

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 196 OF 2018

BETWEEN : **STATE**

AND : **ETIKA LAQAI**

Counsel : *Ms. L. Latu for the State*
Ms. V. Diroiroi for the Accused

Hearing on : *23rd & 24th of November 2020*

Summing up on : *26th of November 2020*

SUMMING UP

Lady and gentlemen assessors;

1. It is now my duty to sum up the case to you. Your opinion is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the assessors of facts.

2. As the representatives of the society, your duty here is sacred. Your role is to guide this legal system to serve justice. In doing so, you are steered by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 10 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to you in my opening address, your opinion should be based only on them. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel during the examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by counsel in their addresses

are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the available evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe none, a part or all of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions

with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provide for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept.
12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as

directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there is more than one reasonable inference to draw, against the accused, as well in his favor, based on the same set of proved facts, then you should draw the most favorable inference to the accused.

13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond a reasonable doubt, for you to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.
15. You are not required to decide on every point the Counsels in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges are proved against the accused.
16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not a must.

17. Let us look at the Information. The Director of Public Prosecutions has charged the accused of a count of rape.

COUNT

Statement of Offence

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

Particulars of Offence

Etika Laqai, on the 26th day of December 2017 at Nadi, in the Western Division, had carnal knowledge of Vaseva Raluve, without her consent.

18. Now I will deal with the essential elements of the offence of Rape alleged in the count. Section 207(1) of the Crimes Act reads as;

207. —(1) Any person who rapes another person commits an indictable offence.

Section 207 (2) (a) of the Crimes Act reads as;

(2) A person rapes another person if —

(a) The person has carnal knowledge with or of the other person without the other person's consent;

19. Accordingly, in this case, to prove the offence of Rape as for the alleged count the prosecution must prove the following elements beyond a reasonable doubt.

- (i) The accused;
- (ii) Penetrated the vagina of Vaseva Raluve with his penis,
- (iii) Without the consent of Vaseva Raluve (the complainant); and
- (iv) Either the accused;

Knew or believed that the complainant was not consenting; or
Was reckless as to whether or not she was consenting.

20. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence. The defence does not challenge the identity of the accused. But you should be satisfied that the accused and no one else committed the alleged offence.
21. The second element is penetration of the Vaseva Raluve's vagina with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. The prosecution has to prove this element beyond reasonable doubt. However, the accused has admitted having sexual intercourse with the complainant.
22. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact, that there was no physical resistance alone, shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
- i) by force; or
 - ii) by threat or intimidation; or
 - iii) by fear of bodily harm; or
 - iv) by exercise of authority..... etc.
23. Apart from proving that the complainant did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.

24. It is not difficult to understand what is meant by the words “the accused knew or believed”. But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant’s vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
25. Please remember that no witness can look into an accused’s mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused’s state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
26. If you find a reasonable doubt in respect of any of the elements, in regards to any of the count of rape, you shall give the benefit of that doubt to the accused and find the accused not guilty of the alleged count of Rape.
27. The following were recorded as the admitted facts by the prosecution and the defense in agreement.
- i) The complainant is Vaseva Raluve, 35 years, domestic duties of Balawa, Lautoka.
 - ii) The accused is Etika Laqai, 34 years, unemployed of Narewa Village, Nadi.
 - iii) The complainant on the 25th of December, 2017 at around 7.45pm went to the accused’s place in Narewa Village, Nadi for a Christmas party.
 - iv) At the accused’s place, the complainant drank Rum and Cola and Beer.
 - v) The complainant with her cousin (namely Mere), accused, accused’s wife and another couple went to Phoenix Night Club.
 - vi) Later they returned to Narewa Village and started drinking again.

- vii) Sometimes on the 26th of December, 2017 the accused had sexual intercourse with the complainant whereby the accused inserted his penis into the complainant's vagina.
- viii) The only issue to be determined is whether the said sexual intercourse between the accused and the complainant was consensual or not.
- ix) The accused was caution interviewed on the 17th of January, 2018.

These admitted facts need no further proof. You should consider them as already proved. If there happens to be any inconsistency between the admitted facts and the given evidence, the admitted facts should prevail.

Summary of Evidence

28. The PW1, Vaseva Raluve is the sole witness of the alleged incident, for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. Her evidence is that;
- i) In 2017, she was 35 years old and on the 25th of December 2017, she came to Narewa Village with her cousin sister Mere.
 - ii) They went to the accused's house and having introduced, sat there and had drinks. They have had Rum & Cola and Beer. From there, all of them (she, Mere, Etika and his wife and another couple) have gone to the Phoenix Night Club. At there too they have had beer and having danced, came back to the accused's house around 12.30am on the 26th of December 2017.
 - iii) They have had drinks again at the accused's house. When she wanted to relieve herself, she went out and having relieved herself when pulling her undergarments up, someone came and pulled her by her wrist. She has called Mere's name but she could not hear as the music was on.

- iv) She explains that having urinated she stood up and then a person held her by the wrist and forced her to have sexual intercourse with her. She refused as that man was married and that man has taken her to a banana tree. She identifies that man as the accused, Etika Laqai.
- v) He has told her that he wants her and wants to have sex with her, but she has repeatedly said that he is a married man. At the banana tree, he has told her to lie down and also to remove her undergarments. He has removed her bra and the top. Then he has come on top and inserted his penis into her vagina. Having done that he has told her to kneel and come on top of him as it was her turn to do it to him.
- vi) She came up on top of him and when about to do it, she heard a ladies voice and that lady has come right up to her kicked her on the face and assaulted her. She was hit on the head with a stick and then felt unconscious. The lady referred to is the wife of the accused.
- vii) She states when the accused put his penis into her vagina, she called out for help. Instead of explaining the way she sought help, states that the accused kept on telling her to not to shout.
- viii) Been unconscious she has woken up by the river bank at Narewa. The accused has entered his penis into her vagina under a banana tree away from there. She was naked and was also bleeding from an injury on her head.
- ix) She managed to get help from a nearby house. They have helped her to call her mother. Later she was taken to the hospital and examined by a doctor. Her statement was recorded once her injuries were healed.
- x) She states that she did not agree to have sex with the accused as he was a married man.

29. In answering the cross examination by the learned counsel for the accused, the witness states;

- i) Though she kept on shouting for Mere, no one answered. The place she was relieving herself was about 15 meters away from Etika's house. The place they have had sex under the banana tree was about 50 meters away from Etika's house. She has been dragged by Etika all the way to the place they have had sexual intercourse. They went passing a few houses. She did not shout then as the accused has told her to not to shout.
- ii) She went under a coconut tree to urinate because there was no one at Etika's house and also because her cousin Mere took her before to the same place to urinate.
- iii) At the place where they have had sexual intercourse, Etika pulled and removed her undergarments, her bra and the top. This is somewhat inconsistent with her evidence in chief where she stated that Etika asked her to remove her undergarments and he removed her bra and the top only. She further states that she resisted him removing her bra and the top by pushing him away.
- iv) When Etika's wife came calling him, he just ran away naked, leaving her there. She agrees that she did not have time to run away from there.
- v) She states that when Etika was on top of her, her panty was removed half way. She admits to have stated to the police that she was still wearing her panty and Etika inserted his penis into her vagina from the side of her panty.
- vi) Later she admits that what she said in evidence before was incorrect and her panty was removed only after Etika having entered his penis into her vagina. It should be noted that her evidence in this regards is much inconsistent.
- vii) She admits of not telling anything about the alleged rape to the doctor when she was examined at the hospital.
- viii) Etika works with Mere. They were waiting by the road, close upon the Daily shop at Martintar in Nadi. They were by the road which goes to Bila and were sharing a bottle of Rum. Then Etika came and joined them. There was

a storage container parked there and Etika was sitting right in front of her. She learned that Etika is from Nadroga. She is aware that males from Nadroga are known as stallions. She denies of having asked Etika 'How is the horse?'. When suggested, Etika replied that 'you will be made to ride on the horse' and then she laughed, she answers that she did not laugh.

- ix) Later at Etika's house, they were seated at the porch and she was sitting right opposite Etika. Later around the midnight, they have gone to the night club. At the night club, she has danced. However, she denies of having danced with Etika there.
- x) When back at Etika's house, they were seated inside the porch. She further denies that she accompanied Etika to buy grog from there. The witness also denies kissing Etika on the way before entering the banana plantation.
- xi) The witness admits that she cried rape because the wife of Etika caught her red handed. She further admits that she would not have complained of rape if not for his wife having caught them red handed. She has alleged rape in order to save herself and her reputation.

30. In answering the re-examination by the learned counsel for the prosecution, the witness states that;

- i) The only reason she reported the matter was due to she being assaulted. Again she states that the accused had forceful sexual intercourse with her.
- ii) She denies of having had consensual sexual intercourse with the accused.

31. The second witness or the PW2 was Dr. Farhana Naaz Begum. She has examined the complainant at the Nadi hospital on the 26th of December 2017 at around 12.00noon. Her evidence was that;

- i) She is a qualified doctor and was working at the Nadi hospital in 2017. She has examined the patient Vaseva Raluve. She has filled a police Medical Examination form and having identified it, marks and produces it as PE1.

- ii) As for the history given by the patient, she was assaulted by an I-Taukei female. Specular examination, which is the examination of inner and outer genital areas were done. There was a laceration of less than 1cm at the cervix. Cervix is the inner most part of the vagina.
 - iii) In answering the cross examination, the witness states that through penile penetration, lacerations to the cervix are unlikely to happen. However, based on the laceration in the cervix it cannot be stated whether the sexual intercourse was consensual or not. Consensual sexual intercourse is a possible cause for the laceration in the cervix.
 - iv) The patient did not complain of any sexual assault and she has done the vaginal examination based on the information provided by the police.
 - v) As for the history given by the patient, she was found naked beside the road.
32. With leading the evidence of PW1 and the PW2, the prosecution closed their case. The Court being satisfied that there is sufficient evidence adduced by the prosecution covering the elements of the alleged offence, decided to call for defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.
33. The accused having understood his rights elected to give evidence on his behalf. His evidence was that;
- i) In December 2017, he was working as a steward at the Sitar Restaurant at Martintar in Nadi. On the 25th of December, the Christmas day, he started work at 7.00am and finished at 4.00pm.
 - ii) He was residing at Narewa and on his way, he had to buy a few things. On his way, he received a phone call from Mere who was working with him at the Sitar Restaurant. He went back to the Martintar and Mere was with few others drinking Rum at the back of the Daily shop.
 - iii) He went and bought a carton of Rum and Cola. Mere introduced her friends to him. They were sitting there and he was leaning against a container. Mere was sitting beside him and Vaseva was seated in front of him. Mere

introduced him saying that he is from Nadroga. Later he was flirting with Vaseva and was joking of her riding on the horse.

- iv) They were there for about 2 hours. Then they all went to his house at Narewa. They sat in the porch and mere introduced her friends to his wife. Then they all started drinking Rum & Cola. He was sitting by the door. Mere was sitting next to him. His wife was sitting next to Mere. Vaseva was sitting right in front of him. The carton was in the middle.
- v) He had his legs spread out and Vaseva too had her legs stretched out. While drinking, Vaseva was scratching his legs with hers and they used to look at each other and laugh.
- vi) At around 11.00pm, they left for the night club. At the night club, they continued with the drinking and he has kept on dancing with Vaseva. She has kept on coming to take him to dance. They were dirty dancing, that is dancing very close to each other and almost kissed and Mere almost caught them. They were there till the night club closed at 3.00am. Then all of them went back to his house at Narewa.
- vii) When came back, Vaseva was lying down at the porch and the others went inside. He decided to have grog and came out to go and buy. Then Vaseva asked for them to go together. He agreed and they went inside the village. On the way, Vaseva put her hand on his hand and then both of them have kissed. That was close to Tai Lumelume's house. While they were kissing, she has put her hand inside his pants and he has put his hands inside her pants.
- viii) Then they have gone to the back of Lumelume's house and having pulled her pants down has licked her vagina while she was standing and holding his head. Thereafter since there was light coming from the house, he has taken her inside the banana plantation.
- ix) Banana plantation was fenced with 3 lines of barbed wire and he having first gone in, stepped on one and pulled another line for her to come in. Then he collected some banana leaves and spread them for them to lie on

them. Vaseva pulled down her pants and he too pulled down his pants. Then Vaseva lied down and they have had sexual intercourse. When he was on top, Vaseva suggested for her come on top and they have switched the positions. He has taken off his T-shirt to lie on that and she also has removed her T-shirt and the bra. When they were having sexual intercourse, his wife has come looking for him. She has come into the banana plantation Vaseva stood up to look for her clothes. Then he stood up and ran away naked. He went to another house and grabbed a towel & covered himself.

- x) He has met his wife around 5.00am and has sought forgiveness from the wife.
- xi) The accused denies raping Vaseva and the version of events stated by her and states that they have had consensual sexual intercourse that day.

34. In answering the cross examination, posed on behalf of the prosecution, the accused states that;

- i) Though he lives in Narewa village, he is from Nadroga and he was born on 01.09. 1983.
- ii) He admits of having interviewed at Nadi Police Station just a few weeks after the incident. He admits of not having informed to the police of about the drinking near the Daily shop before they all went to his house. However, it should be noted that the complainant admitted the same.
- iii) The accused also admits of not informing the police of him flirting with Vaseva.
- iv) When he came home with the group from the Daily shop that evening, his wife was not there at home. She was drinking kava in the next door and later came and joined them. When they were seated in the porch and drinking, Vaseva scratched his feet with hers, but he has not informed that to the police in his statement.

- v) He denies forcing Vaseva to have sexual intercourse with him and also denies raping Vaseva.
35. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you, and you alone to decide.
36. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence has been proved beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
37. The Accused has indicated his stance and it was that he did not rape Vaseva but they have had consensual sexual intercourse. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.
38. With the submission of the accused's stance, one of the three situations given below would arise;

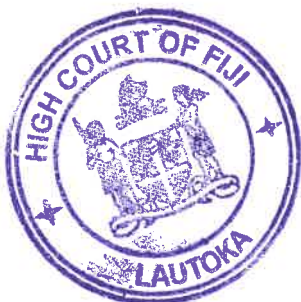
- (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
- (ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
- (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged count.

39. Any re-directions? - *no*

40. Lady and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

41. Your opinion should be;

Whether the accused is guilty or not guilty of the alleged offence of Rape?



Chamath S. Morais
Chamath S. Morais
JUDGE

Solicitors for the State

: *Office of the Director of Public Prosecutions*

Solicitors for the Accused

: *Legal Aid Commission, Lautoka*