

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 123 OF 2018**

**BETWEEN** : **STATE**

**AND** : **APENISA LAQERETABUA**

*Counsel* : *Mr. S. Seruwatu with Mr. R. Chand for the State*  
*Ms. L. Volau for the Accused*

*Hearing on* : *27<sup>th</sup>, 28<sup>th</sup> & 31<sup>st</sup> of August 2020*

*Summing up on* : *04<sup>th</sup> of September 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 assist this legal system to serve justice. In doing so, you are guided 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 100 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 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 offence the accused is charged with and matters that will enable you to decide whether or not the charge is 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 1**

##### ***Statement of Offence***

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

##### ***Particulars of Offence***

Apenisa Laqeretabua, on the 29<sup>th</sup> day of June 2018 at Nadi, in the Western Division, penetrated the vagina of Kalesi Leba with his penis 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 Kalesi Leba with his penis,
- (iii) Without the consent of Kalesi Leba; and
- (iv) Either the accused;  
knew or believed that Kalesi Leba 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 defense do not challenge the identity and admit having sexual intercourse on that given date with the complainant.

21. The second element is penetration of the Kalesi Leba'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 accused admits this too.

22. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the vagina of the complainant, without the complainant's consent. This issue is strongly contested by the accused.

23. 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.
24. Apart from proving that the complainant did not consent for the accused to penetrate her vagina with the accused's penis, 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.
25. 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 with his penis, 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.
26. 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 upon relevant proven facts and circumstances.
27. If you find a reasonable doubt in respect of any of the elements above, you shall find the accused not guilty of the count of Rape.
28. The following were recorded as the admitted facts by the prosecution and the defense.
- i) The accused in this matter is Apenisa Laqeretabua, 29 year old artist of Sikituru Village, Nadi at the time of the offence.
  - ii) The complainant in this matter is Kalesi Leba, 29 year old of Martintar, Nadi at the time of the offence.
  - iii) The accused is known to the complainant as 'Ben'.

- iv) On the 28<sup>th</sup> of June, 2018, the complainant met her cousin, Ravuravu Aquila who was with his friends namely; Josaia and the accused at RB Jet Point, Martintar and invited them to her place.
- v) On the 28<sup>th</sup> of June, 2018 at about 6.00 pm, the complainant, Ravuravu Aquila, Josaia and the accused started drinking grog at the complainant's house.
- vi) On the 28<sup>th</sup> of June, 2018 at about 11.00 pm, they had finished drinking grog and the accused left to buy can of Bounty Rum.
- vii) The accused had sexual intercourse with the complainant.
- viii) The only issue is whether or not the complainant consented to having sexual intercourse with the accused.

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 evidence, the admitted facts should prevail.

### **Summary of Evidence**

29. The PW1, Kalesi Leba is the sole witness 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 2018, she lived with her 3 children aged 10, 7 and 5 at Martintar, Nadi. She has separated from the father of her children and lived in a de-facto relationship for 4 years by then.
- ii) On the 28<sup>th</sup> of June, 2018 evening, she has met her cousin, Ravuravu with his friends Josaia and Ben at the RB Jetpoint, at Martintar. She has then invited them to her house that evening.
- iii) She has known the accused, Apenisa as Ben and known him for about 1 ½ years through her cousin Ravuravu. When they arrived they have gone on drinking grog until 10.00 or 11.00pm and then decided to have some alcohol.
- iv) Then Ben went and bought some Bounty Rum cans. They went on drinking and when ran out she went with Ben and bought some more alcohol. They came back



and started drinking and she got drunk and started kissing Ben and flirting with him.

- v) Again when they ran out of drinks, Ravuravu and Josaia went to buy some more. Then Ben went inside the house and she has thought that he wanted to use her washrooms. They (she, Ravuravu and Josaia) went on drinking and Ravuravu gone inside the house and seen Ben sleeping on her bed. So Josaia has gone and told him to get up and go and lie down in the sitting room. He has not gone but slept there on her bed. She has not said anything to him but they all had laughed at him.
- vi) Then her cousin had gone to get some more drinks and some food. She has gone to have a shower and when she came back, her cousin was cooking. Thereafter they have had dinner and Josaia has gone. Ravuravu has slept with her two elder children in the other room and her youngest child, the daughter aged 5 has slept on the same bed with Ben. Since she knew Ben through her cousin she has thought it okay and let him sleep.
- vii) Then she has gone on to the bed to sleep and she has slept at the left side, Ben on the right side and the daughter in the middle. Early in the morning she has felt Ben on top of her and she has told him 'Hey, this is not right, don't do this, and he has said 'relax, it's okay' and she has said 'no it's not okay' because it actually wakes her daughter up.
- viii) First she has felt him pulling her panty down and then she has felt him on top of her. Then she tried to stop him and he went on saying 'it's okay'. Then she has kept on saying 'I don't want to have this' as her daughter was awake and she did not want to scare her. She has also told him 'don't, my daughter is in the room'. Then he has stopped after banging her for few more minutes, going in and out of her. When they were having sexual intercourse, she tried to push him away. But he held her hands and went on saying 'shhhhhh it's okay'.
- ix) After Ben had sexual intercourse with her she has just picked her towel and gone to the wash room. She has had a wash and when came out, Ben was not there and the door was open and he has gone. When she left the room, her daughter was awake and has followed her. She has left her daughter in the other room to sleep with the boys. She has gone back to her room and slept alone till the

morning. She has told her cousin in the morning and he has not taken her seriously as she has been kissing Ben.

- x) She has reported the matter to the police after 5 or 6 days as she was stressed about it and did keep on thinking about it. She admits to have consensually kissing him, but states that she said no for him to have sex with her.
- xi) She states that night, she was kissing Josaia and Ben and knew that was wrong and she was drunk, but told him that she is not having sex and she doesn't want to do that as her daughter was in the room and did not want to scare her.

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

- i) By 2018, she has been in a de-facto relationship with one, Mr. Shane Decorby for 4 years. He is the one, solely supporting her and the children. By the 28<sup>th</sup> of June, he was overseas.
- ii) When she met Ravuravu and his two friends and invited them home, she took the lead home with Josaia and Ravuravu and Ben went to buy grog that evening. Having had grog, later at around 10.30 they decided to have alcohol and Ravuravu and Ben went and bought some cans of Bounty Rum.
- iii) By the time they started drinking alcohol, she was sitting beside Josaia and all were listening to the music. While sitting beside Josaia she has been kissing him and passing flirtatious comments to him. She admits that Josaia stopped kissing him because the children came out to the porch they were drinking in. She says that she cannot recollect having an argument with Josaia, but admits that she went and sat with Ben and started flirting with and kissing him.
- iv) Then she has gone with Ben to buy more alcohol and on their way too, they have kissed. She admits admiring Ben a lot as he was quiet and good looking. She further admits that they were kissing passionately.
- v) She denies that Ben asked her whether he can have sex with her. When suggested that she asked Ben to wait until Ravuravu and Josaia go out to have sex with her,

she denies it. She states that by the time Josaia and Ravuravu went to buy the drinks, Ben was asleep in her room.

- vi) She admits that to go to washrooms from her bedroom, she has to go in between the other bedroom and the kitchen. She denies that she went to her bedroom with Ben, when Josaia and Ravuravu had gone to buy more drinks. She states that Ben went to her bedroom when Josaia and Ravuravu were there and Ben was sleeping without any clothes. Then, Josaia went and told Ben 'what the hell are you doing' and asked him to get dressed. Thereafter Josaia and Ravuravu went to buy some more drinks and she went to have a shower.
- vii) Josaia and Ravuravu brought corned beef and noodles instead for they could not buy any drinks as the shop was closed by then. When Josaia was preparing noodles and corned beef, she has come out of her room wearing a towel. She states that she was after the shower by then. She denies having sexual intercourse with Ben while Josaia and Ravuravu were away to buy more drinks.
- viii) She admits that her daughter woke up when she was having sexual intercourse with Ben. She further admits that she turned her daughter to face the wall then. She admits that the side she slept on the bed is towards the wall. It should be noted that if what she stated is correct, then she has turned the daughter towards her. Therefore, her position is inconsistent and contradictory. Later, when queried, she goes on to deny that she turned her daughter towards the wall.
- ix) Answering a few questions by the court, the witness states that she was aware of him penetrating her vagina with his penis, but did not object to it. She further states that her complain is when asked to stop, he went on for some time without stopping.
- x) She states that she planned with Ravuravu to go on a picnic on the following morning and when invited Josaia refused to join them. She further states that she asked Ben to not to come for the picnic.

31. In answering the re-examination by the learned counsel for the prosecution, the witness states that;
- i) She has had an argument with Josaia that night. The kisses she was having with Ben were passionate kisses they were kissing on the lips.
  - ii) When they were having sexual intercourse, she asked Ben to stop and Ben went on for about 25 seconds without stopping it then.
32. With leading the evidence of PW1, the prosecution closed their case. The Court being satisfied that there is sufficient evidence adduced by the prosecution covering the elements of the 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 and to call another witness on his behalf. His evidence was that;
- i) By the 28<sup>th</sup> of June 2018, he was 30 years old and resided at Sikituru. On that evening he was returning home from Sigavou. He is an artist there and having finished his work and left around 4.00pm on that day. He has gone with his friends Ravuravu and Josaia to RB Jetpoint to fill his bus card and while coming out has met Kalesi the PW1 at the Hot Bread kitchen.
  - ii) He has known Kalesi for about 1 year and she has invited them to have grog at her place. While Kalesi and Josaia went to her place he has gone with Ravuravu to buy grog and having bought it they have gone to the Kalesi's house.
  - iii) There the 4 of them have had kava at the porch of the house. Kalesi lives there with her 3 children. The grog session has gone on till around 11.00pm and he has gone with Ravu to buy alcohol. They have bought 8 cans of Joskeys and shared it by all 4 of them. While drinking Kalesi and Josaia have kissed. After some time Josaia has got angry at Kalesi for kissing when children were watching. Then Josaia has stood up and walked outside. The accused has asked Ravu to go and get Josaia and having brought Josaia back they have continued drinking.

- iv) Thereafter, Kalesi has come and sat next to the accused and they having talked first, have gone on kissing. Then he has asked her whether they can sleep together. She has said yes to that. Then she has told him to wait until Ravu and Josaia go, for them to sleep together.
- v) Later he has gone with her to buy more drinks and on the way too, they have kissed each other. Thereafter, all of them have moved inside the house to the left corner of the living room, as the porch was too cold for them to stay. While inside the house too, Josaia and Ravu were sitting together and he has sat together with Kalesi. When they finished the drinks, Josaia and Ravu have gone to buy more.
- vi) Then they have kissed again and stood up and gone to the kalesi's bedroom with her. Inside the room the child was sleeping on the corner of the bed and each of them having removed their own clothes lied on bed and had sexual intercourse. It has gone on for about 15 minutes and the child has woke up. They have stopped sexual intercourse and lied hugging each other. When the child woke up, Kalesi has turned the child towards the wall. While they were hugging each other, josaia and Ravu have come back and Kalesi having stood up went out of the room wearing a towel. He has waited on the bed.
- vii) Little later, Josaia came into the room and informed him to come and have dinner. He did not go to have dinner and waited lying on the bed. Thereafter having had dinner, Kalesi has come back to the room and asked for them to go to the nightclub. He has asked them to go and waited lying down. After a while they have come back saying the nightclub was closed. Then Ravu has gone to sleep in the children's bedroom and Josaia has gone to his home. Kalesi, came and having removed her clothes has jumped on to him. Then they have had sexual intercourse for a long time.
- viii) When they were still having sexual intercourse, the child has woken up again. Then Kalesi asked him to stop and he has stopped there. Then they have slept with Kalesi being in the middle.
- ix) He denies raping Kalesi at any time.

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

- i) Having finished the grog and the 1<sup>st</sup> round of drinks, he went with Kalesi to buy more drinks. By that time Josaia and Kalesi has had an argument due to Kalesi kissing Josaia in front of her children. Kalesi came to him thereafter.
- ii) He and Kalesi have been flirting with each other and both ended up kissing. The children were still awake by then. When he went to the shop with Kalesi, they bought some bottles of Bourbon. Having brought the drinks, they went straight into the house as the porch was too cold.
- iii) The witness denies that he went to the room knocked out. He states that he went to Kalesi's room only after Josaia and Ravu went out to buy more drinks and he went in along with Kalesi. The accused denies the suggestion that Kalesi went out of the room wrapped in a towel because she has had a shower and states that she went out of the room because Ravu and Josaia came back from the shop.
- iv) He admits that he did not go out of the room to have dinner because he was knocked out, but denies that he was too drunk to have sex at that time.
- v) The witness admits though he stated that he had the 2<sup>nd</sup> sexual intercourse with Kalesi for a long time and in all styles, he has not mentioned that to the police.
- vi) The witness states that he has sexual intercourse with Kalesi thrice that night. The final time was in the early hours of the morning and he has ended it up by ejaculating that time without any interruption. Thereafter he has lied hugging her till the morning.
- vii) The accused admits saying to Kalesi 'it's okay'. But denies that she said no to have sexual intercourse with him. The accused further denies that Kalesi pushed him off at any time. However he admits that Kalesi told him to stop on two occasions and states that he did stop on those two occasions.
- viii) The accused denies that he was too drunk to care about Kalesi's consent that night and states that he has had sexual intercourse with Kalesi with her consent.

35. In answering the re-examination, the accused states that;

- i) When Ravu and Josaia went out to buy more drinks, he went into the room with Kalesi and had sexual intercourse. Thereafter he was knocked out and was surprised when Josaia came in and called him. It should be noted that is uncertain what the condition he was in. When said to be knocked out, does he mean that he

is unaware of anything happening around him or was feeling down enough to not to get out of the bed or else. You may give it an appropriate consideration.

- ii) The witness states that he removed his clothes as soon as he entered the room and he wore them back only in the morning.

36. The next witness called on behalf of the accused was Mr. Josaia Niuvou Mateiwai. He states that;

- i) On the 28<sup>th</sup> of June 2018, evening he was at Miller's place behind the Sitar at Martintar, Nadi. Miller is the cousin of Ravu and he came to know her real name as Kalesi at the police station after the incident.
- ii) Ravuravu, Apenisa, him, Miller and her 3 children were at her place that evening. They have gone there to have grog. Around 10 or 11pm they have finished having grog and decided to have few Joskeys to wash down. He gave his bank card to Apenisa to withdraw money from the ATM and buy the drinks. While he waited with Miller, Apenisa and Ravuravu went and brought the drinks.
- iii) He was sitting with Miller and when having drinks and started to get intoxicated, they started kissing. Then her youngest child, the daughter came there crying having woke up and he came to his senses. He has pushed her away and told her that they cannot do that as she has kids and has a permanent partner.
- iv) When they ran out of drinks, Apenisa and Miller has gone to buy the drinks. When they came back Miller made advances towards Apenisa and they were kissing. Though he told them to not to do it Ben and Miller has laughed it off. Prior to going to buy the drinks too Ben and Miller were cuddling and kissing.
- v) Though he left there after an argument with Miller, Ravu has calmed him down and brought him back. They have decided to go for a third round of drinks and he and Ravu has gone to get the drinks. By the time they left, Ben and Miller were still cuddling in the porch. The liquor shop was closed and they could not buy any liquor. They have bought noodles and corned beef instead. When came home, ben and Miller were not to be seen and he has gone to the kitchen to heat up the food. When he and Ravu were eating he has called Miller to come and eat as he has assumed that Ben has gone home.

- vi) Then Miller has come out of her bedroom with a white bath towel wrapped around. She did not show any signs of having had a bath. When he asked her of Ben she has told that 'you didn't want it'. He has felt something was going on and gone into her bedroom and pulled the bed sheet out. Then Ben was there, lying naked. Then Miller who walked back with him to the room has said 'set, it's okay'. When he told them that what they do is wrong, Miller told him off. Since it was the second time she did so that night, he has walked out and gone home having caught a cab.
- vii) Miller has called him back in the following morning and told him that she and her cousin have planned a picnic and asked him to come to her place. He has gone to her place around 11.00am. Before going there he has called Ben and asked him to join them at the picnic with some Ice cream. Having gone to Miller's place while he was talking with her of the previous night, she has gone to the neighbors place to apologize for the noise and the disturbance of the previous night.
- viii) That neighbor was a close friend of her partner. When she came back after apologizing, he has seen love bites around her neck and told her whether she knew that she has love bites on her neck. She has immediately rushed to check on the mirror and having come back said 'Oh, my God, I got these love bites'.
- ix) The picnic was cancelled immediately. Miller did not complain of any incident to him then. Thereafter on Sunday or Monday night Miller has messaged him saying that Ben has forced on her.

37. In answering the cross examination by the learned prosecuting counsel, the witness states that;

- i) He has been friends with Apenisa for about 4 years and still are friends. They have worked together at Sigavou.
- ii) They drank a lot that night. But were not very intoxicated. Initially having had 8 cans of Joskeys, Ben and Miller had bought a few bottles of Bounty rum and cola. Though he went with Ravu to buy more, they could not as the shop was closed. When they went to buy, Ben and Kalesi stayed back.
- iii) When they came back, Ben was knocked out in Kalesi's room. Kalesi was awake and she walked out in a white towel when they came back. When they came



Kalesi's room door was closed, but the house door was open. The witness denies that Kalesi has come after a bath as she showed no signs as such.

- iv) They drank on the Thursday night and the picnic was planned for the Friday morning. Miller and Ravu has told him of the picnic on the Friday morning at around 8.00am. He denies that she called him and cancelled the picnic. The picnic was cancelled when he went to her place. He admits that his statement to the police does not contain the fact that he went to her place on the following morning. It only contains that Kalesi called him about the picnic.
- v) He would not know for sure whether Ben raped Kalesi or not as he was not there with them when the alleged incident is said to have happened.

- 38. 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.
- 39. 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 proved 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 a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
- 40. The Accused has indicated his stance and it was that he did not rape her and there was only consensual sexual intercourse between them. 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.

41. 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.

42. Any re-directions? *none*

43. 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.

44. 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, Lautoka*  
*Solicitors for the Accused* : *Legal Aid Commission, Lautoka*