. She admitted that upon reaching the isolated house at Abaca, she got out of the twin cab on her own free will. She said that she did not use fire wood or knife as a weapon or attempt to run away because she feared that he will do something worst to her.

51. She denied having given consent to Adriu to lick her vagina or to use his finger on her vagina or to have sexual intercourse with her.

52. She admitted that Adriu kissed her on the forehead and then they both went to sleep. She admitted that in her statement she told police that she was in Abaca with one Adriu and, after two days, he just left her in Abaca and ran away.

53. She admitted that she had been missing from her uncle's place for 3 days and aunty and uncle had lodged a missing person police report. She also admitted that she was frightened at the police station and that she knew that she could get into trouble if she told the truth to police. However, she denied making up this story and lying in court so that she could save herself.

54. Under re-examination, she said that she got in the twin cab on her own free will because she had known Adriu beforehand. She got off the cab on her own free will because he told her to get off and there was no other house in that area.

55. She said that when they went past the bridge to the isolated place, she was shouting asking for help, but no one responded. She didn't make any attempt to escape from the house because she was feeling weak. She did not attempt to escape while Adriu was away because she could not see anybody around the house and that place was also new to her.

PW 2 Kalesi Bose

56. On the 9th of September, 2016, at around 7.00 pm, while Kalesi was in front of her house in Abaca, she saw one girl running on the road. She thought that it was one of the girls from the village by the name of Seini. By looking at the way she was running she knew that someone was chasing her. She called her twice, *Seini, Seini where are you going?* The girl stood still, and came towards her. Then the girl informed her that her name is not Seini, but Vinaisi. Vinaisi informed her that she was coming from an isolated house. Vinaisi further informed that one man took her to that house, but did not inform the name of the man. Vinaisi looked dirty and worried. She informed Vinaisi to take a shower, change her clothes, and have dinner so that they will call the police for her to give her statement only to the police. Then she informed her brother's wife to call the police. After calling the police they were lying down at home waiting for the police. While they were sleeping in the middle of the night the police came and took Vinaisi to the Lautoka Police Station.

57. Kalesi said that there's only one isolated house located inside which is about 2km from the Abaca village. Tavakubu Police Post is 11 km away from Abaca Village. Kalesi admitted that there's a path in front of the isolated house which villagers use to go to the main road.

58. Under cross examination, Kalesi said that when the police knocked at the door, she opened the door and police did ask for Vinaisi. When Vinaisi saw the police officer, she knew the police officer. At the same time she came out of the house and went with the police officer.

59. That is the case for the Prosecution. At the close of the Prosecution case, you heard me explain to the Accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against

him to the requisite standard or he could give evidence in which case he would be cross-examined.

60. As you are aware, Accused elected to give evidence. That is his right. Now I must tell you that the fact that an Accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. Even if you don't believe a single word Accused person says, you must still be sure that he is guilty of the crime that he is charged with.

Case for Defence

DW 1 Andrew Mark Rod /Adriu (The Accused)

61. Adriu said that he is 28 years old. In September, 2016, he was residing in Tomuka, Lautoka. He is a private mechanic, a father of three children. He is separated from his wife. He was driving a twin cab given by a Fijian lady.

62. On 7th September 2016, he was drinking rum and beer at the Waiyavi Stage 5 since the previous night with two of his friends and his cousin Saimoni. After dropping other friends, he and Saimoni were cruising around in the twin cab and drinking. Around 9 – 10 a.m., on their way to town, he saw Vinaisi walking towards the shop. He asked her where she is going; she informed that she is going to the shop to buy washing powder. He asked her to board the vehicle. She got in the vehicle on her own will and sat on the back seat. He informed her that they will go and drop Saimoni first at Anupam, and then they will buy the soap powder. She greed.

63. Adriu said that he came to know Vinaisi when he was repairing her uncle's vehicle. They were talking to each other and in a boyfriend and girlfriend relationship for two months.

64. They went to Anupam to drop Saimoni off, and made a round in town. They then met one lady who is his customer. She also boarded the vehicle. Having dropped her at Natabua, they then went to Flame Tree Road to wash the vehicle. Near the bridge there, he reversed the vehicle towards the river and opened the

door, removed the vehicle mat inside, opened the backdoor, and started talking to each other for 20 minutes, while she was still seated in the van. He informed her that, after washing the vehicle, they will go back to Abaca. However, he did not wash the vehicle. He informed her that they will go direct to Abaca.

65. Another white twin cab went past while they were talking. There were three iTaukei, Fijians inside the twin cab. When it went past, they looked at him. He waved at them. Then they came towards Tavakubu roundabout, and filled diesel at the bowser where they spent 20 minutes and then went to Abaca. He came to a house at Abaca and parked the vehicle. He informed her to get off the vehicle. She got off the vehicle and after having a look around, she went inside the house.

66. He opened all 3 doors of the house and came back towards the vehicle. He saw that the rear tyre of the twin cab was flat. He started calling some of his friends to find a spare tyre.

67. He then went inside the house, had a shower and asked her to cook dinner. She cooked rice with dhal on her free will. He was fixing the radio in the vehicle while she was cooking. There was no electricity in the house. They got light from the fire. Then they had dinner. After having dinner, he showed her the bed room. She went first to the room and chose the big bed and was lying down. They were talking about his private life; that he had divorced from his wife. He asked her if they can have sexual intercourse. She said "yes", and removed her clothes. He also removed his clothes. They then started kissing and had sexual intercourse for ten minutes. He did not notice any reaction from Vinaisi. They then lied down on the same bed. In the next morning, he asked her to make tea. She made pancakes. He went out of the house, looking at the animal, while Vinaisi was making pancakes. After having breakfast, he went inside the room and slept while Vinaisi was lying down on the settee in the sitting room.

68. When he woke up, he asked her to prepare lunch. After having lunch, he went back to sleep. They slept together in the same bed in the night. In the next morning, he informed her that he is going down to pick a tyre for the vehicle. She said, 'yes' I will wait for you. He left the house around 9.00 a.m. Vinaisi did not attempt to go with him.

69. When he returned about 6.00 p.m., Vinaisi was not there. He started calling her, the light was on. She did not respond. She was not there.

70. He denied laying on top of her in the van. He admitted kissing each other and making love bites on her neck when they were parked past the bridge. He admitted that she had pushed him to go outside the van when she saw the boys in the twin cab. He denied inserting his finger into her vagina. He admitted inserting his penis into her vagina with her consent.

71. He said that Vinaisi must have filed a false report against him at the Lautoka Police Station because she was missing from home for 3 days.

72. Under cross-examination, Adriu said that he knew that, in 2016, Vinaisi was 18 years old and attending school. But he can't recall the name of the school. He denied the suggestion that they were never in a boyfriend and girlfriend relationship.

73. He said that when Vinaisi boarded the vehicle he informed her that they will first go to drop Saimoni at Anupam, and then they will buy the soap powder. He said that, after dropping Saimoni and having made three rounds in town, they had bought soap powder, before meeting the lady who boarded the cab.

74. He admitted that when he made a few rounds in town Vinaisi had asked him to drop her back at her house. He admitted that he did not wash the cab although the main reason of going to Flame Tree Road was to wash the vehicle. He denied having forced himself on her when he kissed and made a love bite. He denied that he had never gone to the Bowser to fill the diesel. He denied that before going to the house at Abaca, Vinaisi had asked him again to drop her home. He denied licking her vagina. He agreed that he would have called her uncle or relatives but he couldn't call them because they might get angry on him.

Analysis

75. Ladies and gentleman Assessors, the Accused is charged with one count of Sexual Assault and two counts of Rape. There is no dispute in this case as to the identity of the Accused. Accused admits that he had sexual intercourse with the Complainant who was known to her for two months.

76. Accused completely denies all the elements of first two counts. He denies licking the vagina of the Complainant. He also denies penetrating the vagina of the Complainant with his finger. In respect of the third count, Accused admits having had sexual intercourse with the Complainant. However, he denies that he did it without her consent.

77. You should be fully satisfied that Andrew penetrated Vinaisi without her consent before you can find him guilty of Rape on the third count.

78. Both the Complainant and Accused gave evidence and presented two different versions. It is your duty to find which of the two versions is acceptable and believable.

79. Prosecution called two witnesses and based their case substantially on the evidence of the Complainant. If you are satisfied that the evidence she gave in court is truthful and trustworthy you can safely act upon her evidence in coming to your conclusion. No corroboration is required.

80. If you are satisfied that the Complainant has told the truth in Court, then you must see whether each element of each count had been proven beyond reasonable doubt before you can find him guilty.

81. Prosecution says that Complainant is a trustworthy witness because she made a prompt complaint to police. Defence on the other hand says that if Complainant was raped she would have complained to Kalesi, the first person she saw that night. Defence also takes up the position that Complainant made her complaint only when she was visited by the police who were investigating a missing person report lodged by her uncle. You are to decide which argument is appealing to you.

82. It was also argued that Complainant could have yelled or demonstrated her displeasure in any other form, when she saw the iTaukei boys in the white cab if she was not consenting to the improper advances made by the Accused.

83. Defence also argues that Complainant could have complained to the lady who boarded the twin cab if she was being driven by the Accused against her will.

84. Defence also argues that she could have easily escaped from the house when the Accused was having shower and when he went to bring the tyre.

85. You observed Complainant's demeanor in court. You decide if she is an honest and credible witness and what weight should be attached to her evidence.

86. Accused denies licking Complainant's vagina and inserting her finger into her vagina. He maintains that he had had consensual sexual intercourse with Complainant.

87. Defence Counsel said that Accused is straightforward and consistent in his evidence. Prosecution says that the version of the Defence is inconsistent and implausible. You watched Accused giving evidence in court. It is up to you to decide which version is to believe and whether you could accept the version of the Defence.

88. 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 their case beyond reasonable doubt. Remember, the burden to prove the Accused's guilt on each count lies with the Prosecution.

89. If you accept the Prosecution's version of events, and you are satisfied that Accused licked Complainant's vagina then you must find the Accused guilty on the first count. If you are satisfied that Accused penetrated her vagina with his finger, without her consent, you must find him guilty on the 2nd count. If you find that Accused penetrated her vaginal with his penis, without her consent, then you must find the Accused guilty on the third count. Please remember, you are to consider each count separately.

90. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

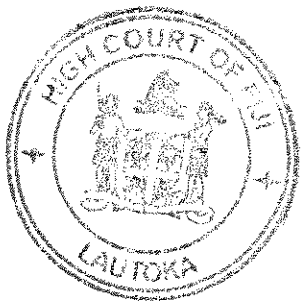
91. Your opinions should be

1st Count –Accused guilty or not guilty ?

2nd Count- Accused guilty or not guilty?

3rd Count- Accused guilty or not guilty?

92. Any re-directions?



Aruna Aluthge
Judge

AT LAUTOKA
22nd March, 2018

Solicitors: **Office of the Director of Public Prosecution for State**
Office of the Legal Aid Commission for Defence