

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

**CRIMINAL CASE NO. HAC 02 OF 2019**

**BETWEEN** : STATE

**AND** : AMENONI NASILASILA

**Counsel** : Ms M Khan with Ms M Konrote for State  
: Ms U Baleilevuka with Mr M Anthony for Accused

**Date of Hearing** : 16<sup>th</sup> – 17<sup>th</sup> September, 2019

**Date of Summing Up** : 19<sup>th</sup> September, 2019

**SUMMING UP**

- [1] Ladies and Gentleman Assessors, it is now my duty to sum up the case to you. We have differing roles in this trial. I have to give you directions on the law and you must accept those directions. You are to decide the facts applying those directions and to give me your opinions as to the Accused's guilt or innocence.
- [2] In going through the evidence I may express an opinion. If you do not agree with that opinion, you are free to ignore it and to form another view of that piece of evidence. I may omit some evidence which you think significant. Nonetheless you may give that evidence such weight as you consider appropriate. You are free to form your own opinions.
- [3] At the end of this summing up, and after you have given your individual opinions, the final decision on the facts rests with me. I am not bound to conform to your opinions. However in arriving at my judgment I shall place much reliance upon your opinions.
- [4] The burden of proof rests throughout the trial upon the prosecution. In our system of justice there is a presumption of innocence in favour of an Accused. The prosecution brings the

charge against the Accused. Therefore it is for the prosecution to prove the charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.

- [5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty. If you entertain reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty.
- [6] The Accused elected not to give evidence. That is perfectly his right. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing, one way or the other. You will have to decide whether, on the prosecution's evidence, you are sure of his guilt.
- [7] You must decide this case upon the evidence presented to you. If a witness was not called you must not speculate the reasons why the witness was not called. You must only consider evidence which were led in the trial.
- [8] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state his or her individual opinions orally on the charge against the Accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.
- [9] However it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions. Those opinions must be based solely upon the evidence, that is, the sworn testimony of the witnesses that was called by the prosecution and the defence.
- [10] Neither speculation nor theories of one's own constitute evidence. Media coverage, idle talk, or gossip, are similarly not evidence. Put out of your mind when considering your opinions,

anything you may have read in the newspapers about this case. Focus solely on the evidence which you have seen, heard, or examined in this court.

- [11] This summing up is not evidence either, nor are counsel's addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [12] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness's answer is evidence. If he or she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [13] In arriving at your opinions, use the common sense you bring to bear in your daily lives, at home and at work. Observe and assess the witness's evidence and demeanour. You can accept part of the witness's testimony and reject other parts. The witness may have told the truth about one matter and lie about another; he or she may be accurate in saying one thing and be wide of the mark about another.
- [14] If you have formed a moral opinion on the conduct alleged in this case, put that to one side. Consistent with your oath, you should put away both prejudice and sympathy. Approach your assessment of the evidence dispassionately. Bring a cool detachment to your task of examining whether the case against the Accused has been proved before you, proved with evidence led by the prosecution.
- [15] I turn now to deal with what the prosecution must prove. The Accused is charged with one count of rape. The charge alleges that the Accused on 22 December 2018 at Sigatoka had carnal knowledge of the complainant without her consent. Carnal knowledge is an old term for sexual intercourse.
- [16] To prove rape, the prosecution must prove three elements.
- [17] First, it must be proved beyond reasonable doubt that the Accused had sexual intercourse with the complainant, that is, he penetrated her vagina with his penis.

[18] Second, the prosecution must prove beyond reasonable doubt that when the Accused penetrated the vagina of the complainant with his penis, he did so without her consent. The term consent means consent freely and voluntarily given by the complainant for the Accused to have sexual intercourse with her. Consent can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated in other ways. Consent obtained after persuasion is still consent. However, the law specifically provides that a person who does not offer actual physical resistance to sexual acts is not, by reason only of that fact, to be regarded as consenting to the sexual acts. A person who submits to sexual acts with another person as a result of threats or violence is, by law, not to be regarded as consenting to the sexual acts.

[19] Third, it must be proved that the Accused knew that the complainant did not consent. This is a subjective, and not an objective test. You might ask how, in the absence of an admission by the Accused, the prosecution can prove that the Accused was aware that the complainant did not consent. The prosecution asks you to infer from other facts which it has set out to prove, that the Accused must have known and that he did indeed know.

[20] The first element is not in dispute. The Accused admits that he had sexual intercourse with the complainant at Sigatoka on 22 December 2018. His defence is that he had consensual sex with the complainant. So the issues for you to consider are:

Whether the sexual intercourse was without the consent of the complainant?

Whether the Accused knew that the complainant did not consent to the sexual intercourse?

[21] I turn now to summarize the evidence. In doing this it would be tedious and impractical for me to go through the evidence in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case. The Agreed Facts are part of evidence. You must take the Agreed Facts as the truth.

- [22] The first witness for the prosecution was the complainant. She is a young woman in her twenties who was born in Fiji but now resides in the United States of America. She migrated to USA with her parents and siblings when she was 17 years old. Her evidence is that she first met the Accused in 2017 when he came to USA as part of the Fiji Sevens Rugby team. Thereafter they have been in contact with each other on social media. She said it was a friendship relationship.
- [23] In July 2018, she came to Fiji to visit her relatives. She was scheduled to return on the evening of 22 December 2018. On this day she was staying with her aunty at Olosara, Sigatoka.
- [24] In relating to the alleged incident, the complainant said that around 2pm, she was at home with her aunty when the Accused turned up at their home with two other boys. She said the Accused knew the address because he had been there on previous occasions. She did not know the two boys who accompanied the Accused. She said she had a conversation with the Accused on the front porch and that she could smell alcohol on him. When her aunty came out of the house she introduced her to him. Her aunty was excited to meet him and took a photo with him. After taking photo her aunty left the house for town to get some souvenirs for her to take back to the United States. Her aunty took a ride to town with the two boys who had accompanied the Accused.
- [25] The complainant said her aunty was comfortable leaving her behind because she knew the Accused as a rugby player. After her aunty had left the home, the complainant remained on the front porch with the Accused. She said she went inside the house to check her mobile phone when she heard notifications. She was expecting her parents to contact her. Her phone was inside the first bedroom charging.
- [26] As she was walking out of the bedroom with her phone, the Accused held her and pushed her down on a mattress in the second bedroom. She fell on her back on the mattress. She was wearing a top, a sarong like sulu and an underwear. Before she could recover and get up, he came on top of her. She pushed him off and that's when he reached inside her sulu

and pulled down her underwear. She was able to grab her underwear and run out of the bedroom to escape. She said she was having her menses.

- [27] She ran to the bathroom next to the kitchen and tried to close the door and lock it. But before she could do that the Accused had come inside the bathroom. She said the Accused was aggressive towards her and removed all her clothing. She said when he was removing her clothing she was fighting back but at the same time she was scared because he was intoxicated. She told him to stop but he became more aggressive. He held her more tightly and she said she already was scared because he had got hold of her while she was saying stop.
- [28] She said after removing all her clothing, he took her into the shower and pushed her down. He got on top of her and had sexual intercourse. She said she was scared and angry. She said that she wanted to get up and run out. He kept holding her back and shoving her back down every time she tried to get up. She said she felt weak and kept telling him that she didn't want to have sex. She said she was scared that he would do something more serious as she knew he was intoxicated. She said while he was having sexual intercourse he told her that he wanted to have a baby with her and that he was going to ejaculate inside her. He turned her over and had sexual intercourse from the back while she was refusing and saying no. He turned her over again and told her that he had ejaculated inside her. The incident lasted 10 to 15 minutes.
- [29] After that they heard people in the living room. At that moment, the Accused left the complainant in the shower after putting on his clothes to see who were in the living room. She asked him for a towel to clean herself but he just left her.
- [30] The complainant said she locked the bathroom door immediately after the Accused left because she was scared that the people inside the house may come inside the bathroom. She said when she did not hear any sound she got dressed and came out of the bathroom. She immediately locked the front and the sliding doors after coming out of the bathroom. She grabbed a towel and went back into the bathroom and rinsed herself. She then messaged her

boyfriend, Mitieli Mataibau to meet her using her phone. He messaged her back to meet him at the bus stop at Olosara.

- [31] The complainant said she met Mitieli on the bus at the bus stop at Olosara. She said she told Mitieli that she wanted to go to the police station and when he asked her why she told him that the Amenoni came to the house unexpected and raped her and she wanted to go to town to report it. She said she told Mitieli that she did not consent to have sex with the Accused. She said she accompanied Mitieli to town and lodged a report of rape with police.
- [32] In cross examination, the complainant admitted she had a romantic relationship with the Accused from 2017 till the beginning of 2018. She admitted that there was some earlier arrangement to meet the Accused with her brother in the weekend of 22 December, but she didn't know that the Accused was going to turn up to her home without notice. She explained that she did not run outside to escape because she thought she'll just lock herself in the bathroom. She explained that she was in a state of fear to scream to raise alarm. She agreed that she was little sore from the fall in the shower but she did not sustain any bodily injuries.
- [33] The complainant admitted that she met with the Accused's friend, Aisake Katonibau on 23 September at Chicken Express and also had dinner with him on the same evening. She said that Mr Katonibau tried to talk her out from proceeding with her case against the Accused, but when she informed him that she was going ahead with her case, he said to her that he was going to do everything he can in order for her to drop the case. She said she went ahead and had dinner with Mr Katonibau that evening after telling him that she was not going to drop the case.
- [34] She agreed that she accompanied Mr Katonibau to the police station after the meeting at Chicken Express and met the Accused and his mother there. She said when she met them they were crying and that she also cried with them while telling them that she was still going ahead with her case. She said that at no stage she tried to withdraw her complaint of rape against the Accused.

- [35] The next witness for the prosecution was Mitieli Mataibau. You will recall that the complainant told the court that she complained to her boyfriend, Mitieli that the Accused had raped her when they met on the bus shortly after the incident. Mr Mataibau gave evidence saying the complainant appeared distressed when she told him that the Accused raped her in the bathroom of her house. She did not give him the details of rape. He accompanied her to the police station to lodge a report.
- [36] There is a further direction that I wish to give you regarding the complaint evidence. In a case of sexual offence, recent complaint evidence is led to show consistency on the part of the complainant and to negate consent. Consistency on the part of the complainant may help you to decide whether or not the complainant has told you the truth when she said she did not consent to sexual intercourse with the Accused. It is for you to decide whether the evidence of this complaint given to a boyfriend helps you to reach a decision, but it is important that you should understand that the complaint is not independent evidence of what happened between the complainant and the Accused, and it therefore cannot itself prove that the complaint is true. You must consider these matters if you decide to rely upon the complaint evidence to assess whether the complainant's evidence is consistent and therefore believable.
- [37] The third and the final witness for the prosecution was Dr Elizabeth Natasha. Dr Natasha medically examined the complainant on 22 December 2018 at Sigatoka hospital. After examining the complainant she made a written report of her findings, which was tendered by the defence as DE2. During the examination, the doctor obtained history from the patient which is recorded in the report. You must disregard the history when determining the issues in this case. The history was obtained for the purpose of medical examination and therefore it is not evidence of what transpired in this case.
- [38] The only significant finding of the doctor was the abrasions on the complainant's genitalia. The doctor said that abrasions are caused by the skin being rubbed away by blunt trauma. The doctor's opinion is that the abrasions on the vagina may suggest recent sexual activity but she cannot say whether the injuries were caused by consensual or non-consensual sex. The doctor also said she did not find any visible bodily injuries on the complainant. She said



the probabilities of bodily injury occurring during sexual assault will depend upon the circumstances such as the nature of fall and surface of the fall.

[39] The medical evidence of course is not conclusive. It does not prove that the sexual intercourse between the Accused and the complainant took place without the consent of the complainant. However, the evidence is before you, and it is matter for you to decide whether the evidence supports the complainant's account of force was used during sexual intercourse.

[40] That concludes the prosecution case.

[41] The Accused elected not to give evidence and let me remind you that that was perfectly his right. The defence called one witness, Mr Isake Katonibau. He is the Accused's friend and rugby colleague. They have played together sevens rugby representing Fiji in international tournaments. Mr Katonibau has also been the Accused's mentor. The evidence of Mr Katonibau is that he was in the West on the weekend of 22 December.

[42] On 23 December he was on his way to Suva when he learnt that the Accused was arrested and was at Sigatoka Police Station. He said he went and visited the Accused at the station and was on his way back to Suva when he decided to drop by at Chicken Express for lunch. He said that when he entered Chicken Express, he saw the complainant. She was there with her cousin. He knew the complainant from his previous international tournaments. He invited the complainant and her cousin to join him for lunch. They agreed. He said during his conversation with the complainant at Chicken Express, she told him that she had consensual sex with the Accused in the bathroom and that she was hurt when he didn't bring her a towel and that he just left her there all alone.

[43] He said that he was surprised by what he heard and that he told the complainant to do the right thing. It was on her request he took her to the police station for her to withdraw her report. When they arrived at the station he remained in the vehicle while she went into the room where the Accused was kept. When she returned she told him that the police told her that her report couldn't be withdrawn. Later that evening he had dinner with the complainant on her request.

- [44] In cross examination Mr Katonibau said he did not see fit to inform the police of the conversation he had with the complainant at Chicken Express because he felt it was her responsibility to do the right thing.
- [45] The defence case is that the complainant's account that the Accused used force to obtain her consent is not true. The defence says that the complainant cried out rape because she was scared that the two boys had seen her and that since the Accused left without saying anything, she was worried that her boyfriend was going to find out from them. The defence says the lack of bodily injuries on the complainant, her decision not to run outside to raise alarm when she had the opportunity, her clothing being not stretched and her decision to meet Mr Katonibau for lunch and dinner the following day while claiming pressure from him to withdraw her report are inconsistent with the conduct of a truthful person who had been raped.
- [46] The defence says that you should, therefore, regard the complainant's evidence that the Accused had sexual intercourse without her consent as false. This is necessarily a matter which you should consider, but I must warn you that reactions or responses of a complainant who is sexually assaulted does not necessarily indicate that the evidence of the complainant is false. It may indicate fabrication on the part of the complainant, but does not necessarily do so. There may be good reasons why a person who has been sexually assaulted reacts during and after the incident in a certain manner. The complainant told the court that she resisted but she was also scared because she knew he was intoxicated and that she did not know what else he could have done to her when he was not listening when she was telling him to stop. The prosecution says that the complainant had been consistent with her complaint that the Accused had sexual intercourse using force and without her consent. Do you accept the complainant's reactions during the incident and afterwards to be reasonable in the circumstances of this case. That is a matter for you to consider.
- [47] The real issues for you to consider are whether the sexual intercourse was without the consent of the complainant and that the Accused knew she did not consent. The resolution of these issues depends upon whether you accept the evidence of the complainant as true. If you believe the account of the complainant that the Accused used force and had sexual intercourse without her consent and if you are satisfied beyond reasonable doubt that the

complainant did not consent and that the Accused knew she did not consent, then you may find the Accused guilty. But if you do not believe the account of the complainant on the use of force to obtain her consent or if you feel unsure whether the complainant did not give consent or whether the Accused knew she did not consent, then the proper opinion would be not guilty.

[48] Your possible opinions would be either guilty or not guilty. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them.

[49] Please now retire to deliberate on your opinions.



A handwritten signature in blue ink, appearing to be "D. Goundar", written over a dotted line.

**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for State  
Baleilevuka Law and AC Law for Accused