

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 166 of 2017

STATE

V

KAMAL KAPOOR

Counsel : Mr. A. Kumar with Mr. S. Seruvatu for the State.
: Mr. M. Yunus with Ms. S. Shafique for the
Accused.

Dates of Hearing : 18, 19, 22 and 23 June, 2020

Closing Speeches : 24 June, 2020

Date of Summing Up : 25 June, 2020

SUMMING UP

(The name of the complainant is suppressed she will be referred to as "A.N")

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 207 (2) (c) of the Crimes Act 2009.

Particulars of Offence

KAMAL KAPOOR, on the 13th day of July, 2017 at Yalalevu, Ba in the Western Division, penetrated the mouth of "**A.N**" with his penis, without the said "**A.N's**" 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 mouth of the complainant "AN" with his penis;
 - (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 mouth of the complainant with his penis without her consent.
15. The slightest of penetration of the complainant's mouth by the accused penis 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. In this trial there is no dispute about the identity of the accused you are to consider this element as proven beyond reasonable doubt.
17. The second element is the act of penetration of the complainant's mouth by the penis. Like the first element this element of the offence is not in dispute you are to also consider this element as proven beyond reasonable doubt as well.
18. The third element is that of consent, this element is in dispute 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.

19. If you are satisfied that the accused had penetrated the mouth of the complainant with his penis 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 that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the complainant's mouth 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.
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.

ADMITTED FACTS

25. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.
26. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
27. 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

28. The prosecution called four witnesses to prove the charge against the accused.
29. In July, 2017 the complainant was working as a Cleaner at the construction site of the new hospital near Clopcott Street in Ba. On 13th July the complainant was at work there were three other Cleaners as well namely Lavenia, Miriama and Milinia.
30. During lunch time the complainant was in her room alone resting when the accused called on her mobile phone asking her to come and clean his office. According to the complainant the accused was a Foreman at her

workplace, when the complainant was in the office of the accused she was told to clean the tables, as she turned around the accused locked the room door.

31. At this time the accused asked the complainant to have sex with him when she refused he then told the complainant to suck his penis, at this time he pushed his pants down and told her to suck his penis when the complainant refused he forcefully pushed her down from her head and then forcefully pushed his penis inside her mouth.
32. When the accused forcefully pushed her down she did not do anything he made her sit on her knees and then he forced her to suck his penis she refused to do so the accused told her if she did not suck his penis he will terminate her from her employment. The accused was forceful in what he was doing the complainant tried to struggle with him but she couldn't. The accused also ejaculated inside her mouth he made her suck his penis for at least two minutes she tried to close her mouth but couldn't do it since the accused was forcefully penetrating her mouth.
33. After ejaculating inside her mouth, the accused pulled out his penis and then wiped it with a tissue. The complainant also pulled out a tissue to clean her mouth, she was vomiting and she did not like what had happened to her. The accused pulled up his pants and opened the door after covering her mouth with a tissue the complainant left the office and went to her room.
34. The complainant did not agree with what the accused had done to her. In her room the complainant vomited in the sink she was crying and was thinking about what had happened to her. Shortly after, her friends Lavenia, Milinia and Miriama came the complainant was crying so her friends questioned her. The complainant told them that she did not wish to work and also she did not like working there so she wanted to go home.

When her friends asked her for the reason the complainant told them about what the accused had done to her.

35. The complainant then informed her immediate supervisor about the incident. According to the complainant after the incident the accused was looking for her to give her some money to settle the matter.
36. In cross examination the complainant stated that the accused was not her employer and her immediate Supervisor was one Raymon. On the day of the incident the complainant did not accompany her friends to town because she did not have money to go with them. The complainant also agreed the accused was not in a position to sack her. The complainant's employment was arranged by her neighbour through the accused. The accused had pick her and showed her the workplace and introduced her to the employer.
37. The complainant disagreed with the suggestion that in the office of the accused she had agreed to suck his penis, she stated that the accused had forcefully done it to her. When it was put to the complainant that she could have bitten the accused penis the complainant said that she did not bite his penis but tried to push him. The complainant maintained that she did not want to suck the accused penis but he had forced his penis into her mouth.
38. The complainant did not squeeze the accused testicles when he had penetrated her mouth with his penis since the accused was forcing his penis into her mouth and she tried to push him away. At this time the accused was also forcing himself on her. She did not open her mouth the accused forcefully did it, the accused was also telling her to suck his penis otherwise he will make her lose her employment. The complainant also could not resist because one of her arms wasn't good.

39. The complainant was referred to her police statement dated 13 July, 2017, she agreed that it was not mentioned in her police statement that the accused was pushing her down because she had not told this to the police.
40. The complainant said that she had shouted but no one heard her since everything was closed in the accused room. The complainant was again referred to her police statement and asked whether it was mentioned or not that she had told the police about shouting the complainant stated that she could not remember telling the police.

Ladies and Gentleman Assessors

41. I will address you on how to consider the inconsistencies between what the complainant had told the police officer writing her statement with her evidence in court a little later.
42. When the complainant came out of the accused's office she did not see anyone outside because it was everyone's lunch hour and she went to her room. The complainant disagreed that she had made a call to the accused before going to the hospital. She also stated that although the Vodafone call records showed a two second duration call made from her phone to the accused phone at 4.39pm on the day of the incident the complainant did not speak to the accused. The complainant also could not remember whether she made a call or not to the accused that afternoon.
43. The complainant disagreed that she did not shout because she had agreed to suck the accused penis and also disagreed that when she was talking to the doctor she was laughing.
44. In re-examination the complainant stated that although the accused did not have authority over the Cleaners he had said if she did not suck his penis he will have her terminated from her employment.

45. The complainant could not recall why it was not in her police statement that she was pushed down by the accused. Furthermore, the offices around the accused office were closed at the time since it was lunch hour.
46. The second witness Miriama Likutabua stated that in July, 2017 she was employed as a Cleaner with the complainant, Lavenia and Milinia. On 13th July, during lunch time the witness with Lavenia and Milinia had gone to town.
47. After the witness and her friends returned from town they saw the complainant crying so they asked her what had happened. The complainant told them that the accused had said in Hindi "*hamar lund khao*" meaning "*you eat my penis*". Furthermore, the complainant had also said that she did not have her lunch because the accused had ejaculated inside her mouth. According to the witness she was able to understand Hindi the complainant was crying when she was telling her what the accused had done to her.
48. The complainant also said in Hindi, the accused had said "*ewala nai khao jao ghare*" meaning "*if you won't suck my dick you gonna go home*". After informing the Human Resources Officer Raymon Paul the matter was reported to the police.
49. In cross examination the witness stated when she came back from town she did not see Pauliasi, Isikeli, Kitione or George when the complainant was whispering in her ear about what the accused had done to her it was loud enough to be heard by all of them.
50. The witness also stated that the accused was an Engineer for the Ministry of Health and for the construction workers it was Raymon who had the authority to hire and sack the workers not the accused.

51. The third witness Lavenia Adi Tukana more or less told the court what Miriama had told us, this witness stated the complainant had told them that in his office the accused had told the complainant to suck his penis he then forcefully pulled her hair and then penetrated her mouth with his penis when he was finished he wiped his penis with a tissue and that the accused had forcefully put his penis through her mouth.

52. The complainant was crying and she had vomited, the complainant also said that she did not consent and that the accused had threatened her with termination of her employment. The complainant reported the matter to the police.

53. In cross examination the witness said that she did not understand Hindi well but little bit and that the complainant was talking in Hindi. The witness disagreed that it was Miriama who had told her what the complainant had said. According to the witness when she returned from town the complainant was crying outside the room. The complainant had told them everything in Hindi and she understood Hindi slightly.

54. The witness was referred to her police statement dated 14 July, 2017, line 15:

“Then at about 12.30pm – 12.45pm we all returned to our workplace. When I went inside I saw that Nisha was crying.”

55. When asked what she meant by *“went inside”* the witness stated the complainant was crying inside the change room. When questioned that the witness had stated that the accused had threatened the complainant the witness said the complainant had said in Hindi *“ewala tum nai khayega tum jaega ghare”* meaning *“for her to suck his penis if not then she will go home”*.

56. The witness agreed in her police statement that she had not used the word “*threat*” in line 25 of her statement:

“When Nisha went to his office then Kamal told Nisha to suck his penis and if she does not suck then Kamal will send her home and not to come to work again.”

Ladies and Gentleman Assessors

57. The learned counsel for the accused in this regard was cross examining the complainant and Lavenia about some inconsistencies in the statements they gave to the police when facts were fresh in their minds with their evidence in court. I will now explain to you the purpose of considering the previously made statement of these witnesses with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witnesses are believable and credible. However, the police statement itself is not evidence of the truth of its contents.
58. 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.
59. 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.

60. Furthermore, 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.
61. 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 Miriama and Lavenia about what the accused had done to her.
62. This is commonly known as recent complaint evidence. The evidence given by Miriama and Lavenia is not evidence of what actually happened between the complainant and the accused since Miriama and Lavenia were not present and they did not see what had happened between the complainant and the accused.
63. 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 Miriama and Lavenia after they had returned from town shortly after the alleged rape.
64. The complainant had spoken to Miriama and Lavenia about what the accused had done to her after they had noticed the complainant was crying and they had asked her why. The prosecution also says that the complainant had relayed relevant information to Miriama and Lavenia about what the accused had done to her and therefore she is more likely to be truthful.

65. On the other hand, the defence says the complainant had made up a story against the accused if what she told the court was the truth she would have informed Pauliasi and his group about what had happened to her. This was her first point of contact before going to her room.
66. The complainant had spoken in Hindi therefore there is a likelihood that Miriama and Lavenia may not have understood fully what the complainant had told them. Lavenia admitted that she did not understand Hindi well. Defence further says the complainant did not mention anything to Pauliasi to whom she had spoken to because nothing had happened so she should not be believed.
67. 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.
68. The final witness WDC Shiwani told the court that she was the investigating officer in this case. As part of her duties the witness had recorded the complainant's and other witnesses police statement.
69. When the witness met the complainant in the charge room she saw the complainant was crying so she took the complainant into another room and calmed her down.
70. When the complainant was on her way to the hospital she was quiet and at the hospital the witness told the complainant that even though a male doctor would be examining her she should tell him everything she had told her. According to the witness the complainant was shy.

71. The witness also visited the crime scene and drew a rough and fair sketch plan, these plans were marked and tendered as prosecution exhibits 1 and 2.
72. In cross examination the witness stated that the distance between the containers A and B in the fair sketch plan was about 4 meters apart. The witness agreed that she had not done a measurement but had estimated the distance.
73. The witness agreed if someone was sitting in the foyer of the hospital building that person would be able to see who was going inside and coming out of the accused office. The witness was not present when the complainant was examined by the doctor.
74. In re-examination the witness stated that she had briefed the doctor about the offence and after the doctor had completed the medical examination he had briefed the witness about the contents of the medical report.
75. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

76. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.
77. The accused could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also called two

witnesses. You must consider their evidence and give such weight as you think fit.

78. The first defence witness was Dr. Mohammed Shahid. Dr. Shahid graduated with MBBS degree from the Fiji School of Medicine in the year 2015.
79. On 13th July, 2017 the doctor had conducted the medical examination of the complainant at the Ba Mission Hospital, the Fiji Police Medical Examination Form of the complainant was marked and tendered as defence exhibit no. 1.
80. According to the doctor his initial impression of the patient was that she was laughing but oriented to time, place and person. The doctor explained that when he started his interview on her background and history it seemed to him that the complainant was laughing. The doctor also asked questions to ascertain the patient's condition or brain function.
81. The general impression of the doctor was that it was quite strange for a victim who was sexually assaulted to be laughing in front of him. According to the doctor usually such victims were shy or crying or may not be willing to proceed with the interview and usually a doctor needed assistance from someone to get the history from the patient.
82. The doctor did not record any specific medical findings, however, he had examined the patient's lips, mouth, oral cavity to look for any signs of trauma or a scratch mark or bruising or a sign of bleeding but did not find anything. The doctor stated that the history related by the patient and his medical findings did not match, he did not find any injuries on the patient.
83. The doctor also stated that if a person is made to forcefully suck a penis it was very difficult to see injuries on the oral cavity area but there may be

some injuries on the lips. Furthermore, if someone is forced to open the jaws there would be injuries to the jaw such as bruises or scratch marks from the nails because it was due to a forceful act.

84. Finally, there was no clinical evidence to say whether or not there was a sexual assault on the complainant.
85. Upon cross examination by the state counsel the doctor stated that before completing the medical report and before conducting the medical examination he did not have any discussions with WDC Shiwani or after the completion of the medical examination or at any time in the presence of the complainant.
86. The doctor stated that during his examination of the complainant WDC Shiwani and a Staff Nurse were present. According to the doctor based on the history given he could not rule out sexual assault but upon his professional opinion and clinical examination he could not find any evidence of whether the assault had taken place or not. When it was suggested if there would be any injuries upon voluntary sucking of the penis the doctor said it is difficult to say or would not be. The doctor could not recall having a discussion with WDC Shiwani and telling her that the complainant was shy.

Ladies and Gentleman Assessors

87. You have heard the evidence of Dr. Shahid who was called as an expert on behalf of the defence. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in his evidence as a whole is to assist you.

88. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
89. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
90. The accused informed the court that he was a Project Officer employed by the Ministry of Health and Medical Services for the new Hospital Project in Ba. The complainant was one of the Cleaners working for the Contractor who had been awarded the tender by the Ministry to build the new hospital. The accused letter of appointment was marked and tendered as defence exhibit no. 2.
91. Furthermore, all the workers at the site were working for the Contractor the accused knew the complainant well. She had started work as a Cleaner about a month prior to July, 2017. On 12th July, the complainant was at work and during lunch hour he made a call to the complainant around mid-day and had called her into his office.
92. When the complainant came into his office, they kissed and hugged each other. The accused asked the complainant if she could suck his penis. She responded by saying the lunch hour was about to finish and that she will come the next day.

93. Next day during lunch hour the accused called the complainant and asked her to come to his office. The door of his office was not locked so the complainant opened the door and walked inside. In the office both started kissing and hugging each other, while kissing the complainant held the accused penis over his pants. The accused slowly opened his pants and the complainant pulled down his pants and underwear to his knees.
94. After this the complainant slowly started sucking his penis whilst being on her knees. At this time the accused was standing behind his desk while the complainant was kneeling and sucking his penis. When the accused had asked the complainant to suck his penis she did not object and continued sucking for about 3 to 4 minutes, both were about 5 meters away from the door.
95. While sucking his penis the complainant did not bite his penis or push him away he ejaculated into the complainant's mouth because the complainant had kept on sucking it. After ejaculating the accused wiped his penis with a paper towel and pulled up his underwear and pants. The complainant also took a paper towel and wiped her mouth and drank a glass of water. The complainant was normal and was not crying she left in about 5 to 6 minutes time.
96. The accused had enjoyed the moment, he denied the allegation that he had forcefully penetrated the mouth of the complainant with his penis, he said she had consented for him to do what he did. The complainant did not shout for help or try to leave the office.
97. The complainant before leaving his office said "bye" and the accused had said "we shall meet tomorrow again" the complainant laughed and left. The office of the accused was not sound proof but a normal office.

98. The foyer was about 5 to 6 meters away from the accused office and anyone sitting in the foyer would clearly see his office. The accused had no authority to terminate any of the Contractor's workers. After the incident neither the accused nor his family at any time had tried to look for the complainant, it was late afternoon there was a call made by the complainant to his mobile phone when he was at home.
99. The accused had introduced the complainant to the Construction Company by taking her to their office. He had an intimate relationship with the complainant and on some occasions he had given her some money.
100. In cross examination the accused denied calling the complainant into his room to clean his office, he stated that the complainant had pulled down his underwear but he had pulled down his pants. The accused denied forcing the complainant to suck his penis or took advantage of his position or had threatened the complainant with termination of her employment. The accused did not deny or confirm whether he had a hand in getting the complainant employed by the Contractor.
101. The accused said it was professional to date an employee of the Contractor and he had an intimate relationship with the complainant. The accused agreed that when he was questioned by the police about the allegation he had totally denied it. When suggested that he had lied to the police the accused stated it was a white lie since it was an incorrect allegation that he had forced the complainant and if he had not said it never happened he could have lost his family.
102. The accused also stated that it was a white lie that he did not tell the police that the complainant had consented to the act because he wanted to save his family and the complainant's reputation. The accused denied committing the offence as alleged and also he had not tried to get the matter settled after the report was lodged by the complainant.

103. The final defence witness Pauliasi Maraiwai informed the court that on 13th July, 2017 he was having lunch beside the office of the accused with his friends about 5 to 6 meters away.
104. While eating the witness saw movement of people and he also saw the complainant walk into the accused office and then come out of the office after a while.
105. The complainant came to where the witness was sitting since she used to sell homemade sweets, the witness asked for some sweets which the complainant said was available but would not give on credit. The complainant was normal there was no sign of any problem and she did not say anything else to him.
106. The complainant then walked away later the witness saw the other three Cleaners walk to the gate from outside. The witness did not hear any screaming from the accused office during the lunch break.
107. In cross examination the witness stated that he knew the accused from about 2 years prior to 2017 when he had started working for the Yangin Company.
108. The accused was the Project Officer and they used to meet each other every day. The accused cared about the workers and the witness had a professional relationship with the accused who was also a close friend.
109. Although the witness was facing the accused office he did not see the complainant open the door of the accused office but had seen her entering the office and come out. The witness maintained that he was seated outside during the lunch hour and that the complainant had come to him

because he had asked her about some homemade sweets which she used to sell.

110. The witness stated that he was not making up a story due to his close relationship with the accused.
111. This was the defence case.

ANALYSIS

112. The prosecution alleges that on 13th July, 2017 the accused who was a Foreman at the construction site where the complainant was employed as a Cleaner had called her into his office during the lunch hour to clean the tables. The complainant obliged when she was in the office of the accused he went over to lock the door of his room and then wanted to have sex with her. When she refused he asked the complainant to suck his penis and at the same time threatened her to have her terminated from her employment.
113. When the complainant refused the accused forcefully made her sit on her knees opened his pants and forcefully penetrated his penis into the mouth of the complainant for about two minutes. The accused then ejaculated into the mouth of the complainant. The complainant did not consent to what the accused had done to her she started to vomit so she covered her mouth with a tissue paper and left the room.
114. The complainant was crying in her room shortly after her friends came and saw her crying upon their questioning the complainant told them what the accused had done to her.

115. The defence of the other hand says the accused and the complainant were in an intimate relationship the complainant had met the accused the previous day and she had agreed to come to the office of the accused during lunch hour on the 13th. The complainant had gone to the accused room and had consented to suck his penis.
116. Since the complainant had consented she did not shout or resist or bite the accused penis when it was in her mouth. The complainant had even opened her mouth to allow the accused penis inside her mouth. The complainant also had the opportunity to squeeze the testicles of the accused but she did not do because she had consented to suck the accused penis.
117. When the complainant left the accused office she met Pauliasi and others but she did not complain to them despite having a conversation with Pauliasi. According to Pauliasi there was nothing wrong with the complainant she was normal. The doctor who had examined the complained also did not make any medical findings of any injuries on the complainant, the doctor also found it strange that the complainant was laughing when she was narrating what had happened to her.

Ladies and Gentleman Assessors

118. You have seen all the witnesses give evidence keep in mind that some witnesses react differently when giving evidence.
119. 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 giving 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.

120. 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.
121. You will have to evaluate all the evidence and apply the law as I explained to you when you consider whether 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 his or her previous statement 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.
122. 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.
123. 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.

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

125. Your possible opinions are:-


COUNT OF **RAPE** ACCUSED - GUILTY OR NOT GUILTY

Ladies and Gentlemen Assessors

126. 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 the staff so that the court can be reconvened.

127. 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
Judge

At Lautoka

25 June, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. M.Y. Law, Ba for the Accused.