

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 161 OF 2014

STATE

v

1. Eroni Nabitu
2. Taniela Naiseru

Counsel: Ms. L. Latu for the State  
Ms. Vulimainadave for Defence

Date of Trial: 3<sup>rd</sup>, July, 2017- 6<sup>th</sup> July, 2017

Date of Summing Up: 7<sup>th</sup> July, 2017

**SUMMING UP**

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to

form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.

2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the Counsel. They were their arguments, which you may properly take into account when evaluating the evidence. It is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that Accused persons are innocent until they are proved guilty. The burden of proving their guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the Accused guilty, you must be satisfied so that you are sure of their guilt. If you have any reasonable doubt as to their guilt, you must find them not guilty.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this Courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial. 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.

10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to. I will deal with the law as it is applicable to the offence with which the accused-person are charged, in a short while.
12. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witnesses.
13. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a Complainant in a rape case such as this should react to the experience. Any person who has been raped, will have undergone trauma whether the accused were known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in Court or at the Police Station. The

experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.

14. As Assessors you were chosen from the community. You, individually and collectively represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
15. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.
16. The charges against Accused are as follows:

**FIRST COUNT**

*Statement of Offence*

**RAPE:** Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**ERONI NABITU**, on the 25<sup>th</sup> day of October, 2013 at Nailaga, Ba in the Western Division, had carnal knowledge of **VETINIA DIKUILA**, without her consent.

**SECOND COUNT**

*Statement of Offence*

**RAPE:** Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**ERONI NABITU**, on the 08<sup>th</sup> day of November, 2013 at Nailaga, Ba in the Western Division, penetrated the vagina of **VETINIA DIKUILA**, with his finger, without her consent.

**THIRD COUNT**

*Statement of Offence*

**RAPE:** Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**ERONI NABITU**, on the 08<sup>th</sup> day of November, 2013 at Nailaga, Ba in the Western Division, had carnal knowledge of **VETINIA DIKUILA**, without her consent.

**FIFTH COUNT**

*Statement of Offence*

**RAPE:** Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**TANIELA NAICERU**, on the 08<sup>th</sup> day of November, 2013 at Nailaga, Ba in the Western Division, had carnal knowledge of **VETINIA DIKUILA**, without her consent.

17. I will now deal with the elements of the offence. A person rapes another person if:
  - (a) The person has carnal knowledge with or of the other person without other person's consent; or
  - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
  - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
  - (d) The person knew or believed that the complainant was not consenting, or he was reckless as to whether or not she was consenting.
18. Insertion of finger or penis fully into vagina is not necessary. Slightest penetration is sufficient to satisfy this element.
19. Consent as defined in Section 206 of the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given

consent. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.

20. Documentary evidence is evidence presented in the form of a document. In this case, medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time upon examination of the Complainant.
21. Expert evidence is also important in this case. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before Court on the basis of their learning, skill and experience. In this case, doctor gave evidence as expert witness. Doctor's evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if his reasons are convincing and acceptable to you; and, if his opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence in the case.
22. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.
23. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witnesses' demeanor 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 demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.

24. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the Accused-person and connect him to the offence that he is alleged to have committed.
25. Proof can be established only through evidence. Evidence can be direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence as to what she saw, heard or felt.
26. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.
27. In testing the credibility of a witness, you can consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.
28. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in this case, complaint Complainant made to police is genuine and what weight you attach to the complaint she eventually made.
29. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told Court contradicts with his/her earlier version. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another, for example by a police officer, in recording the statement where the witness is alleged to have given that version.

30. You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.
31. You must also consider the issue of omission to mention something that was adverted to in evidence on a previous occasion on the same lines. You must consider whether such omission is material to affect credibility and weight of the evidence. If the omission is so grave, you may even consider that to be a contradiction so as to affect the credibility or weight of the evidence or both.
32. You may also see whether there is a motive or obvious reason to fabricate a false allegation against the Accused. If there is an obvious reason to make up a case, then you may attach less weight to Complainant's evidence.
33. Please remember, there is no rule in Fiji for you to look for corroboration of Complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of Complainant, depending on how you are going to look at her evidence.
34. I will now deal with the summary of evidence in this case. In doing this I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision in this case.

### **Case for Prosecution**

#### **PW 1 Vetinia Dikuila (Complainant)**

35. Vetiana was 14 in 2013. Since the day she was born, she had been living with their grandparents, Romuluse Bitukau and Litiana Bitukau in Kurukuru Settlement, Nailaga. She was attending Form 3 at Ba Sangam College.
36. Around 7.30 pm on 25<sup>th</sup> of October 2013, she was going to Seven Day Adventist Church at Nailaga for the prayer meeting. After the prayer meeting, Taniela alias Dan called her and asked her to go and sit at the wooden bell. When she reached there she saw Eroni. Dan informed her that Eroni wanted to speak to her. She



asked Dan what Eroni wanted to speak to her. After that Dan went to Monika. Eroni started questioning her personal things and asked if she had a boyfriend. She said 'no'. After that Eroni approached her and invited her to take a walk. She said 'no'. Eroni then started to touch her and wanted to have carnal knowledge of her. She refused. He still forced her. After that he lied on top of her and removed her panty and skirt.

37. Vetinia called out to Dan and said 'see what Eroni is doing to me'? Dan replied saying 'just relax'. She couldn't free herself as he was lying on top of her. She was scared. After that he removed his trousers and inserted his private part into her private part.
38. First he inserted his finger, and then inserted his private part into her private part. She was in pain. He then pulled it out, wore his trousers and left. She was crying because she was in pain. She was scared.
39. Whilst he was doing this to her, Monika was coming towards them. Dan informed her to go back. This happened around 9.00 p.m., 7-8 meters away from church. She stood up slowly, wore her panty and skirt. After a while, Monika came. She informed Monika of what had happened. She did not say it to anybody else as she was scared. She did not inform anybody else even to her family members because she suspected that they will spread rumours about her in the village. She said that she did not give him permission for him to do that. She had informed him that she can't agree to do that because she had not done that and gone out with a boy.
40. She knew Eroni before the incident. He used to come and stay with Dan who is her cousin.
41. The second alleged incident occurred on 8<sup>th</sup> of November 2013. At about 7.00 pm, she went to the same church. After the church service, she was on her way home with Monika and Ben, and at the gate she met Dan and Eroni. They said that they were waiting for Ben. After that she was taking the lead in going home with Monika and Ben, Dan's elder brother. At the guava tree they met Leone. Monika asked Leone 'where are you going? Leone said that he was going to the shop. Monika suggested that they all go with Leone to the shop, so they were coming to the shop. Before they reached the shop they were awaiting at the mango tree for Leone who had gone to Manasa. At that time she started to have a stomachache. After informing Monika she turned around to come home. She thought Monika was following her and turned around to see if Monika was

following her. She saw Eroni. Then she informed Eroni that she was going back to Monika. Eroni asked her to take the lead to go home. Eroni was pulling her hand. He took her hand and punched her. He took her towards the guava tree. After that, Dan and Leone came. They were trying to remove her cloths. When she tried to shout, Leone covered her mouth. Eroni was trying to remove her panty. After that Eroni removed his trousers and inserted his private part into her private part. She couldn't do anything. She was just crying because Leone was blocking her mouth and Dan was holding on to her hand. He also inserted his finger into her private part.

42. After, Eroni had done that to her, he informed Dan to get ready for his turn. Dan took his turn. He removed his trousers inserted his private part into her private part. Leone was blocking her mouth. While Dan was doing that to her Eroni was inserting his finger into her private part. She did not give permission for them to do that to her.
43. When she entered the house, she started crying and informed her grandmother Litiana what had happened. Litiana reported the matter to the Police on the next day. She was taken for a medical examination at the hospital. Dr. Neeraj Sharma medically examined her.
44. She used the word "veiyacovi" to describe carnal knowledge, the act of inserting the 'ball' into her vagina.
45. Under Cross Examination, Vetinia said that she is close to her grandparents. The statement to the Police was given on the 9<sup>th</sup> of November, 2013. She admitted that the fact that she went to church with two others is not there in the statement. She denied that she had asked Dan that she had wanted to talk to Eroni and sat beside him and sent Dan to buy an ice block.
46. She denied that she had told Eroni that they two go somewhere that nobody could see. Vetinia denied that while they were talking and kissing, Eroni requested her that he wanted to have sex with him and that she had agreed. She said that he forced her down and then came on top of her. When Eroni was forcing her to lie-down she called out Dan's name. Then Dan told her to 'relax'.
47. She admitted that there were two shops near the church. She also admitted that when he came on top of her, she did not push him away or struggle. She however denied hugging him.

48. She admitted that she agreed to Eroni's proposal to be his girlfriend. The relationship stopped after the incident on 9<sup>th</sup> November.
49. Vetinia denied that she went with Eroni to tell stories underneath the guava tree. She denied that after she had done with Eroni, Eroni requested her if she can have sex with Leone and Dan and that she agreed to have sex with Dan.
50. After this thing was done to her she shouted and two boys heard her voice and approached her. When they came, Eroni, Dan and Leone ran away.
51. She was crying on her way. When she entered the house, she started crying and did not inform everything to grandmother. She didn't tell her grandmother what happen on the 25<sup>th</sup> of October 2013, because she was scared. When she was asked by the Defence Counsel whether it was also because her grandmother will spread rumors about her, she said 'yes'.
52. All the family members gathered and these three boys also came home. She denied that the only reason why she is complaining that she got raped is because she was caught and wanted to save herself and also because she was scared.
53. Under re-examination, Vetinia said that Dan came to sleep over at her house after he ran away from his home. Even though her grandmother didn't know that he was one of them (culprits).
54. All family members and villages were looking for her and when she came home after the incident their family members came home with yaqona and asked for forgiveness and asked not to bring this matter to the Police.

**PW 2 Dr. Neeraj Sharma**

55. Dr. Sharma examined the Complainant on 9<sup>th</sup> November, 2013 when she was produced at the Ba Mission Hospital.
56. Doctor's initial impression of the patient was that her mood was a bit depressed. She seemed afraid at that time but she answered all the questions.
57. In the external examination, doctor did not notice any physical injuries. Upon genital examination, vagina and the perineum which is including the inner side, he found that the hymen was not intact. There was no obvious bleeding, discharge or abrasions but there were some areas which looked red hence the

injuries seemed recent. He was concerned about the psychological trauma because she was very afraid and in a shock. He prescribed that the patient goes for counseling and debrief.

### **PW 3 Litiana Seganikilai**

58. Next witness for Prosecution was Litiana, grandmother of Vetinia.
59. On the 8<sup>th</sup> November 2013, around 7.30pm, while returning home from market, she met Monika and her granddaughter, Vetinia. They were going to church. She came home. When she was resting, 2 of her grandchildren came and inquired about Vetinia. They informed her that the church service had already finished long ago. She informed them to go and search for Vetinia.
60. When they came back, they came back with Vetinia. When Vetinia entered the house she started crying. She told her 'don't cry; tell me what happened to you? She informed her that Eroni and Leone dragged her and covered her mouth with a cloth. She asked Vetinia, 'did they do something to you?' She said 'Yes'. She informed Vetinia, that she 'll take this to the hand of the law.
61. At that time, plenty people were inside the house. Eroni and Leone also came. She didn't know that one of the persons involved in this incident was Taniela. Eroni asked her not to report the matter but for him to be beaten up or assaulted. She said that he can't be beaten up because of his built and youth. She informed them that she will report the matter to police. Taniela's parents brought grog and asked for forgiveness. When Taniela 's parents came, Taniela ran away from her kitchen where he had been hiding. Taniela's grandmother and herself are sisters.
62. She did not accept the grog they brought. She reported the matter to police on the next morning.
63. Under cross examination, Litiana said that she was in a sad mood when her statement was being recorded by police and that there are things that is not in the statement. Taniela Rokobaleni went to the place where Vetinia was dragged and uplifted Vetinia's panty and brought it home. She was angry when Vetinia was missing. Vetinia may not have told everything because she was angry, and that she would beat her up.
64. That is the case for the Prosecution. At the close of Prosecution case, you heard me explain to the Accused what their rights were in defence and how they could

remain silent and say that the Prosecution had not proved the case against them to the requisite standard or they could give evidence in which case they would be cross-examined.

65. As you are aware, Accused persons elected to give evidence. That is their right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the Prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. Even if you don't believe a single word Accused person says, you must still be sure that he is guilty of the crime that he is charged with.

### **Case for Defence**

#### **Eroni Nabitu (1<sup>st</sup> Accused)**

66. On 25<sup>th</sup> of October 2013, Taniela (Dan) came from playing and informed him that they go to see Ben. When they went across the church, Vetinia called Taniela.
67. Vetinia gave Dan some money to go and buy ice blocks. Vetiana had informed Dan that she wants to speak to him. When Dan had gone, he was sitting with Vetinia at the wooden bell house. He asked her what she wanted to ask him. She smiled. He asked her if she wants to be his girlfriend. She agreed to be his girlfriend.
68. After prayer meeting session had finished she suggested that they two go to a place where the people couldn't see. She took the lead and followed her towards the coconut tree beside the tamarind tree.
69. She sat down first. He asked her if he could kiss her, she agreed and they started kissing. After kissing, he asked her if they could have carnal knowledge. She agreed. She removed her panty by herself. She was lying down on the ground. Then he lied on top of her. Then they started having carnal knowledge roughly for 5 minutes. Vetinia did not do anything; she was tightly hugging him.
70. After that he informed to wear her clothes. Then she informed him to take the lead and she'll follow so that nobody can see them.

71. On 8<sup>th</sup> November 2013, around 7.30pm, after speaking with Dan, they came to the shop and waited for Ben. When they reached the shop they met Ben, Monika and Vetinia. Dan informed them to go home. On their way home they met Leone. Leone informed them that he will buy something from the shop for them to eat. Then they all went back to the shop. On their way to the shop, Leone informed that he was joking. Vetinia went first. He called Vetinia and invited her for a talk. She informed him to take the lead. Then they went under a guava tree, sat down and talked. This was the second time they were meeting after 25<sup>th</sup> October 2013. He asked and kissed her. She removed her panty. He asked her if she would agree to have sex with him. She replied 'Yes'. He kissed on her lips and touched her. She lied down. He was trying to have canal knowledge of her, but his penis was not erected. He did not move any further.
72. While they were there, Dan and Leone came. He asked Vetinia, if those two could also have canal knowledge of her. She said 'yes' and asked do it slowly. They saw some phone light coming towards where they were. Leone and Dan were scared. Vetinia told them to run away and they all ran. He reached the main road and came home with Dan.
73. He denied forcing her to have canal knowledge or poking her private part. She may have reported because she was caught, she was scared; maybe she wanted to save herself.
74. Under cross examination, Eroni said that straight after Form four, he started working as a plaster man. He told Police that his penis was never erected on the 8<sup>th</sup>.
75. Under Re-Examination Eroni confirmed that he had told police at question 61 that his dick was not erected.

**DW 2 Taniela Naiseru /Dan (2<sup>nd</sup> Accused)**

76. On 25<sup>th</sup> October 2013, Dan came with Eroni back from playing touch rugby. His cousin Vetinia called him from the church. He went towards Vetinia, leaving Eroni at the Wooden Bell. She wanted to speak to Eroni. He informed Eroni that Vetiana wants to talk to him. Then Eroni asked him to call her. Vetinia gave him some money to go and buy an ice block. Eroni and Vetiana started talking. He went to buy an ice block. He never met Eroni and Vetinia again that night.

77. On 8<sup>th</sup> November 2013, around 6.00 pm or 7.00 pm, he met Eroni. They went to meet his elder brother Ben. When they were waiting at the gate of the shop for Ben, Ben, Monika and Vetinia came out from the shop. Then they all came back home. They met Leone who asked them to go back to the shop. They all went back to the shop.
78. When they were standing at the mango tree Leone went to pick his wages. Vetinia started to have stomach pain. She took the lead to go home. After that, Eroni called her and they were walking together while they were standing there.
79. On his way home he heard people talking at the guava tree. He went to the guava tree to check who was there. When he reached there he saw Eroni and Vetinia lying down. He could not see properly because it was dark. When he moved closer, he fell on top of Vetinia, when he was trying to stand up, Leone pushed him back. He managed to stand up. He saw a phone light coming towards where they were. Then they ran. Vetinia also ran.
80. When her grandmother asked her about this incident Vetinia did not inform Eroni's name but she mentioned his name.
81. Under cross examination, he admitted that he had told police that on 08<sup>th</sup> of November 2013, Vetinia was wearing a red dress and that he saw Eroni having sex with Vetinia. He denied having sex with Vetinia.

### **Analysis**

82. The Prosecution based its case substantially on the evidence of the Complainant. If you are satisfied that the evidence of the Complainant gave in Court is reliable and trustworthy you can safely act upon her evidence in coming to your conclusion. No corroboration is required from an independent source.
83. Considering all the evidence led in the trial, if you are satisfied that Complainant had told the truth and her evidence is believable, then you have to consider whether the Prosecution has discharged its burden and proved each element of each count beyond reasonable doubt. You have to consider each count separately.
84. 1<sup>st</sup> Accused admitted that he penetrated Complainant's vagina on the 25<sup>th</sup> of October, 2013 and that he was with Complainant on the 8<sup>th</sup> November 2013 at the

crucial time. Complainant is the 1<sup>st</sup> cousin of the 2<sup>nd</sup> Accused. There is no dispute in this case with regard to the identity of Accused persons.

85. 1<sup>st</sup> Accused having admitted that he penetrated the vagina of the Complainant on the 25<sup>th</sup> denies that he did so without her consent. 1<sup>st</sup> Accused denies penetrating Complainant at all on the 8<sup>th</sup> November 2013 either with his penis or finger. 2<sup>nd</sup> Accused denied penetrating her at all.
86. Prosecution called three witnesses, the Complainant, her grandmother Litiana and doctor Sharma. Prosecution based its case substantially on the evidence of the Complainant. At the close of Prosecution case both Accused presented evidence under oath.
87. Prosecution says that 1<sup>st</sup> Accused penetrated Complainant on the 25<sup>th</sup> October 2013 without her consent. You must decide whether you are sure that Complainant did not consent. That will require an assessment by you of the Complainant's evidence.
88. Prosecution says that Complainant made a prompt complaint to police on the 9<sup>th</sup> November 2013 and her complaint was genuine and that she maintained her consistency right throughout. They also say that the Complainant was in a distress condition after the incident when the doctor examined her on the 9<sup>th</sup> November 2013.
89. Defence on the other hand says that Complainant did not make any complaint about the alleged incident to her grandmother who is her guardian or to anybody at the first available opportunity and that the complaint she ultimately made to police is a fabrication. Defence also argues that she had not raised any alarm, not screamed and allowed the Accused to penetrate her because she was consenting.
90. Complainant said that she did report the matter to Monika soon after the 1<sup>st</sup> incident. She suspected that Monika, who is a close relative of Leone, was also involved in the plan. Prosecution did not call Monika to give evidence. To explain why she failed to report the matter promptly to her grandmother at the first available opportunity, Complainant said that she was threatened by the Accused that they will do something to her if she were to tell this to anybody. She was scared to tell everything to her grandmother and was also worried that her relatives would spread rumours about her if the matter was leaked to them.



91. In light of directions I have given, you consider whether the explanation given by the Complainant is reasonable in the circumstances of this case and from her perspective.
92. Counsel for Accused in her closing remarks stated that Complainant did not shout or scream, and that she had no external injuries to indicate that she had struggled in protest.
93. In the alleged 1<sup>st</sup> incident, Complainant admitted that when Eroni came on top of her, she did not push him away or struggle. She said that she couldn't free herself as he was lying on top of her. Complainant said that she was scared. Complainant also said that she called out to Dan and said 'see, what Eroni is doing to me? Dan said 'just relax'.
94. During the second incident, Complainant said that when she tried to shout, Leone covered her mouth and couldn't do anything. She was just crying because Leone was blocking her mouth and Dan was holding on to her hand.
95. In her closing argument Defence Counsel submitted to you that her failure to protest and react positively demonstrates that she was not telling the truth. This is an argument which you should consider with care when you do, you should not assume that there is any classic or typical response to an unwelcome demand for sexual acts. The experience of the Courts is that people who are being subjected to nonconsensual sexual activity may respond in variety of different ways.
96. I must tell you that, according to the Crimes Act, the offence of Rape charged requires proof that the Complainant did not consent. The offence may or may not be accompanied by force or the threat of force, but please note that it is no part of the Prosecution's obligation to prove that the accused used force or the threat of force.
97. If you accept that the complainant was not consenting you must ask yourself did the Accused know that she was not consenting, and if not, was that a reasonably held belief, or was the Accused reckless in going on knowing that she might not be consenting? Complainant said that she had called out to Dan during the 1<sup>st</sup> incident but Dan had said 'just relax'. According to her, she had verbally refused to have sexual intercourse. In these circumstances you consider whether Eroni knew or it was reasonable for him to believe that she was consenting.

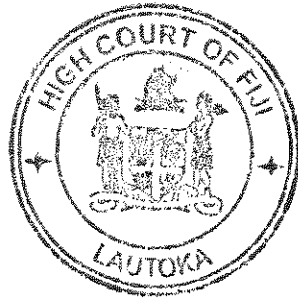
98. Both Accused flatly denied the allegations and gave evidence in their defence although they were not required to prove their innocence or prove anything at all. You must consider their evidence and evaluate it using the same tests that you have used to test the credibility of Prosecution version.
99. You can compare their evidence with what they had told police about the incidents and ask yourselves whether they are consistent.
100. If you believe the version of the Defence, you must find them not guilty. Even if you don't believe the version of the Defence, Prosecution must still prove the charges beyond reasonable doubt. Remember, the burden to prove the charges rests on the Prosecution. Accused are under no obligation to prove their innocence or prove anything at all.
101. If you are satisfied that the version of Prosecution is credible and believable, then you have to be satisfied that each element of the offence of rape as charged had been proved beyond reasonable doubt.
102. If you are sure that 1<sup>st</sup> Accused penetrated the Complainant's vagina on the 25<sup>th</sup> October, 2013 with his penis without her consent, then you can find the 1<sup>st</sup> Accused guilty of rape on 1<sup>st</sup> count.
103. If you are sure that 1<sup>st</sup> Accused penetrated the Complainant's vagina on the 8<sup>th</sup> November, 2013 with his finger without her consent, then you can find the 1<sup>st</sup> Accused guilty of rape on count 2.
104. If you are sure that 1<sup>st</sup> Accused penetrated the Complainant's vagina on the 8<sup>th</sup> November, 2013 with his penis without her consent, then you can find the 1<sup>st</sup> Accused guilty of rape on count 3.
105. If you are sure that 2<sup>nd</sup> accused penetrated the Complainant's vagina on the 8<sup>th</sup> November, 2013 with his penis without her consent, then you can find the 2<sup>nd</sup> Accused guilty of rape on count 5.
106. Ladies and gentleman assessor, it is for you to determine the case of each accused separately against each count on a consideration of all the evidence and applying the directions that I have given to you.
107. That concludes my summing up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and

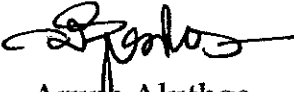
form your individual opinions on whether the charges have been proved against each accused. I remind you that you must consider the case against each accused separately. On your return you will be asked to separately state in Court your opinion in respect of each accused whether he is guilty or not guilty of the charge or charges with which he is charged with.

108. Your possible opinions would be:

- 1<sup>st</sup> Count - 1<sup>st</sup> accused guilty or not guilty?
- 2<sup>nd</sup> Count - 1st accused guilty or not guilty?
- 3<sup>rd</sup> Count - 1st accused guilty or not guilty?
- 5<sup>th</sup> Count - 2nd accused guilty or not guilty?

109. Any re-directions?



  
Aruna Aluthge  
Judge

AT LAUTOKA  
07<sup>th</sup> July, 2017

Solicitors:                   Office of the Director of Public Prosecution for State  
  Office of the Legal Aid Commission for Accused