

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 7 of 2016**

**STATE**

**V**

**SOSICENI VATUNITU NAULU**

**Counsel** : Ms. P. Lata for the State.  
: Ms. J. Singh with Ms. G. Henao [LAC] for the  
Accused.

**Dates of Hearing** : 13 and 14 May, 2019  
**Closing Speeches** : 14 May, 2019  
**Date of Summing Up** : 15 May, 2019

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**SUMMING UP**

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Ladies and Gentleman Assessors

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

**ROLE OF JUDGE AND ASSESSORS**

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as

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

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

### **BURDEN OF PROOF AND STANDARD OF PROOF**

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

8. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
9. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this court room.
10. You must decide the facts without prejudice or sympathy to either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

### **INFORMATION**

12. The accused is charged with the following offence: (a copy of the information is with you).

#### *Statement of Offence*

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

#### *Particulars of Offence*

**SOSICENI VATUNITU NAULU**, on the 19<sup>th</sup> day of March, 2015 at Nadi in the Western Division penetrated the vagina of **TORIKA TABUA** with his fingers without her consent.

13. To prove the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Penetrated the vagina of the complainant Torika Tabua with his fingers;
  - (c) Without her consent;
  - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
14. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his fingers without her consent.
15. The slightest of penetration of the complainant's vagina by the fingers is sufficient to satisfy the act of penetration.
16. The first element of the offence is concerned with the identity of the person who allegedly committed the offence. There is no dispute that it was not the accused as alleged therefore you can accept this element of the offence as proven beyond reasonable doubt.
17. The second element is the act of penetration of the complainant's vagina by the fingers.
18. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

19. If you are satisfied that the accused had penetrated the vagina of the complainant with his fingers and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
20. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
21. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his fingers into the complainant's vagina without her consent then you must find the accused guilty as charged.
22. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offence he is charged with.
23. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
24. You must be satisfied that the prosecution has proved all the elements of the offence beyond reasonable doubt in order for you to find the accused guilty of the offence of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused not guilty.

25. Furthermore, the law provides that when a person is charged with rape and the court is of the opinion that he is not guilty of rape but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard I direct you that if you find the accused not guilty of the offence of rape that is you are not sure whether the accused had penetrated the vagina of the complainant with his fingers then you should consider the offence of sexual assault.
26. The elements of the offence of sexual assault are:
- (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant.
27. The first element of the offence is concerned with the identity of the person. The defence did not dispute this element so you can accept this element as proven beyond reasonable doubt.
28. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
29. Assault is the unlawful use of force on the complainant by the act of touching her vagina. You should ask yourself:
- (a) Whether you consider the force which was used could have been sexual because of its nature; and
  - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that use of force is in fact sexual in nature.

30. If you are satisfied that the prosecution has proved all the above elements of the offence of sexual assault beyond reasonable doubt, then you must find the accused guilty of the lesser offence of sexual assault. However, if you have a reasonable doubt in respect of any element of the offence of sexual assault then you must find the accused not guilty of the lesser offence of sexual assault.
31. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

### **PROSECUTION CASE**

32. The prosecution called three (3) witnesses to prove its case against the accused.
33. The complainant Torika Tabua recalled on 19<sup>th</sup> March, 2015 after a grog session at Narewa Village she was asked by her uncle to buy some grog and a packet of cigarette from the house of Mesake in the village.
34. It was 3 am in the morning when the complainant went past the house of the accused she saw him sitting beside his house. The complainant knows the accused since they are from the same village. The accused called out to the complainant and asked for a cigarette roll. The complainant went to the house of an uncle to buy a cigarette roll when there was no answer the complainant opened the packet of cigarette she had with her and gave one roll to the accused. The accused smelt of liquor.

35. Both went to smoke on the footpath near her grandfather's house. After a while the accused pushed the complainant on the footpath and forcefully removed her pants and inserted his finger into her vagina for about 2 minutes. When the accused did this the complainant was afraid of the accused. The complainant was wearing a  $\frac{3}{4}$  shorts and a white t-shirt.
36. When the complainant reached home her uncle Seremaia Teka asked her what had happened to her, she told him everything the accused had done to her that morning. The matter was reported to the police on same day. The complainant identified the accused in court.
37. In cross examination the complainant agreed when she told her uncle Seremaia Teka that the accused had forcefully inserted his fingers in her vagina her uncle got angry with what the accused had done. When it was suggested she had told her uncle the accused had assaulted her and taken her  $\frac{3}{4}$  shorts the complainant agreed the accused had taken with him her  $\frac{3}{4}$  shorts and some money. As a result she was wearing a towel which she was able to get in the village to wrap herself. The complainant maintained she had told her uncle the accused had inserted his fingers into her vagina.
38. The complainant stated when the accused was inserting his fingers into her vagina she had shouted by calling her grandmother but there was no response. At this time the accused was holding her hand she did not kick the accused but had pushed him.
39. The complainant maintained the accused had removed her  $\frac{3}{4}$  shorts and had forced his fingers into her vagina. The complainant denied making up a story against the accused since she did not have the packet of cigarette her uncle had asked her to buy. The complainant stated that she did not go to her grandmother's house close by because there were dogs in front of her grandmother's house.



40. In re-examination the complainant stated that the footpath she was made to lie on was dirty. When asked to clarify from what time the complainant was wearing the towel she stated it was around 10pm when she went to buy grog.
41. The second witness Seremaia Teka the uncle of the complainant informed the court he was having a grog session at one of his grandfather's house. The grog and the cigarette had finished so he sent the complainant to buy some more at about 2 am in the morning.
42. The complainant was late in coming back but when she arrived the witness saw her clothes were dirty and she was wearing a towel. The witness asked the complainant what had happened to her the complainant told him that the accused had called her and asked for a cigarette, after both had smoked the cigarette the accused pulled her, removed her shorts and touched her vagina. When the witness asked the complainant why she did not shout, the complainant mentioned that she had called one of the witness aunts but there was no response.
43. After hearing this, the witness went with one of his uncles looking for the accused but could not find him. The accused is the cousin of the witness.

#### Ladies and Gentleman Assessors

44. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

45. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant told her uncle Teka the accused had pulled her, removed her shorts and touched her vagina.
46. This is commonly known as recent complaint evidence. The evidence given by Seremaia Teka is not evidence of what actually happened between the complainant and the accused since Seremaia was not present and did not see what had happened between the complainant and the accused.
47. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told her uncle Teka immediately after what the accused had done that is the accused had forcefully inserted his fingers into her vagina and therefore she is more likely to be truthful. On the other hand, defence says the complainant did not tell her uncle the accused had inserted his fingers into her vagina but had told him the accused had touched her vagina so she should not be believed.
48. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
49. In cross examination the witness stated that he did not tell the police that the complainant had told him the accused had touched her vagina. The witness was referred to the third paragraph in his police statement dated

19<sup>th</sup> March, 2015 which he had given to the police when everything was fresh in his mind:

*“At about 3.17am she came back with a packet of cigarette. I then noticed that my [niece’s] t-shirt was dirty and I asked [her] what happened then she said that she was forcefully assaulted by one Sosiceni Vatunitu which he took the packet cigarette and the money with my ¾ shorts with him”*

50. When the witness was asked his police statement did not mention that the complainant had told him that the accused had touched her vagina the witness explained he did not tell the police everything in detail.
51. When suggested the witness had either lied to the police or the court the witness explained the complainant being his niece had told him what had happened to her. He just did not explain to the police in detail what he was told.

#### Ladies and Gentleman Assessors

52. The learned counsel for the accused in this regard was cross examining the witness about some inconsistency in the statement he gave to the police immediately after the incident when facts were fresh in his mind with his evidence in court. I will now explain to you the purpose of considering the previously made statement of the witness with his evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
53. It is obvious that passage of time can affect one’s accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.

54. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.

55. The final witness was the charging officer Detective Constable Setareki Gavidu on 31<sup>st</sup> December, 2015 the accused was charged in the iTaukei language. The witness had also prepared an English translation as well. The charge statement of the accused in the iTaukei language and the English translation were marked and tendered as prosecution exhibit no. 1 and 1 (A) respectively.

56. The witness stated that the accused had voluntarily made a statement in the following words:

*"I admit what I have done to Torika after I saw her on the ID parade and I wish to apologise for what I have done to her and everyone who may have hurt. I also wish to apologise to the court for my actions."*

57. In cross examination the witness agreed the admission did not mention that the accused had raped or inserted his finger into the vagina of the complainant. Furthermore, the witness did not clarify what the accused was apologizing for. The witness agreed as a prudent Police Officer it is good to clarify things, however, in this charge statement he did not clarify what the accused was sorry and apologizing for.

Ladies and Gentleman Assessors

58. The charge statement of the accused is before you and the answers given are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the charge statement.
59. During the cross examination of the Police Officer the counsel for the accused did not suggest that the answers in the charge statement were not given voluntarily by the accused.
60. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his charge statement then you should disregard them. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.
61. This was the prosecution case.

**DEFENCE CASE**

Ladies and Gentleman Assessors

62. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent and not call any witness that is his right and you should not draw any adverse

inference from the fact that the accused decided to remain silent and not call any witness.

63. From the line of cross examination the accused takes up the position that he did not penetrate the vagina of the complainant as alleged. The accused and the complainant were sitting on the footpath in the village and the complainant could have shouted or called for help since the houses were nearby. The complainant made up a story against the accused since she did not have the packet of cigarette to give to her uncle which he had asked her to buy.
64. This was the defence case.

### **ANALYSIS**

65. The prosecution alleges on 19<sup>th</sup> March, 2015 after a grog session the complainant was asked by her uncle Seremaia Teka to buy some grog and a packet of cigarette from the house of Mesake in the village.
66. It was 3 am in the morning when the complainant went past the house of the accused she saw him sitting beside his house. The accused called out to the complainant and asked for a cigarette. The complainant gave the accused one roll.
67. Both went to smoke on the footpath near her grandfather's house. After a while the accused pushed the complainant on the footpath and forcefully removed her pants and inserted his finger into her vagina for about 2 minutes. When the accused did this she was afraid of the accused.
68. When the complainant reached home her uncle Seremaia Teka asked her what had happened to her, she told him everything the accused had done to her that morning.

69. Seremaia Teka the uncle of the complainant informed the court after the grog and the cigarette had finished he sent the complainant to buy some more at about 2 am in the morning.
70. The complainant was late in coming back but when she arrived the witness saw her clothes were dirty and she was wearing a towel. The witness asked the complainant what had happened to her. The complainant told him that the accused had called her and asked for a cigarette, after both had smoked the cigarette the accused pulled her, removed her shorts and touched her vagina.
71. Detective Constable Setareki Gavidu on 31<sup>st</sup> December, 2015 charged the accused in the iTaukei language. The accused had made a statement during the charging process apologizing for what he had done to the complainant.
72. The accused on the other hand denies the allegation he takes up the position that he did not penetrate the vagina of the complainant as alleged. The accused and the complainant had smoked on the footpath in the village. The complainant could have shouted or called for help if the accused had done what she alleged. The complainant made up a story against the accused since she did not have the packet of cigarette to give to her uncle. In respect of the admission in the charge statement the defence position is that the accused did not seek apologies for raping the complainant as alleged.

Ladies and Gentleman Assessors

73. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which

witnesses are reliable and which are not. You observed all the witnesses give evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

74. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another he or she may be accurate in saying one thing and not be accurate in another.
75. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
76. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
77. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to



prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.

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

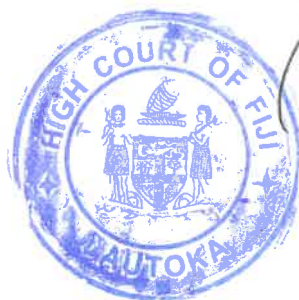
79. Your possible opinions are:-

1. Count One: **RAPE**: GUILTY OR NOT GUILTY.
2. If you find the accused not guilty of Rape then you are to consider whether the accused is guilty or not guilty of the lesser offence of **SEXUAL ASSAULT**.

Ladies and Gentleman Assessors

80. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.

81. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



*Sunil Sharma*  
**Sunil Sharma**  
**Judge**

**At Lautoka**

15 May, 2019

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**