

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO.: HAC 010 OF 2019**

**STATE**

**V**

**JONE BEBE**

**Counsel:** **Ms. S. Shameem for State**  
**Ms. T. Kean for Defence**

**Dates of Trial:** **4, 5 and 6 November 2019**

**Date of Summing Up:** **7 November 2019**

**SUMMING UP**

Madam Assessor and Gentlemen Assessors:

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 to accept their submissions. 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 proven 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. Approach the evidence with detachment and objectivity.
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. However, the inferences should not be based on mere speculation.
10. An incidents of rape 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 emo-

tions 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. It is impossible to predict how a victim of rape 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. 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. 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. The agreed facts of this case are that:
  - a) The Complainant is KL of Manu Village, Tailevu.
  - b) The Person charged is Jone Bebe of Nabulini Village, Tailevu.
  - c) The Accused and the Complainant are known to each other as they are cousins.
  - d) On 1<sup>st</sup> January, 2019, the Accused went to Manu Village, Tailevu.
  - e) On 1<sup>st</sup> January, 2019 the Accused went to the Complainant's hosue.
  - f) On 1<sup>st</sup> January, 2019, the accused had sexual intercourse with the complainant.
  - g) The alleged incident was reported to Nayavu Community Police Post on 2<sup>nd</sup> January, 2019 by the Complainant.
  - h) The Accused was interviewed under caution at Korovuto Police Station on 3<sup>rd</sup> January, 2019.
  - i) The Accused was charged for the alleged offence of Rape at Korovou Police Station on 4<sup>th</sup> January, 2019.

13. I have given you a copy of the Information which contains one count of Assault with Intent to Commit Rape and one count Rape. The Information reads as follows:

*Count 1*  
*Statement of Offence*

**ASSAULT WITH INTENT TO COMMIT RAPE:** Contrary to section 209 of the Crimes Act, 2009.

*Particulars of Offence*

**JONE BEBE**, on the 1<sup>st</sup> day of January 2019, at Manu Village, Tailevu in the Eastern Division, assaulted **KL** with intent to commit rape.

*Count 2*  
*Statement of Offence*

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

*Particulars of Offence (b)*

**JONE BEBE**, on the 1<sup>st</sup> day of January 2019, at Manu Village, Tailevu in the Eastern Division, had carnal knowledge of **KL** without her consent.

14. In order to prove the 1<sup>st</sup> count, the Prosecution must establish beyond reasonable doubt that the accused assaulted the complainant with the intent to rape the complainant. I will explain the elements of rape specifically relevant to this case in the following paragraphs.
15. In order to prove the 2<sup>nd</sup> count (Rape) the Prosecution must established that the accused penetrated complainant's vagina with his penis without her consent. Insertion of penis fully into vagina is not necessary. A slightest penetration is sufficient to satisfy this element.

16. On the issue of consent, it must be proved that the accused either knew that the complainant did not consent or was reckless as to whether she consented. The accused was reckless as to whether the complainant consented to penetration if you are sure that he realised that there was a risk that she was not consenting and carried on anyway when in the circumstances known to him it was unreasonable to do so.
17. Consent 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.
18. 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.
19. Documentary evidence is evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time upon examination of the complainant.
20. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before court on the basis of their learning, skill and experience. In this case, the doctor gave evidence as an expert witness. Doctor's evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if her opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are

bound to take into account the rest of the evidence led in the case. You have to bear in mind that the expert evidence does not implicate the accused or link him to the alleged offences even if you decide to rely on it. You can only use doctor's opinion to test the constancy of complainant's evidence.

21. 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 have gave evidence in court. 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.
22. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witness's 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? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
23. 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.
24. I now wish to direct you on recent complaint evidence. You heard complainant say that she relayed the incident to her father Waisake on the same day of the incident. Waisake gave evidence and said that he received a complaint from the complainant. However, Waisake was not present during the alleged incident and therefore, he is not capable of giving evidence as to what actually happened between the complainant and the accused. What he heard from the complainant is not evidence as to what actually happened between the complainant and the accused. Recent complaint evidence is led to show consistency in the conduct of the complainant and is relevant in assessing her credibility. If you find Waisake a credible wit-

ness than you may use the complaint he received to test the consistency and credibility of the complainant.

25. Evidence was led that the complainant looked distressed, that she was weak and just lying down shortly after the alleged incident. This is how you should approach the evidence of distress. You must be satisfied beyond a reasonable doubt that the complainant's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged sexual offence. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred. The distress evidence must not be used to connect the accused to the alleged offence. Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause. In deciding these matters, you must take into account all relevant circumstances. If you are so satisfied then you may give such weight to the evidence of distress as is appropriate. But if you are not so satisfied then you must disregard the evidence of distress.
26. You may also consider whether there is a motive on the part of the complainant to make up such an allegation against the accused. If she had such a motive, then you may think that this allegation has been fabricated.
27. 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.
28. I will now remind you the evidence led in the trial. It is a short trial and things should be fresh in your memory. 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**

#### **KL (The Complainant)**

29. KL is 18 years of age. In January 2019, she lived in Namara, Tailevu. On 1 January 2019, she, with her 6 month-old daughter, visited her parents for New Year at Manu Village in

Vainibuka. During her visit to parents, she went down to her grandmother's house and, when she returned back to her father's house, she saw her cousin Jone standing at the door step.

30. Having breastfed her daughter, KL went down to the tap beside the house to wash some kitchen utensils. Jone approached her. He wanted to pour water on her. Then Jone pulled her to the nearby bush from her t-shirt. She tried to scream but she could not as he closed her mouth. She was scared because Jone was drunk. Having pulled her into the bush, Jone punched her on her face and bit her neck. She did not agree for Jone to bite her neck. Her head became numb. She tried to resist but failed because Jone was huge. She fainted and fell to the ground. Jone took off her T-shirt, skirt and the panty and he undressed himself. She did not agree to have sex with him. When he was pulling her, she had told Jone that she did not want to have sex with him as her daughter was still small. So Jone knew that she was not agreeing to have sex. Jone did not listen to her. He laid on top of her and then inserted his penis into her vagina. She tried to push him but she could not. She could smell the home brew on his mouth.
31. When this incident was taking place he saw Mosese standing a bit far from them. She called out for help and told Mosese to take a stick and beat Jone. But Mosese did not do anything. She heard grandmother calling her. When Mosese told Jone that her grandmother was calling, Jone stood up, took his cloths and ran away. She took her cloths and went home. When she returned home, her daughter was not there. She went to her grandmother's house. She told her grandmother and her parents everything that had happened. Her father told her that he will go to Jone's house to punch him. She told her father not to do anything as they could go to police station and report the matter on the next day. On the next day (2 January 2019), she went to the police station with her father and reported the matter to police. As they returned home, Jone and his family had come to reconcile with her family. But she did not agree for reconciliation as the matter had already been reported to police.
32. Under cross-examination, KL denied that she was in a secret relationship with Jone. She admitted that she went to the nearby bush with Jone. She said she screamed and shouted and denied having had consensual sexual intercourse with Jone. She admitted that Jone had made love bites on her neck while having sexual intercourse with her. She agreed that when the grandmother was calling, she (grandmother) sounded angry and she felt scared at that



moment. She admitted that Jone and his family had come to her house asking for forgiveness for what Jone had done to her. KL agreed that she had told her father not to assault Jone because she cared for him. She admitted that it his family that had told her to report the matter to police.

### **PW 2 Waisake Raqio**

33. Waisake is the father of the complainant. He testified that on 1 January 2019, when he returned home at around 7 am, his daughter KL said that Jone came home, he took her hand and took her outside; Jone punched on her eyes and he wanted to have sex with her. He noticed that KL was feeling weak and just lying down. He first thought of going for Jone but realized not to go. He reported the matter to police on the next day. After the report was lodged, she was taken to Nayavu Health Centre where KL was medically examined by a doctor. When they reached home Jone's family was already at home to present their *bulubulu* or traditional forgiveness. He accepted *bulubulu* because of the *Vanua* and the family.
34. Under cross examination, Waisake denied that on the 1 January 2019, whilst at Viliame's, house, he had called Mosese, Jone, KL and his wife and they accompanied him to his house.

### **PW3- Dr. Kasaia Liku Rakai**

35. Dr. Rakai conducted the medical examination on KL on the 2 January 2019 at Nayavu Health Centre. She said that the patient was alert, oriented and answered questions appropriately. The patient had a 3mm x 3mm bruise on her right temple region. There was haematoma on the neck both on right and left sides. She described them as love bites. Upon the examination of the genitalia, she found a superficial laceration on the interior surface of major labia at 6 o'clock and 8 o'clock position.
36. Doctor's professional opinion is that the injuries noted could have been caused by a blunt trauma. She opined that the injuries noted on genitalia are evidence of a penetration. Based on the evidence of blunt trauma noted on the genitalia, neck, and face of the patient, the doctor had come to the conclusion that the patient was sexually assaulted.

37. Under cross-examination, the doctor said that she is unable to confirm the exact time the superficial laceration was caused. The doctor conceded that it is possible for female genitalia to cause a bleeding even during a consensual sexual intercourse.
38. That is the case for the Prosecution. At the close of the Prosecution's 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.
39. The accused elected to give evidence under oath and call a witness on his behalf. 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.

### **Case for Defence**

#### **DW.1 Jone Bebe (The Accused)**

40. Jone said that on 1 January 2019, he came to Manu Village to attend the New Year church service. He went to Viliam's house to listen to music where he was invited by his cousin KL to join her in dancing. Jone said that he was in a relationship with KL for two years and when it was started, KL told him to keep the relationship a secret to avoid disputes in the family. KL's father Waisake was also present at William's house and he asked them to accompany him to KL's grandmother's house. From there he, KL, her parents and Mosese went to Waisake's house. After arriving at Waisake's house, Waisake went to buy some drinks. Mosese also went to his village.
41. Whilst at the stairs of Waisake's house, KL came with a bucket of water and poured water on him. Then he took her to the tap to wet her. She invited him to go to the nearby bush to talk and stay together. Whilst at the bush she took off her underwear. He was wearing a shirt and Lee trousers. He opened his zip and when they were about to have sexual intercourse, Mosese arrived. KL was shocked and surprised when she saw Mosese but she did not say anything to Mosese. He had sexual intercourse with KL. She agreed to have sexual inter-

course with him. While they were having sexual intercourse, he heard KL's grandmother calling her Luvu,..Luvu. KL wore her panty and ran to where her grandmother was calling from. After that he went back to his village. Rumours about what had happened to KL were heard and her grand came to his house. On the next day, he and his family went to KL's house with a whales tooth and grog seeking forgiveness for what he had done to KL. KL's family accepted the apology.

42. Jone denied that he had forceful sexual intercourse with KL. He also denied having assaulted KL and biting her neck. He said he did not see any injuries on her face.
43. Under cross examination, Jone admitted that he was drunk at that time. He admitted that he sought forgiveness because he was ashamed of what he had done to KL on the 1 January 2019.

#### **DW 2 Seson Nabogi (Mosese)**

44. Mosese said that KL is her cousin's daughter. On the 1 January 2019 he was in Manu village at KL's grandmother's house. He saw Jone at his grandfather Viliame's house but was not aware if KL was present there.
45. Mosese said he saw KL having sex in the bush at around 11 am. KL was wearing a skirt and a top and Jone was wearing a shirt and his trousers had reached unto his knees. It appeared as if she wanted for him to stay with her. KL did not say anything to him. He heard KL's grandmother calling KL out looking for her. KL pushed Jone and ran away.
46. Under cross-examination, Mosese admitted that he did not hear what Jone and KL were talking as he is a bit deaf. He thought KL was agreeing to have sex with Jone because she was hugging Jone.


#### **Analysis**

47. Ladies and gentleman Assessor, the accused is charged with one count of Assault with Intent to Cause Rape and one count of Rape. There are two counts hence you are supposed to consider evidence against each count separately.

48. To find the accused guilty on the first count, you must be satisfied beyond a reasonable doubt that the accused assaulted the complainant with the intention of raping her. To find the accused guilty of rape you must be satisfied beyond reasonable doubt that the accused penetrated complainant's vagina with his penis without her consent.
49. There is no dispute as to the identity of the accused. The accused admits that he had sexual intercourse with the complainant on the 1<sup>st</sup> January 2019 at Manu Village in Tailevu. The only dispute is with regard to the consent. Accused's defence is that he had consensual sexual intercourse with the complainant. So the issues before you are that, (1) did the sexual intercourse take place without the consent of the complainant? (2) Was the accused aware that the complainant was not consenting to the sexual intercourse?
50. There are two conflicting versions. The resolution of the dispute depends on whether you could accept the complainant as a truthful witness. If you are satisfied that the evidence she gave in Court is truthful and believable, you can safely act upon her evidence in coming to your conclusion. No corroboration is required.
51. Prosecution says that the complainant is consistent and reliable. To support the version of the Prosecution and to prove the consistency of complainant's conduct, the Prosecution relies on recent complaint evidence, distress evidence and medical evidence of the doctor.
52. Prosecution says that the complainant had relayed the incident to her father Waisake on the same day and the matter was reported to police on the next day because the allegation was true. Waisake said that he received a complaint from her daughter. According to the evidence of Waisake, the complainant had not disclosed the incident in full detail to her father as much as it was described by her in her evidence. The Defence says that the evidence of the complainant is not consistent with that of her father. The Defence also suggests that the complaint was lodged with the police only on the intervention or pressure of her family and that it was made to cover herself up when the secret relationship came to the limelight. Considering the directions I have given in the summing up, you decide what weight you should attach to the recent complaint evidence and if the complaint she ultimately made to police was genuine.

53. Prosecution also relies on distress evidence. Waisake said that the complainant was weak and that she was just lying down when he received the complaint. If you are satisfied that the complainant was in a distressed condition after the incident, you may think that her distressed condition had a causal connection with the alleged sexual offences.
54. Prosecution also relies on medical evidence to prove the consistency of the complainant. They argue that the doctor's findings on complainant's body namely, bruise on the right temporal region, haematoma on the neck and the superficial laceration and bleeding on her genitalia are consistent with complainant's evidence that she was penetrated forcibly.
55. Prosecution argues that the accused sought forgiveness from the complainant's family because he had raped the complainant. Defence's on the other hand suggests that the accused sought forgiveness only to prevent further harm that would have been caused to the complainant by exaggerated remorse connected to them having sexual intercourse.
56. Defence argues that the doctor's finding is not conclusive as the doctor was not in a position to say as to when exactly the injuries had been caused. You heard what the doctor had to say about it. Having taken into consideration the directions I have given and other evidence led in the trial, you decide what weight you should attach to doctor's opinion.
57. 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.
58. Position of the Defence is that the allegation against the accused is made up. They are not sure why the complainant had made up such a serious allegation against the accused who is said to be her relative and the lover. The Defence suggests that the complaint was lodged when the secret intimate relationship came to limelight.
59. The accused gave evidence to support the Defence's version and he also called Mosese his relative to show that the sexual intercourse was consensual. The State Counsel says that the Defence witnesses contradicted each other and they did not tell the truth in Court.

60. You watched accused and his relative Mosese give 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. 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 should prove their case beyond reasonable doubt. Remember, the burden to prove the accused's guilt on each count lies with the Prosecution throughout the trial, and never shifts to the Defence.
61. If you believe the complainant is telling you the truth that the accused punched her and penetrated her vagina with his penis without her consent you may express an opinion that the accused is guilty on each count. But if you do not believe the complainant's evidence regarding the alleged offences, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty.
62. Your possible opinion is either guilty or not guilty on each count.
63. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
64. Any re-directions?



**Aruna Aluthge**  
Judge

The image shows a blue circular stamp of the High Court of Fiji, Suva, with a signature in blue ink over it. The signature is written in a cursive style. Below the signature, the name 'Aruna Aluthge' and the title 'Judge' are printed in black text.

**At Suva**

**7 November 2019**

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