

IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 153 of 2017

BETWEEN : STATE

AND : LEMEKI VULI

Counsel : Mr Seruvatu for the State  
Mr Raikanikoda for the Accused

Date of Hearing : 13 September 2019

Closing Speeches : 13 September 2019

Date of Summing up: 13 September 2019

SUMMING UP

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You are to decide the facts of the case, based on the evidence that has been led before this court. You will then apply those directions to the facts and give me your opinions as to whether the Accused person is guilty or not guilty.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going through evidence. If you do not agree with that opinion you will ignore it and form your own opinion with that evidence.
3. You must base your opinion only and only on the evidence given by the witnesses. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence. A suggestion put to a witness is not evidence unless it is admitted by the witness. You may act only upon the evidence given by the witnesses in this case and nothing else. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so is entirely a matter for you.
4. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinion. You will also not let any sympathy or prejudice sway your opinions. Emotions have no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of each element of the offence. You must not form your opinion based on the emotions, sympathies, prejudices, speculations and morality. As I said before you only have to consider the evidence given by the witnesses in this case and nothing else to form your opinion.
5. The complainant and the Accused gave evidence in this case and they are the only witnesses in this case. I will give you only a summary of their evidence. I will not go through every word uttered by them, and if I leave out something

that seems to be important, nothing stops you from taking that into account. Because you decide the facts.

6. After this summing up, you may give your individual opinions as the representatives of the community. You may reject or accept any evidence in forming your opinion. Your opinions need not be unanimous. And you need not give reasons for your opinions.
7. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Ladies and gentleman assessors,

8. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated them.
9. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail and it is also likely that some may perceive the same incident differently and narrate differently. You have to use your common sense in assessing the reliability and credibility of witnesses. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.
10. Generally, complainants of sexual offences react differently when they got to narrate the traumatic experience they have gone through. Some may display

obvious signs of distress, anxiety and restlessness, but some may not. Every witness has their own way of expressions when they give evidence about an experience, specially a traumatic one. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.

11. Subsequent conduct of complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may react instantly and report because of their maturity, education level, social status, and for other similar reasons. Some may not complain at once due to immaturity, lack of education, and for other similar reasons. A complainant's reluctance to report an incident could be due to many reasons. Some may not even complain at all due to the fear that it may damage family ties. A complainant may not be comfortable to report a matter to close family members due to the respect, fear, or due to the reluctance to openly discuss matters relating to sex with elders.
12. It must be noted that according to the law sexual offences do not require other evidence to corroborate the evidence of the complainant. Which means you can even solely rely on the evidence of the complainant without any other evidence to support it.
13. When you consider the evidence given by the witnesses, you have to see whether their evidence is reliable and credible. Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.

14. When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the Accused is guilty or not. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as assessors, in determining a question of fact, should utilise your common sense and wide experience which you have acquired living in this society.
15. It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
16. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the prosecution must prove every element of the offence beyond reasonable doubt.
17. The Accused need not prove his innocence. The fact that the Accused gave evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence. The burden is on the prosecution to prove the guilt of the Accused. That means you must be satisfied that the state has proved every element of the offence beyond reasonable doubt. That doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of the offence, you must find him guilty.

Ladies and gentleman assessors,

18. We will now look at the offence that the Accused is indicted for. The Accused is charged for one count of rape in the Information filed by the Director of Public Prosecutions as follows;

*Statement of Offence*

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 44 of 2009.

*Particulars of Offence*

Lemeki Vuli on the 31<sup>st</sup> day of July 2017, at Nadi in the Western Division, penetrated the vagina of Emily Likabuta, with his fingers without her consent.

19. Now I will explain what matters you must take into consideration to determine whether the offence of rape is proved by the prosecution. The prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vagina of the complainant with his fingers;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complaint was not consenting; or the Accused 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 reasonable doubt that the Accused and no one else committed the offence.

21. The second element involves the penetration of the complainant's vagina with his fingers. The law states that even the slightest penetration of the vagina is sufficient to constitute the offence of rape. As per the offence that the Accused is charged with in this case, the penetration is not by a penis. The offence is constituted by penetration of the vagina with a thing or a part of the body of the Accused that is not a penis. Therefore, the prosecution must prove beyond

reasonable doubt that the Accused penetrated the vagina of the complainant with his fingers to any extent.

22. The third and the fourth elements are based on the issue of consent. 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.

23. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. For the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. Consent obtained through force, threat or intimidation, fear of bodily harm, or by use of authority is not considered as consent given freely and voluntarily. Submission without physical resistance by the complainant alone, to the act of the other person will not constitute consent.

24. The complainant must have the freedom to make the choice. It means she must not have pressured or forced to make that choice. The complainant must have mental and physical capacity to make that choice. Further, the consent given by the complainant may have been limited to a particular sexual activity and not for another sexual activity. Also, the consent can be withdrawn at any time. It is an ongoing state of mind its revocable once given. Consent of a person cannot be assumed.

25. In addition to proving that the complainant did not consent to the Accused to insert his finger into 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.

26. The Accused was reckless, if the Accused realised there was a risk that she was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the vagina, you may find that the Accused was reckless as to whether or not the complainant was consenting. In other words, you have to see whether the Accused did not care

whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

27. If you believe that the prosecution proved all the elements of the offence you may find the Accused guilty to that offence. Likewise, if you believe that the prosecution failed to prove all the elements of the offence you must find the Accused not guilty to the offence of rape.

28. The prosecution and the defence agreed to certain facts. Those facts are before you in a document titled as amended admitted facts. Those facts need not be proved again by the prosecution and you can use those facts to make your opinions without any further proof.

Ladies and gentleman assessors,

29. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions. Only the complainant was called to prove the case against the Accused. After the prosecution case was closed the Accused gave evidence for the defence.

30. The complainant, Emily Likabuta gave evidence that on 30<sup>th</sup> July 2017 she was drinking grog with her sister, Beni Tinai and two other neighbours. She said that the Accused came home later with another friend. According to her evidence they all were drinking alcohol late that night. After their friends had left, the complainant had lied down beside her sister in the sitting room. Later her sister had woken her up and had asked her to go to their room. The complainant gave evidence that she went and slept in the room while the Accused and her sister were sleeping in the sitting room.

31. When she was sleeping, she had felt someone kissing her and touching her vagina. She said that she was wearing shorts and a T shirt. According to her



evidence the Accused had inserted his fingers into her vagina. She said that when she turned, she saw that it was the Accused. The complainant had then pushed him away and had gone to the toilet. She also said that when she came back from the toilet, she saw the Accused lying beside her sister. The complainant had then gone to the other room. She said that she woke her younger sister up and told her what happened. In the morning she had complained about the incident to her sister, Beni Tinai. The complainant said that she did not consent the Accused to insert his fingers into her vagina.

32. During the cross examination the complainant confirmed that they all were drinking rum and cola together. The complainant was asked during cross examination as to how she recognized the Accused if she was drunk. In response, she said that the Accused's hand was still inside her panty and he was still trying to kiss her when she turned. She confirmed that she saw the Accused when she turned. She also said that she was wearing a pair of Lee shorts with an elastic and it did not have a zip or buttons. When she was asked as to why she did not scream or called for help, the complainant said that she was scared, shocked and she could not believe that something like that would happen to her.

33. The complainant denied that the allegation was fabricated to frame the Accused. When it was suggested to her that she was in tears because she has framed him, the complainant said that she cried when she gave evidence because the incident actually happened to her. The complainant denied that her sister's former husband returned on the very next day that the Accused was remanded. She reiterated that it was after a few months that her sister started living with her former husband.

34. In re-examination the complainant said that she did not fabricate the case to frame him. She said that it really happened to her. She also said that she could not believe that it happened as the Accused was her brother in law.

35. That was the case for the prosecution.

36. After the closure of the prosecution case the Accused was explained his rights. The Accused decided to give evidence. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused and he need not prove his innocence.

37. The Accused gave evidence that on 31 July 2017 he was drinking rum and cola with his de facto wife, Beni Tinai, the complainant, her boyfriend and another neighbour, after he came home. The Accused said that the others left after drinking and he slept in the sitting room with his de facto wife, Beni. He said that at around 6.30 in the morning he went back to his room and no one was there in the room at that time. He further said when he was sleeping in the room, the Police came at around 11 am to take him to the Police Station. The Accused said that he did not know that it was Beni who told the complainant to sleep in their room.

38. The Accused said that in July 2017 he asked Beni to divorce her former husband and she refused to do so. Then the Accused had informed Beni that he will move out of the house. He said that he was looking for a house and on the same day that the alleged incident happened. The Accused gave evidence that her de facto wife, Beni and the complainant framed him to allow the former husband to come and live with Beni.

39. Although the Accused said in evidence-in-chief that he did not know how the complainant went to sleep in his room, during the cross examination he admitted that it was Beni who told the complainant to go and sleep in his room. However, the Accused later said under cross examination, that he did not know where the complainant slept and when he went to his room at 6.30 in the morning there was no one in his room. The Accused denied that he went inside the room when the complainant was sleeping. He also denied that he inserted his fingers into the complainant's vagina.

40. That was the case for the defence.

Ladies and gentleman assessors,

41. It should be noted that in our law no corroboration is needed to prove a sexual offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, the prosecution can solely rely on the evidence of the complainant only without any supporting evidence whatsoever in sexual offences. It is for you to decide how credible and consistent is the evidence of the complainant.

42. The prosecution case was that the Accused penetrated the vagina of the complainant with his fingers without her consent.

43. The Accused denied the allegation and said that the complainant has fabricated the allegation with her sister, to frame him.

44. As it was said before, it is the duty of the prosecution to prove the elements the offence against the Accused. The Accused need not prove his innocence.

45. You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the Accused not guilty of the charge, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence, beyond any reasonable doubt.

46. It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence given by the Accused. You must

consider his evidence also for its consistency and also the probability of the version. If you find the evidence of the Accused is truthful and reliable, then you must find the Accused not guilty of the charge, since the prosecution has failed to prove its case.

47. However, I must caution you that even if you reject the evidence of the Accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. You must still consider whether the evidence given by the complainant proved all the elements of the offence of rape beyond reasonable doubt.

48. I have now given you the directions of law and summarized the evidence adduced in this case. Before I conclude my summing up let me remind you some points again.

49. If you believe that the prosecution has proved the elements of rape beyond reasonable doubt, you must find the Accused guilty.

50. If not, you must find the Accused not guilty.

51. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

52. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



A handwritten signature in blue ink, consisting of several overlapping loops and lines, positioned above the name "Rangajeewa Wimalasena".

**Rangajeewa Wimalasena**  
**Acting Judge**

**Solicitors**

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Raikanikoda Lawyers