

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 328 of 2016**

**STATE**

**V**

**KERESONI WAQATAIREWA**

**Counsel** : Ms. Kimberly Semisi for the State  
Ms. Talei Kean with Mr. Paula Gade for the Accused

**Dates of Trial** : 16-17 May & 20-24 May 2019

**Summing Up** : 27 May 2019

***The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "IL".***

### **SUMMING UP**

Madam Assessors and Gentleman Assessor,

**[1]** It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

**[2]** As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the documents tendered as prosecution exhibits and any admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, a matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and 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 correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14]** The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every victim has her own way of coping. 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 alone 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.
- [15]** You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems 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.
- [16]** In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well.

That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. 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 is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.

- [17] 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 that witness is for you to decide. 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 his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.
- [18] Ladies and Gentleman Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [19] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [20] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable 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 of the charges. 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 commonsense and wide experience which you have acquired living in this society.
- [21] 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 offences charged.

- [22] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [23] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [24] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [25] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [26] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [27] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [28] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [29] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offences charged. A reasonable doubt is

not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.

- [30] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [31] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [32] I must also explain to you as to the reason for permitting a closed court proceedings when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that by having a closed court proceedings the complainant is relieved of any mental pressure to describe the often unpleasant incidents. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [33] The same applies for permitting a support person, from the Fiji Women's Crisis Centre, to sit beside the complainant when she gave evidence in this case. Again you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [34] Let us now look at the charges contained in the Amended Information.
- [35] There are four charges preferred by the Director of Public Prosecutions (DPP), against the accused:

### **COUNT 1**

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

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

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

**KERESONI WAQATAIREWA**, on the 31<sup>st</sup> day of August 2016, at Nabua in the Central Division, had carnal knowledge of IL without her consent.

### **COUNT 2**

***Statement of Offence***

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

***Particulars of Offence***

**KERESONI WAQATAIREWA**, on the 31<sup>st</sup> day of August 2016, at Nabua in the Central Division, on an occasion other than that mentioned in Count 1, had carnal knowledge of **IL** without her consent.

**COUNT 3**

***Statement of Offence***

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

***Particulars of Offence***

**KERESONI WAQATAIREWA**, on the 31<sup>st</sup> day of August 2016, at Nabua in the Central Division, on an occasion other than that mentioned in Count 1 and Count 2, had carnal knowledge of **IL** without her consent.

**COUNT 4**

***Statement of Offence***

**ASSAULT CAUSING ACTUAL BODILY HARM**: Contrary to Section 275 of the Crimes Act 2009.

***Particulars of Offence***

**KERESONI WAQATAIREWA**, on the 31<sup>st</sup> day of August 2016, at Nabua in the Central Division, assaulted **IL** causing her actual bodily harm.

[36] As you would have noted there are three counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act); and one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act.

[37] As you are aware the accused has already pleaded guilty to count four, which is the charge of Assault Causing Actual Bodily Harm. As such, you do not have to make any determination in respect of the said count. However, please bear in mind that although the accused has pleaded guilty to count four, that does not automatically make him guilty of the remaining three counts of Rape. The accused is presumed to be innocent

of those charges. He may be convicted of the remaining counts only if the prosecution establishes that he is guilty of the said offences charged. It is not his task to prove his innocence in respect of the said charges.

**[38]** Let me now explain the elements of counts one, two and three together, which are counts of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act.

**[39]** Section 207(1) of the Crimes Act reads as follows:

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

**[40]** Section 207 (2) (a) of the Crimes Act is reproduced below.

*(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; or*

**[41]** Therefore, when Section 207 (1) is read with Section 207 (2) (a) it would read as follows:

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

*(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.*

**[42]** In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

**[43]** Therefore, in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 31 August 2016);
- (iii) at Nabua, in the Central Division;
- (iv) penetrated the complainant's vagina, with his penis;
- (v) without the consent of the complainant; and
- (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

**[44]** In order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 31 August 2016), but on an occasion other than that mentioned in Count 1;
- (iii) at Nabua, in the Central Division;
- (iv) penetrated the complainant's vagina, with his penis;
- (v) without the consent of the complainant; and
- (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

**[45]** Similarly, in order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 31 August 2016), but on an occasion other than that mentioned in Counts 1 and 2;
- (iii) at Nabua, in the Central Division;
- (iv) penetrated the complainant's vagina, with his penis;
- (v) without the consent of the complainant; and
- (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

**[46]** Let me now elaborate on these elements together in respect of counts one, two and three.

**[47]** 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.

**[48]** The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

**[49]** The fourth element involves the penetration of the complainant's vagina; with the accused's penis. It must be noted that, in law, 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 or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

**[50]** The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.

**[51]** You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the 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:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

**[52]** Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, 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.

**[53]** A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 32 years of age at the time of the incident, and therefore, she had the mental capacity to consent.

**[54]** In our law, no corroboration is needed to prove an allegation of Sexual Offence; Rape is obviously considered as a Sexual Offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

**[55]** If you are satisfied beyond any reasonable doubt that the accused, on 31 August 2016, penetrated the complainant's vagina with his penis, without her consent, then you must find him guilty of the first count of Rape.

[56] If you are satisfied beyond any reasonable doubt that the accused, on 31 August 2016, on an occasion other than that mentioned in Count 1, penetrated the complainant's vagina with his penis, without her consent, then you must find him guilty of the second count of Rape.

[57] If you are satisfied beyond any reasonable doubt that the accused, on 31 August 2016, on an occasion other than that mentioned in Counts 1 and 2, penetrated the complainant's vagina with his penis, without her consent, then you must find him guilty of the third count of Rape.

[58] If you find that the prosecution has failed to establish any of these elements in relation to any of the three counts, then you must find the accused not guilty to all three charges.

[59] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[60] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Amended Admitted Facts*" without placing necessary evidence to prove them:

1. The complainant is one IL, 32 years old, security officer of Nabua Muslim League and the accused is one Keresoni Waqatairewa, 36 years old, security officer of Muslim League, Nabua.
2. The accused and the complainant were in a defacto relationship at the time of the alleged offences.
3. The complainant used to reside with the accused at the Nabua Muslim League for 11 years with their four children.
4. At the time of the alleged offences, the accused had carnal knowledge of the complainant.

[61] Since the prosecution and the defence have consented to treat the above facts as "*Amended Admitted Facts*" without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

### **Case for the Prosecution**

[62] The prosecution, in support of their case, called the complainant and Dr. Elvira Ongbit. The prosecution also tendered the following documents as a prosecution exhibits:

Prosecution Exhibit **PE1** – The Resume of Dr. Elvira Ongbit.

Prosecution Exhibit **PE2** - The Medical Examination Report of the complainant.

**[63] Evidence of the complainant II**

- (i) It is an admitted fact that the complainant was 32 years of age and working as a security officer at the time of the alleged incident. It is also an admitted fact that the accused person, Keresoni Waqatairewa, was 36 years old and was also working as a security officer at the time. The complainant and the accused were in a defacto relationship at the time of the alleged incident. They had been in a defacto relationship for 11 years. The complainant used to reside with the accused and their 4 children at Nabua Muslim League.*
- (ii) The complainant testified that she is currently 36 years old and working as a kitchen hand at a Restaurant in Flagstaff.*
- (iii) She is currently residing at Koroi Road in Samabula with her aunt. When she was not working, she was staying at Navunisoile in Tailevu. Since she started working about a month ago, she is staying with her aunt in Samabula.*
- (iv) The complainant testified that she has four children. The eldest is 13 years old; the 2<sup>nd</sup> 12 years old; the 3<sup>rd</sup> 10 years old and the youngest is now 3 years old. Her children are currently living at Navunisoile with her elder sister. The father of her four children is Keresoni Waqatairewa, the accused.*
- (v) The witness testified to the events that took place on 30 August 2016. At that time she was staying with her aunt in Samabula and her children were at Navunisoile. The father of the children, the accused was living at the Nabua Muslim League.*
- (vi) She stated that she was not staying together with the accused at the time as they had an argument a few days prior to 30 August 2016. She testified that when she came back from work that day (few days prior to 30 August 2016), her son had informed her that he had seen his father sitting on top of the bed using a bottle to smoke something. She had asked the accused about it and a heated argument had taken place. She had told the accused that she doesn't like what he was doing in front of their son. Because of the heated argument, the accused had told her to go away from the house. The complainant had then gone to her aunt's place in Samabula. Later, she had taken her children to Tailevu.*

- (vii) *Coming back to the 30 August 2016, the witness said that in the morning she was at her aunt's place in Samabula. After 9.00 p.m. she had left to the CWM Hospital to do night shift. She was working as a security guard at Grid Security. She was to do the night shift commencing at 11.00 p.m. and ending at 7.00 a.m. the next morning (31 August 2016).*
- (viii) *She was rostered that night to guard the Tailevu/Namosi Ward. Between 11.00 – 12.00 p.m. the accused had come to meet her. He had told her that he was on stand-by at CWM and that all the sites were occupied. Even the accused was a security guard employed by Grid Security. She had asked the accused what he was doing there. He had said that he was wandering around. The accused had been sitting for a while on the seats that the public use. She had asked the accused to leave. He then went down and was sitting with other security guards at the main entrance to the hospital.*
- (ix) *After a while, the accused had come up again. She had asked him again as to what he was doing there. After she had spoken to the accused, he had gone down and sat at the main entrance once again.*
- (x) *The witness testified that the accused had come up the third time to meet her. She had then asked him about the sick sheet which she had wanted the accused to get for her. The accused had said that the sick sheet was done, but that it was at home. He had told her that he was going to get the sick sheet from Nabua and after she finishes work (at 7.00 a.m.) for her to wait for him at the Suva Bus Stand.*
- (xi) *After she finished work, the complainant had changed and walked down to the Suva Bus Stand. She had waited for the accused at the Namadi Bus Stop. The accused had come there and given the sick sheet to her. Although she had said that she can take the sick sheet by herself, the accused had suggested that they go together to the Grid Security Office at Namadi to hand over the sick sheet. So they had left for Namadi together by bus. This was around 8.00 in the morning.*
- (xii) *After reaching the Grid Security Office at Namadi, the accused was standing outside whilst the complainant went inside to hand over the sick sheet.*
- (xiii) *The accused was still standing outside when the complainant came back after handing over the sick sheet at the office. She had then told the accused that she was going back to Samabula. The accused had said that they go together, follow the short cut to the Nabua Muslim League, and separate from there. Although, the complainant had been*

telling the accused that she wanted to leave from there, the accused had kept insisting that they follow the short cut.

- (xiv) Therefore, the complainant had followed the accused along the short cut leading towards the Nabua Muslim League. On reaching the road that leads to their house, the complainant had again said that she wants to go to Samabula so that she could rest since she was to do the night shift that day as well. However, the accused kept on saying for them to go to the house. The complainant said "I remained standing and I kept on telling him that I do not want to go home. He kept on insisting that we go home.....He then pulled my hand and we went home."
- (xv) When asked as to why she did not go to Samabula, the complainant said "Because he had pulled my hand, and I knew that if I do not go with him, he will do something to me." When asked to explain further, she said "He can beat me up My Lord."
- (xvi) The complainant said that she had felt frustrated because she had wanted to go her aunt's place in Samabula. However, she said "I knew if I leave he can do something to me."
- (xvii) Thereafter, they had reached home. The accused opened the door and they entered inside the house. When they went inside the house, the complainant had kept telling the accused that she had to go to Samabula. However, the accused had asked her to wait.
- (xviii) Thereafter, she had been standing when the accused moved closer to her. The complainant said "He said for us to stay together (to have sex)." However, the complainant had told the accused that she does not want to have sex. The accused had then taken off her pants (shorts) and her t-shirt and pushed her down to the mattress which was spread on the floor in the living room. When the accused took off her shorts he had also taken off her panty, and when he removed her t-shirt, he had taken off her bra. The complainant testified that she kept telling the accused that she did not want to stay with him or to have sex with him.
- (xix) Thereafter, the accused had removed all his clothes and laid on top of her and touched her private part. Later, the complainant said her female private part and said the part where she urinates from.
- (xx) He had then taken his phone and started taking photos while she was naked. "He took pictures of my breasts and below that.....up to my female private part." She had told the accused that she did not like that

*he was taking pictures of her. However, she said "He kept on playing with the phone and taking pictures."*

*(xxi) The witness was then asked the following questions and she replied as follows:*

*Q. Then what did he do?*

*A. He put the phone down and we had sex.*

*Q. What do you mean when you said we had sex?*

*A. He began to insert his male private part to me.*

*Q. To your where?*

*A. The passage where I urinate from.*

*Q. Did you agree to this?*

*A. No.*

*Q. Did you say or do anything to indicate that you did not agree?*

*A. I was not looking at his face, I kept on looking away.*

*Q. Did you tell him to stop?*

*A. Yes*

*Q. What did you say to him?*

*A. I kept on telling him that I did not like what he was doing to me.*

*Q. What was his response?*

*A. He did not say anything.*

*Q. What did he do when you told him this?*

*A. We kept on having sex.*

*Q. Then what happened?*

*A. We had sex. After we had sex then I told him that I have to go to Samabula.*

*Q. What was his response?*

*A. He told me to wait.*

*Q. When you told him you do not like what he is doing, did he stop?*

*A. No.*

*Q. What happened after he told you to wait?*

- A. *I kept on telling him that I want to go. He told me to wait and that I can leave in the afternoon.*
- Q. *Did you leave at that point?*
- A. *No.*
- Q. *Why didn't you leave?*
- A. *I knew if I leave at that moment or go against him, he will do something to me inside that house.*
- Q. *What do you mean by this?*
- A. *He can beat me up My Lord. I was in that house because I was scared. I was asking him for my clothes. He did not give it back for me to wear it.*
- Q. *How did you feel at that point?*
- A. *I was frightened and also scared.*
- Q. *What happened thereafter?*
- A. *I asked him again if I can go to Samabula. He kept on telling me to wait.*
- Q. *So all this time you were without any clothes?*
- A. *Yes.*
- .....
- Q. *What happened?*
- A. *We were lying down on the mattress.*
- Q. *How did you feel at that point?*
- A. *I was eager to go, but I was scared.*
- Q. *What happened when you were lying down on the mattress?*
- A. *I kept on asking him if I can go to Samabula and sleep/rest, since I will be having night shift again.*
- Q. *Then what happened?*
- A. *He told me again to have sex.*
- Q. *What did you tell him?*
- A. *I told him that I refuse.*
- Q. *Then what happened?*
- A. *He laid on me, touched my breasts and we started to stay together/to have sex.*

- Q. *What exactly did Keresoni do to you?*
- A. *He touched my breasts, he bit my chest and my neck. He inserted his into my mimi. We had sex. He inserted his male private part to my passage where I urinate.*
- Q. *What is mimi?*
- A. *The passage where I urinate.*
- .....
- Q. *Do you know the name of that male private part?*
- A. *His cock.*
- Q. *Then what happened?*
- A. *I pushed him away, and I told him I don't like what he was doing to me.*
- Q. *What did he do?*
- A. *He kept on doing it to me – to have sex.*
- Q. *And then what happened?*
- A. *After a while, we had finished having sex. I told him again if I can go at that moment. He was silent, he didn't say a word.*
- Q. *Did you agree for him to insert his male private part to the passage you urinate?*
- A. *No.*
- Q. *Did you agree to have sex with him at that point?*
- A. *No.*
- Q. *How did you feel at that point?*
- A. *I was angry with him and also scared of him.*
- Q. *Did you leave at that point?*
- A. *No.*
- Q. *Approximately how long after the first incident, did the second incident happen?*
- A. *After 30 minutes approximately.*
- Q. *Why didn't you leave at that point?*
- A. *I did not leave at that point, because when I was inside that house, I was naked.*
- Q. *Then what happened?*

- A. *I kept on asking him if I can go to Samabula. He did not say a word. He was silent.*
- Q. *So, why didn't you get up and leave at that point?*
- A. *Because I was naked.*
- Q. *Did you ask him for your clothes?*
- A. *Yes. He did not say anything.*
- Q. *Where were your clothes at that point?*
- A. *When he removed it from me, I saw he had left it besides the mattress, where we were lying down.*
- Q. *Why didn't you just take your clothes from where he left it beside the mattress, where you were lying down?*
- A. *When I tried to take it, he pulled my hand.*
- Q. *How did you feel at that time?*
- A. *I was angry with him. I knew if I take the clothes from him forcefully he will beat me up.*
- Q. *What happened after that?*
- A. *I kept on asking him if I can go to Samabula and also to give back my clothes. He said, wait you leave right in the afternoon.*
- Q. *Then what happened?*
- A. *We laid down on the mattress and I was asking him if I can go. He kept on saying for me to wait.*
- Q. *Did you leave at that point?*
- A. *No. Because I was not wearing any clothes. We kept lying down and I kept on asking him if I can go. He said just wait, you can go in the afternoon. We were lying down, after an hour he told me again to have sex.*
- Q. *What did you tell him?*
- A. *I told him that I refuse.*
- Q. *What was his response?*
- A. *He lay on me forcefully. Then he touched my breasts. He inserted his cock inside the passage where I urinate. I kept on pushing him and I told him I don't like him.*
- Q. *What did he do?*
- A. *He kept on having sex with me.*

Q. *How did you feel at that point?*

A. *I was angry with him and I did not like what he was doing to me.*

Q. *Then what happened?*

A. *After we had sex, then he said that he will cut my hair.*

Q. *Did you agree to have sex with him at that point?*

A. *No.*

*(xxii) The complainant further testified that the accused brought a scissors and a kitchen knife and left it on top of the table. It came to her mind to lie to the accused, that she wanted to go to the toilet outside. So she had asked for her clothes to go to the toilet. The accused had told her to take a blue coloured wrap-around cloth (sulu vakatoga) that was hanging and to go to the toilet. The complainant had taken the cloth, worn it and gone outside to the toilet.*

*(xxiii) Once outside, she did not go to where the toilet is, but ran up the road towards her neighbours. She didn't know that the accused had been watching from inside. The accused had come running after her (he had been naked), got hold of her, pulled her by her hair and taken her inside the house. He had been pulling her hair and dragging her into the house. While the accused was doing this, her wrap-around cloth had fallen. When the accused was dragging her they were both naked at the time, and the neighbours were watching.*

*(xxiv) After taking her into the house, the accused had taken the scissors and cut her hair (in patches). He then took a rolling pin and hit her left knee once with it. The complainant said that she was crying and screaming at the same time.*

*(xxv) The complainant had again asked the accused if she could leave to Samabula. The accused had said for her to wait until it is dark.*

*(xxvi) After a while, when it was beginning to get dark, the complainant had asked for her clothes and the accused had given them to her. She testified that she was looking for a way to leave the house. So she had suggested to the accused that they leave together. Thereafter, she and the accused had left together to her aunt's place in Samabula.*

*(xxvii) On reaching Samabula, her aunty had asked the complainant to prepare dinner for herself and accused. After having dinner, the accused had left for Nabua.*

- (xxviii) *The complainant testified as to how she had reported the matter to the Police on 1 September 2016. She also testified about the medical examination that was conducted on her.*
- (xxix) *She testified that she had gone and met the accused at the Suva Remand Centre.*
- (xxx) *The complainant also stated in evidence that the accused's cousin and her husband had taken her to the Suva Remand Centre to meet the accused on one particular day. The accused had given her a letter and had instructed her to fill up a Statutory Declaration form before a JP, for the purpose of withdrawing this matter. The complainant testified that she had complied with the accused's instructions and handed over the letter and the Statutory Declaration form at Gunu House.*
- (xxxii) *The complainant was cross-examined at length by the Counsel for the Defence.*
- (xxxiii) *The defence position is that the complainant consented to have sexual intercourse with the accused, on all three occasions, on 31 August 2016. The crux of the defence case is that the complainant made up the allegations of Rape against the accused because she was ashamed and angry with how the accused had cut her hair.*
- (xxxiv) *The defence also highlighted the following inconsistency in the complainant's evidence. In her statement made to the Police, she had stated thus "I was so scared that I ran outside naked and was shouting for help". However, in her evidence in Court, the complainant states that at the time she went out of the house she was wearing a wrap-around cloth, which had fallen when the accused had come and dragged her into the house.*
- (xxxv) *The defence also highlighted as an omission the fact that the complainant had failed to mention in her statement made to the Police that she was looking for an excuse to leave the house (excuse of wanting to go to the toilet).*

**[64] Evidence Dr. Elvira Ongbit**

- (i) *Currently she is employed by the Ministry of Health and serving as a Medical Officer at the Samabula Health Centre and at Medical Services Pacific (MSP). She has been serving at the Samabula Health Centre for the past 11 years and has been based at MSP for the past 7 years. She has been practising as*

*a Medical Officer for more than 30 years. She now specialises in Obstetrics and Gynaecology.*

- (ii) She conducted a medical examination on the complainant, on 1 September 2016 at 3.30 p.m. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE2.*
- (iii) The Doctor testified as to her specific medical findings (column D12), including the vaginal examination findings.*
  - Head: She noticed patches of hair which was cut. There were some areas of hair missing.*
  - Neck: She noticed kiss marks on the neck and cheek.*
  - Breasts: She noticed kiss marks on both breasts.*
  - Extremities (Upper limbs and lower limbs): The Doctor noticed there was haematoma and swelling on the left knee and also three haematomas on the right thigh anterior aspect. She also noticed superficial abrasions on the back of the left thigh.*
  - Vaginal exam: There were no fresh injuries. The hymen is absent due to four vaginal deliveries.*
- (iv) The Doctor stated that a haematoma is a type of injury in which there is a rupture of the underlying blood vessels resulting in blood clots under the skin.*

**[65]** That was the case for the prosecution. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. However, the accused opted to offer evidence under oath.

**[66] Evidence of the Accused – Keresoni Waqatairewa**

- (i) The accused testified that in 2016, he was employed as a security officer working at Grid Security Fiji Limited. At the time, he was a security guard at USP.*

- (ii) *He and the complainant were in a defacto relationship and had four children (3 daughters and a son).*
- (iii) *He testified to the events which took place on 26 August 2016. He was working as security guard at the USP site. He was rostered for the night shift, commencing at 11.00 p.m. and ending at 7.00 a.m. the next day. He said this was pay day. (However, later in evidence it was found out that pay day, which falls on a Thursday, was 25 August 2016).*
- (iv) *The witness testified that on Thursday morning, he, the complainant and their four children were at home. It was school holidays during the second term. He testified to the 3 topics he had discussed with the complainant that morning.*
- (v) *The complainant, who was also working at a security guard, was to do the afternoon shift that day starting at 3.00 p.m. She had left home around 1.00 p.m.*
- (vi) *The witness had left home that day around 9.30 in the evening. At the time he left, the complainant had not come home from work as yet. Her shift was to end around 11.00 p.m.*
- (vii) *The witness said that he did not go directly to work. He had first gone to meet the complainant at the CWM Hospital. He said he went to meet the complainant because it was pay day and he had no money. On meeting the complainant, he asked her for his ATM card and had gone and withdrawn \$10.00.*
- (viii) *He testified that his pay on that day was \$210.00 and that he had withdrawn \$10.00 from that sum. Thereafter, he had gone and returned the ATM card to the complainant and left for his work place.*
- (ix) *On completing his shift at 7.00 a.m. (on Friday morning), he had rushed home. He got home at 8.00 in the morning. When he reached home, the children were playing with each other. They have not eaten and were asking for the complainant. The complainant was not at home.*
- (x) *Since there was no food at home, he had called his elder brother in Raiwaqa to bring some food for them to eat. His brother had brought 2 packets of biscuits for them to eat.*
- (xi) *Thereafter, he had been looking after the children since the complainant had not returned home. Unknown to him, he had fallen asleep. When he woke up it was almost 2.00 in the afternoon. He found that there was no one else at home.*

- (xii) *He started searching for his children. Then he got to know from his neighbor, who lives besides his house, that the complainant had come and taken the children away while he was sleeping.*
- (xiii) *The witness also testified to the events that took place on 30 August 2016 and 31 August 2016. On the night of 30 August he was on stand-by duty at the CWM Hospital. However, all the posts were filled. He said that he waited for the company transport to take him back home. He also said that he did not have any money for bus fare.*
- (xiv) *He admitted that he met the complainant on two occasions during the period she was on night duty (11.00 p.m. to 7.00 a.m.).*
- (xv) *He testified that at 6.30 in the morning, he had walked home to the Nabua Muslim League to collect the sick sheet he had obtained for the complainant. Thereafter, he had met the complainant at the Suva Bus Stand and the two of them had gone together to the Grid Security Office at Namadi for the complainant to hand over the sick sheet to the office.*
- (xvi) *Thereafter, they walked down together until they reached their home. After arriving at home, they had a cup of tea and a loaf of bread. Then they were discussing about the problem that had happened (on Thursday night), where he alleges that IL had used his pay.*
- (xvii) *Thereafter, the witness testified that he and the complainant had sexual intercourse on three occasions that morning. He submits that the complainant consented to have sexual intercourse with him on all three occasions.*
- (xviii) *The witness also admitted to taking photos while the complainant was naked. He also admitted to cutting the complainant's hair and also to hitting her left knee with a rolling pin one time.*
- (xix) *The witness also admitted to calling the complainant to meet him at the Suva Remand Centre.*
- (xx) *Although, he admitted that he had given the complainant a letter to withdraw the case and also instructed her to go before a JP and fill up a Statutory Declaration, he denies that he told his cousin and her husband to bring the complainant to the Suva Remand Centre to meet him.*

## **Analysis**

- [67] The above is a brief summary of the evidence led at this trial. The prosecution relied on the evidence of the complainant and Dr. Ongbit to prove its case. The defence relied on the evidence of the accused himself.
- [68] The prosecution is relying on the evidence of the Medical Officer, Dr. Elvira Ongbit. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [69] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [70] As I have informed you earlier, the burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [71] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [72] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt. Based on the said agreed facts the identity of the accused is proved as it has been agreed that 'The accused is Keresoni Waqatairewa'. The date of incident and the place of incident is also not in dispute. The accused has also admitted that he had carnal knowledge of the complainant. During his evidence he admitted to having consensual sexual intercourse on the three occasions on 31 August 2016.
- [73] Therefore, the main issue for determination is the issue of consent. The prosecution should prove beyond reasonable doubt that the accused penetrated the complainant's vagina, with his penis, without her consent, on all three occasions. Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis on the three occasions, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented.
- [74] The complainant testified that she did not consent to the three acts of sexual intercourse with the accused. The accused denies this and testified that the complainant did consent to the three acts of sexual intercourse.

- [75] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, IL, 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 all three counts of Rape, 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 had proved the elements of the offences of Rape, beyond any reasonable doubt.
- [76] 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 of the accused. You must consider his evidence also for its consistency and also the probability of his version. If you find the evidence of the accused is truthful and reliable, then you must find the accused not guilty of all three charges of Rape, since the prosecution has failed to prove its case.
- [77] If you neither believe the evidence adduced by the accused nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charges of Rape.
- [78] 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. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.
- [79] As you already know there are three counts of Rape against the accused in the information. You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the others.
- [80] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you believe the evidence of the accused, then you must find the accused not guilty of the three charges of Rape;*
  - ii. *If you neither believe nor disbelieve the evidence of the accused, then again you must find the accused not guilty of the three charges of Rape;*
  - iii. *If you reject the version of the accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*

- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the three charges of Rape;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of Rape has been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

**[81]** Any re directions the parties may request?

The Learned State Counsel submitted that I should direct the Assessors that statements made by a witness to the police is not evidence. I directed the Assessors accordingly. I also referred them to the directions I had already given in paragraphs 16 and 17 of this Summing Up as to how they should deal with inconsistencies or omissions.

**[82]** Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the three counts separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

**[83]** Your possible opinions should be as follows:

**Count One**

Rape - Guilty or Not Guilty

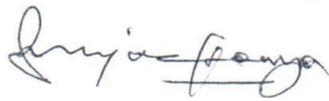
**Count Two**

Rape- Guilty or Not Guilty

**Count Three**

Rape- Guilty or Not Guilty

**[84]** I thank you for your patient hearing.



**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**



AT SUVA

Dated this 27<sup>th</sup> Day of May 2019

**Solicitors for the State** : **Office of the Director of Public Prosecutions, Suva.**  
**Solicitors for the Accused** : **Office of the Legal Aid Commission, Suva.**