

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 301 of 2017**

**STATE**

**v.**

**WAISAKE TURAGA**

**Counsel:** Mr T. Tuenuku for State  
Ms. S. Prakash for Respondent

**Date of Hearing:** 28<sup>th</sup> to 29<sup>th</sup> May 2018

**Date of Summing Up:** 30<sup>th</sup> May 2018

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**SUMMING UP**

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1. The name of the Complainant is suppressed. She is referred to as "AB".
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
3. Our functions are different. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
4. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

5. I may comment on the facts if I think it will assist you when 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 facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion.
6. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is not evidence, it is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
7. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I form and deliver my judgment.
8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

### **Burden and Standard of Proof**

9. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
10. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
11. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

### **Information and elements of the offence**

12. The accused is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offence are before you. Please take your attention to it, as I do not wish to reproduce it in my summing up.
13. The main elements of this offence of Rape as charged are that:
  - i) The Accused,
  - ii) Penetrated into the vagina of the complainant with his penis,
  - iii) The complainant did not consent to the accused to penetrate into her vagina with his penis.
  - iv) The Accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner.

### Agreed Facts

14. I now take your attention to the agreed facts, which are before you. They are the facts that the prosecution and the defence have agreed upon without any dispute. Hence, you can take them into consideration as the facts that are proven beyond reasonable doubt.

### The Accused

15. According to the agreed facts, the complainant knew the accused as they are related to each other and lived in the same village.
16. The prosecution presented the evidence of the complainant to establish that it was the accused person who raped the complainant on that day. The defence did not dispute the identity of the accused. The defence of the accused is based upon the complete denial.

### Penetration

17. Evidence of slightest penetration of the penis of the accused into the vagina of the Complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

### Consent

18. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent to the accused to insert his penis into her vagina.
19. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and

voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.

20. The complainant must have the freedom to make the choice. It means that she must not being pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. The consent for sexual intercourse must be comfortable to the person who made such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.
21. If you are satisfied, that the accused had inserted his penis into the vagina of the complainant and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or reckless that the complainant was freely consenting for this alleged sexual intercourse. I must advice you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual intercourse. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that was prevailed at the time of the alleged incident took place.

### **Corroboration**

22. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accepts it as reliable and truthful; you are not required to look for any other evidence to support the account given by the complainant.
23. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are

natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.

24. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You heard that the accused is the uncle of the complainant. As I said above, it is your duty to determine the legal culpability of the alleged act committed by the accused according to law and not the moral or emotional culpability. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses and the exhibits during the course of the hearing.
25. You must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanours of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

### **Evidence of the Prosecution**

26. Let me now remind you briefly the summary of the evidence presented by the prosecution during the course of the hearing. This is a fairly short hearing and lasted only for two days. Therefore, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
27. The prosecution alleges that the accused lured the complainant into his house under the pretext of seeking her assistance to recharge his credit into his mobile phone. The complainant had gone to the house of the accused in the evening of 2nd of February 2017, to buy some ice blocks. She had called him from the outside. He then came out and gave her ice block, for which she had given him money. He had then invited her into the house, asking her if she could recharge his mobile phone. When she came into

the house, he had given her the mobile phone and went into the room to get the recharge. He then came out and went straight to close the windows and put the curtains down. He had then closed the door of the kitchen. The accused had then came to her and dragged her to the bedroom. He came behind her and put one of his hands under her breast and covered her mouth with other hand. The complainant explained that she could not shout for help as her mouth was covered by his hand.

28. The accused took her into the bedroom and laid her down on the bed. He came on top of her, preventing her, escaping from the scene. The complainant tried to push him away, but he was on top of her. He had covered her mouth with one of his hands. He separated her tights and then inserted his penis into her vagina and had sexual intercourse with her. The complainant explained that she could not shout for help as her mouth was covered and had no prospect of escaping as the accused was on top of her. After he had sexual intercourse with the complainant, the accused threatened her not to tell anyone about this. He had threatened her that if she tells anyone or if anyone came to know about this incident, he will come after and do something worst to her. The accused had given the complainant a mobile phone and told her if she needs anything, she can come to him.
29. The complainant explained in her evidence that she did not tell anyone, including her mother, father and aunty Litia, about this incident as she was scared and also ashamed. The complainant had gone home straight after this incident and went into the bathroom. She has not informed this matter to her mother as she felt scared, ashamed and also did not know how would her mother react if she tells this to her. The complainant explained that she did not know what to do and only she could do, to go in to the bathroom and cried alone.
30. The complainant had not related this matter to anyone and kept it in her for few days. She had kept the mobile phone given by the accused with her. However, her father had found that she was having a mobile phone. Her father was strict on such issues, specially when his children keep or bring something that does not belong to them. According to the evidence of the father, he knew the owner of the mobile phone, but he pretended otherwise. When he asked the complainant about the mobile phone, the

complainant had told him that she received it from her friends, namely Waisale and Inia. The father then accompanied her to meet Waisale and Inia for her to hand the mobile phone over to them. However, they did not come. The complainant had then gone to school.

31. When she came back from the school, she went to see the accused at his house in order to tell him that her father had found the mobile phone. The complainant explained the reason why she still went to the house of the person who raped her few days ago. The complainant said that she did not know what to do. When she went to see the accused, he invited her into the house, which she accepted. While she was inside the house of the accused, Aunty Litia, whose house is six or seven steps away from the accused's, saw the complainant. Aunty Litia then asked her younger sister Loata to go and see who is in the house of the accused. The complainant had shown Loata an ice block. The complainant then came out of the house, where Loata relayed the message to her that Aunty Litia wanted to see her. When the complainant met Aunty Litia, she asked the complainant what she did inside the house of the accused. Litia then told the complainant that she will meet her father. The complainant was scared and went and hid instead of going home. She then went to one of her aunty's house, where her mother came and took her back home.
32. At home, her father questioned her about the phone. She initially cried as she did not know what to do. Later, the complainant related her father this incident that the accused raped her in his house. Her parents were silent for a while and then they all cried together. They then went and reported this matter to the Police.
33. The Doctor in her evidence explained what she found during the medical examination of the complainant. She then explained what is the hymen and how it could be damaged. However, the Doctor said that she could not tell the time that it was damaged.

#### Case of the Defence

34. You may recall that the learned counsel for the defence cross examined the three witnesses of the prosecution.



35. The learned counsel for the prosecution suggested to the complainant that she made up this allegation in order to save herself, which she said no. The complainant denied that she used the mobile phone of the accused in order to communicate with her boyfriend. Moreover, the complainant denied the proposition of the learned counsel of the defence, where she was asked by the counsel that this incident never took place.

#### Right to Remain in Silence

36. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted not to give evidence. The accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

#### Analysis and Directions

37. You heard the evidence presented by the prosecution. The defence presented their case by cross examined the witnesses of the prosecution. The prosecution and the defence have conflicting versions of events. The prosecution alleges that the accused lured the complainant into his house and then forcefully had sexual intercourse with her without her consent. The defence suggested the complainant that such an incident never took place and she made up this allegation in order to save herself. This alleged incident took place in private between the accused and the complainant.

#### Evaluation of Evidence

38. Madam assessors, I now kindly request you to draw your attention to the directions on evaluation of evidence. It is your duty to determine this case based on the evidence. In doing that, you are required to evaluate the evidence in order to determine the credibility, reliability and truthfulness of them. That will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to

judge whether a witness is telling the truth and is correctly recalling the facts about which she or he has testified.

39. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another: he or she may be accurate in saying one thing and not accurate in another thing.
40. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking about in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with her own evidence but also with other evidence presented in the case.
41. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.

### Expert Evidence

42. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.
43. In this case you have heard the evidence of Dr. Ilisapeci Lasaro. She is a medical doctor and gave her professional opinion about the medical findings that she noticed during the medical examination of the complainant.
44. Doctor Lasaro in her evidence said that the hymen is mostly damaged due to sexual intercourse. However, she is not in a position to tell the timing of damage caused to the

hymen of the complainant. The doctor could not relate the fact that the hymen of the complainant is not intact with this alleged incident. However, you could use her opinion about the hymen in considering whole of the evidence in order to determine whether the prosecution has proven the accused guilty for this offence beyond reasonable doubt.

### **Evidence of the Complainant**

45. The most important part of your task is to judge whether the complainant has told the truth, and has given a reliable account of the events that she was describing. The complainant is young adolescent. Some of you will have children and grandchildren who are of a similar age to the complainant. If so, I think you will recognize the sense of the advice that I am going to offer you about your judgment of the evidence of such a witness, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice if you do not agree with it.
46. Young adolescent as of this complainant may not have the same life experience as adults. They may not have the same standards of logic and consistency. Their understandings of life may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a young adolescent may seem very different from life viewed by an adult.
47. Remember how you normally talk to a person of this age. You should bear those considerations in mind when you consider the evidence given by the complainant. All decisions about the evidence are for you to make.

### **Delay in Reporting**

48. You may recall that the learned counsel for the Defence suggested to you to consider that the complainant had not informed or related this matter to anyone for few days, though she had enough opportunities to inform her mother, father or aunty Litia. The complainant had not told her mother when she came home after this incident on the 2nd of February 2017. When her father inquired about the mobile phone, she had again

decided not to tell him about this incident. The complainant did not tell aunty Litia when she asked her what she was doing at the house of the accused on the 8th of February 2017. The complainant in her evidence explained that she was scared and ashamed. That was the reasons she decided not to tell anyone about this incident.

49. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault, will report it as soon as possible. The experience of the court is that, victims of sexual offences can react to the trauma that they have faced in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion or cultural taboos, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise an immediate complaint does not necessarily demonstrate a true complaint.

#### **Inconsistencies and omissions**

50. You have heard that the learned counsel for the defence cross examined the complainant and other two witnesses of the prosecution about the inconsistent nature of the statements that they have made to the police and the evidence given in court. However, none of these statements made to the police tendered in evidence. Moreover, the learned counsel for the defence in her closing address suggested you to consider the inconsistent nature of the evidence given by the complainant regarding the dates of this alleged incident and subsequence events that were followed after this incident.
51. You are allowed to take into consideration about the inconsistencies and the omissions when you consider whether the witness is believable and credible as a witness. However, the statement made to the police is not evidence of the truth of its contents. The evidence is what the witness testified in court on oath.
52. It is 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. Moreover, as I explained above, the victims of rape react differently to the trauma

and the experience they have gone through, especially in revealing those incidents to another person. Sometimes they are unable to recall every minute detail soon after the incident due to the traumatic impact or the experience they undergo *et cetera*. Sometimes, with the passage of time they would be able to resurrect their memory and recall some details of those traumatic experiences.

53. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

#### **Final Directions**

54. Madam Assessors, I now take your attention to the final directions of the summing up.
55. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you can find the accused guilty for the said offence of Rape.
56. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused is not guilty for the said count of Rape.

#### **Conclusion**

57. Madam assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have

reached to your opinion, you may please inform the clerks, so that the court could reconvene.

58. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



  
R.D.R.T. Rajasinghe  
**Judge**

At Suva  
30<sup>th</sup> May 2018

Solicitors

Office of the Director of Public Prosecutions for the State.  
Office of the Legal Aid Commission for the Defence.