

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

**CRIMINAL CASE NO: HAC 19 of 2017**

**BETWEEN:**

**STATE**

**PROSECUTION**

**AND:**

**ERONI RATUDOI**

**ACCUSED PERSON**

**Counsel:**

Ms. A. Vavadakua for State

Ms. S. Devi with Co- Counsel Ms. K. Marama for Accused

**DATE OF HEARING:**

11<sup>th</sup> February 2019

**DATE OF CLOSING SUBMISSION:**

12<sup>th</sup> February 2019

**SUMMING UP:**

12<sup>th</sup> February 2019

---

**S U M M I N G U P**

---

1. The name of the complainant is suppressed.
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
3. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or

refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

4. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
5. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
7. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion

to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

### **Burden and Standard of Proof**

8. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused guilty to the offence.
9. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
10. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

### **Information and elements of the offence**

11. The accused is being charged with one count of Rape, contrary to Section 207 (1), (2) (a) and (3) of the Crimes Act and four counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crime Act. The particulars of the offences are before you in the information.
12. At the conclusion of the prosecution’s case, the court found the accused not guilty for the first, second, fourth and fifth counts as charged in the information. Therefore, now you have to consider only the third count of Rape as charged in the information. It is

important to keep in your mind that you have to disregard the said four counts for which the accused is found not guilty when you take into consideration the third count of Rape. You cannot come to a conclusion that the accused not guilty, just because he is found not guilty for the said four counts. Likewise, you cannot find the complainant is not truthful in respect of the third count, just because of the accused is found not guilty for the remaining four counts. You have to consider the third count separately.

13. The main elements of the offence of Rape as charged are that;
- i) The accused,
  - ii) Penetrated into the vagina of the complainant with his penis,
  - iii) The complainant did not consent to the accused to penetrate into her vagina with his penis,
  - iv) The accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner,

**Agreed Facts**

14. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.

**The Accused**

15. It is the onus of the Prosecution to prove that it was the accused who has committed this crime on the complainant. The accused in his evidence did not dispute the fact that he spent the night with the complainant at the Royal Park Hotel in November 2015. He further said that he and the complainant consumed beer and then slept on the mattress. Therefore, the identity of the accused is not disputed in this matter.

## **Penetration**

16. I will now explain you the element of penetration. Evidence of slightest penetration of the penis of the accused into the vagina of the complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

## **Consent**

17. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent to the accused to insert his penis into her vagina as charged.
18. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.
19. The complainant must have the freedom to make the choice. It means that she must not being pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. The consent for sexual intercourse must be comfortable to the person who makes such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.
20. If you are satisfied, that the accused had inserted his penis into the vagina of the complainant and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or reckless

that the complainant was freely consenting for this alleged sexual intercourse. I must advise you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual intercourse. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that were prevailed at the time of the alleged incident.

### **Corroboration**

21. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable, credible and truthful; you are not required to look for any other evidence to support the account given by the complainant.
22. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.
23. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses during the course of the hearing.
24. You must be mindful that not to bring in to the assessment of the evidence any preconceived views, as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may

not. Demeanours of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

### **Evidence of the Prosecution**

25. Let me now remind you briefly the summary of the evidence presented by the prosecution and the defence during the course of the hearing. This is very short hearing, where only the complainant and the accused gave evidence. Therefore, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
26. The complainant had been living with her grandparent while she was attending to her primary school. She usually gone back to her parent's house during the school holidays and the weekends. Her younger brother and sister were living with her mother and father at their home. Her father is sometimes a dominant character as he does not allow them to socialize much. According to the complainant the accused was angry and had chased her and the family from the house because a mobile phone went missing. The complainant said that sometimes between 1st of November 2015 to 30th of November 2015, her father came to Levuka to take her back to Savusavu at the end of the third term of the school. She was boarded and attending at St John's High School at that time. She could recall that it was her final exam day. After the exams she went straight to the Royal Park Hotel as she was asked by her father, the accused.
27. At the Royal Park Hotel, the accused and the complainant had consumed beer. The room had two beds, but the accused had pulled one of the mattress to the floor. He has then removed the cloths of the complainant and then his own. The accused has then started to masturbate. You may recall that that the complainant said that it was a routine that she had to go through. Afterword, he had penetrated her vagina with his penis. The complainant said that she did not like when he penetrated her vagina with his penis. The complainant had resisted but the accused had told her that it was the last time he would do it. She said that she did not want the accused to do it to her. Neither she asked the accused to do it. When he said that this was the last, the complainant had believed him. He told it before he penetrated his penis into her vagina.

28. You have heard that the complainant explained about her relationship with her mother. It is not a close and good relationship. The complainant had not informed anyone of her family about this incident. However, her sister had found it out, then she had to tell this to her mother.

### **Evidence of the Defence**

29. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted to give evidence on oath.
30. The accused is not obliged to give evidence. He does not have to prove his innocence. However, the accused decided to give evidence. Therefore, you have to take into consideration the evidence adduced by him when determining the issues of fact of this case.
31. The accused in his evidence denies this allegation as he has been suffering from erectile dysfunction. The accused had visited the doctors at Savusavu Hospital, but there was no specialist doctor for this issue. After he was charged with this allegation, he had visited the Labasa Hospital to check his condition of erectile dysfunction. However, the specialist doctor was not at work and he was attended by a normal doctor. Having heard his condition, the doctor has told him that he might be suffering from erectile dysfunction.
32. According to the evidence given by the accused, he had spent a night at the Royal Park Hotel in Levuka with the complainant in November 2015. He said, that he ordered two bottles of beer and consumed it. He couldn't recall, but said that the complainant may have consumed a glass of beer. After consuming the beer, he has pulled the mattress down and slept on it as he was tried. The complainant was also slept beside him on the mattress.
33. I have summarised the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every



items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

### **Analysis and Directions**

34. You heard the evidence presented by the prosecution and the defence. The prosecution alleges that the accused penetrated the vagina of the complainant without her consent while they were staying at the Royal Park Hotel in Levuka. The accused denies the allegation, claiming that he has been suffering from erectile dysfunction.
35. In view of the evidence presented by the prosecution and the defence, the main dispute that you have to determine is whether the accused actually penetrated into the vagina of the complainant.

### **Evaluation of Evidence**

36. It is your duty now, to determine whether the prosecution has established that accused had sexual intercourse with the complainant without her consent as alleged in the third count. In order to do that, you have to evaluate the evidence presented by the prosecution and defence and determine the reliability and credibility of evidence given by the witnesses. You must be satisfied that you can rely on the evidence as the true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.
37. The assessment of credibility of evidence does not concern with unintended inaccuracy, mistakes or errors. It is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his motivations, his relationship to and the reaction to the particular situation.

38. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, 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.
39. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
40. It is your duty to consider the demeanour of the witnesses, how they react to being cross-examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.
41. Moreover, you must bear in your mind that 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 accurate in another thing.

### **Presentation of the Evidence of the Complainant**

42. You have seen that the accused was covered behind a screen, when the complainant gave evidence. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the accused.


## Defence

43. The accused's defence is based upon the contention that he has been suffering from erectile dysfunction. Therefore, he was not in a position to penetrate into the vagina of the complainant.
44. If you conclude that the accused's defence is true or may be true, then he cannot have penetrated into the vagina of the complainant. You must then find him not guilty. If, on the other hand, you are sure, having considered the evidence carefully, that the accused's defence is false, that is a finding of fact which you are entitled to take into account when judging whether he is guilty. But do not jump to the conclusion that because the defence put forward is false the accused must be guilty. The main question for you to answer is: are you sure that this alleged incident actually took place as claimed by the prosecution.
45. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.
46. In respect of the defence, the accused is not required to prove beyond reasonable doubt that he has been suffering from erectile dysfunction. The burden on the accused is evidential burden. It means that the accused has to adduce or point to evidence that suggests a reasonable possibility that he has been suffering from erectile dysfunction. Such evidence that could point or suggest that the accused has been suffering from erectile dysfunction has to be credible and reliable evidence or has the capacity to create a reasonable possibility that he has such a physical condition.
47. The accused claims that this alleged incident never happened as he has been suffering from erectile dysfunction. Therefore, you must determine whether you can accept the evidence of the complainant as reliable, credible and truthful evidence. If you are satisfied, you must then proceed to determine whether what she said in evidence is probable or improbable according to the circumstances which she was explaining.

48. You have heard that complainant said, that she did not inform anyone about this incident, including her own mother. She had thought that her mother would not believe her if she tells her about this incident. Finally, her sister has found it and then the complainant had to tell about this incident. You have to take into consideration the reasons why she did not tell anyone, when you determine the reliability and credibility of the evidence given by the complainant. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that 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. It takes a while for self- confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise an immediate complaint does not necessarily demonstrate a true complaint. Some victims will never reveal their traumatic experiences and want to forget or delete those horrendous memories from their mind forever.
49. You have seen that the prosecution tendered the medical examination report of the complainant in evidence as prosecution exhibit one. According to the medical report, the medical examination was conducted on the 17/03/2017 that was nearly more than one year after this alleged incident. The Doctor who conducted the medical examination has found that the hymen of the complainant was not intact. It is your duty to consider whether the findings in the medical report which was made more than a year after this alleged incident would assist you to resolve the issue of this matter.
50. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of rape as charged under count three, you can find the accused guilty for the said offence of Rape.

51. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the first accused has committed the offence of Rape as charged under count three, you must find the accused not guilty for the said count of Rape.
52. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.



  
R.D.R.I. Rajasinghe  
Judge

**At Labasa**

12<sup>th</sup> February 2019

**Solicitors**

Office of the Director of Public Prosecutions for the State  
Office of the Legal Aid Commission for the Accused