

IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
CRIMINAL JURISDICTION  
CRIMINAL CASE NO.: HAC 61 OF 2015

STATE

-v-

APOROSA NACEWA

Counsel : Ms. S. Kiran for State  
Mr. E. Sailo for Accused

Dates of Trial : 27, 28, 29 November, 2017  
Date of Summing Up : 30<sup>th</sup> November, 2017

*(Name of the Complainant is suppressed. She is referred to as KB)*

## SUMMING UP

Madam and Gentlemen Assessors:

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 facts. 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 Accused made submissions to you about the facts of this case. That is their duty as the Counsel. But 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 come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the Accused person is innocent until he is proved guilty. The burden of proving his 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 his guilt. If you have any reasonable doubt as to his guilt, you must find him 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 it to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts and draw reasonable inferences from facts proved. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. 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 facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

12. 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.
13. 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 is charged, in a short while.
14. In this case the Prosecution and the Defence have agreed on following facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth.
  1. *The victim is KB and she resides with her grandparents in Nawaka, Nadi.*
  2. *The accused is Aporosa Nacewa, 35 years, unemployed of Nausori Highland.*
  3. *The victim often referred to the accused as uncle.*
15. The Accused is charged on following Information:

*Statement of Offence*

**RAPE**: Contrary to Section 207 [1] and [2] [a] of the Crimes Decree 44 of 2009.

*Particulars of Offence*

**APOROSA NACEWA**, between the 1st day of January 2014 and 31st day of December 2014 at Nadi in the Western Division, penetrated the vagina of KB with his penis without the consent of the said KB.

16. I will now deal with the elements of the offence of Rape. 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.
17. Section 206 of the Crimes Act states that the term consent means consent 'freely and voluntary given by a person with a necessary mental capacity to give her consent.' The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Therefore, a person does not have to fight to show that the person is not consenting.
18. You might wonder what it means by representative count. It simply means this. Prosecution says that this incident happened not only once but on several occasions during the period mentioned in the Information.
19. The elements of the offence of Rape in this case are that:
- a. the Accused,
  - b. penetrated the vagina of the Complainant, with his penis,
  - c. without her consent.
20. You may also have to consider whether at the time the offence accused knew she was not consenting. Other parts of the offence of Rape are irrelevant to the facts of this case.
21. A slightest of penetration of the Complainant's vagina by the Accused's penis is sufficient to constitute the 2<sup>nd</sup> element of Rape.
22. 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 that connects him to the offence that he is alleged to have committed.

23. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a Complainant who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.
24. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and 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 test to evaluate evidence.
25. Defence Counsel referred to previous witness statements recorded by police when he was cross-examining prosecution witnesses. A previous statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath as being true. You can of course use those statements to test the credibility of the witness.
26. In testing the consistency and credibility of a witness you should see whether the witness is telling a story on the same lines without variations and contradictions. 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.
27. 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.
28. 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? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.

29. 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.
30. You can consider whether there is delay in making a prompt 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 there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. 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 for such delay.
31. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. There can be a reasonable explanation for the delay. It is a matter for you to determine whether, in this case, the lateness of the complaint and what weight you attach to it. It is also for you to decide, when Complainant did eventually complain, whether it was genuine.
32. Victims of sexual offences can react to the trauma 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, do not complain or go to authority for some time. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. It takes a while for self- confidence to reassert itself. There is, in other words, no classic or typical response by victims of Rape.
33. The offence of Rape requires proof that the Complainant did not consent. The offence may or may not be accompanied by violence, 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.
34. During the course of closing address of the Defence it was suggested that Complainant could have screamed or otherwise objected to what the Accused were doing. It was also suggested that she could have reported to her friends, mother or grandmother immediately. You heard the Complainant's

explanations. In her closing argument Defence Counsel submitted to you that complainant is not consistent in her version. This is an argument which you should consider with care. You should not assume that there is any classic or typical response to an unwelcome demand for sexual activity. The experience of the courts is that people who are being subjected to nonconsensual sexual activity will respond in variety of different ways.

35. 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.
36. I will now remind you of the Prosecution and Defence cases. In doing this it would not be practical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. It was a short trial and I am sure things are still fresh in your minds. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

#### CASE FOR PROSECUTION

##### **PW 1 Ranjani Kumar**

37. Ranjani is a teacher at Nadi Special School where students with intellectual, physical or hearing impairments are given education.
38. KB was one of her students during 2014-2017 period. KB is intellectually and physically impaired. She's a slow learner and her growth is a little bit slow. Otherwise she's an independent child.

##### **PW 2 KB (Complainant)**

39. Complainant, KB, was living with her grandparents in Nawaka. She was attending Nadi Special School. Aporosa is her uncle. She addresses him in the village as 'Koko'.
40. In 2014, when KB was alone at home, Aporosa came and asked for the *dari* or grog bowl.

41. She informed Aporosa that she can't give it because her grandfather and grandmother are not at home. When she was trying to get the container from underneath the bed, Aporosa closed the house. He then undressed her and put his penis into her vagina. It's paining. She did not allow him to do this.
42. KB couldn't recall what she was doing when Aporosa was undressing her and putting his penis in her vagina.
43. She relayed this incident to her neighbor and grandmother when she returned from the market.
44. Aporosa put his penis in her vagina on two other occasions. One incident happened at his place at Nawaka and the other in Nausori Highland.
45. She then described the incident happened at Aporosa's house. When nobody was there at her place, she usually goes to Aporosa's house because his two sisters are her best friends. When she was at her friend's place, she went inside the house to drink water. When she was about to go back home Aporosa pulled her hand and did the same thing to her. He inserted his penis into her vagina.
46. It was painful. She can't recall what she was doing at that moment. She did not allow him to insert his penis in her vagina. Aporosa's two sisters were staying in the porch when this happened. She did not seek assistance from her friends. She forgot to seek their assistance.
47. KB then described the incident happened at Nausori Highlands. Her namesake's house is close to Aporosa's house. She was telling stories with Aporosa's sisters at Aporosa's house. Aporosa came and pulled her and took her to his room. He repeated the same thing. He put his penis into her vagina. It was painful. She did not allow him to insert his penis into her vagina. She can't recall what she was doing whilst he was doing this. Aporosa's sisters were about 10m away from Aporosa's room when he was doing this.
48. She informed her grandmother about the incident happened at her house. Then her grandmother went to Aporosa's uncle and told him what had happened.
49. KB said that she did not inform anyone about the incident happened at Aporosa's house in Nawaka because she was scared of her grandfather and was worried that he would hit her. She informed Nausori Highlands incident to her grandmother but nothing was done.



50. She was always scared of her uncle Aporosa whenever she saw him because of the thing he did to her.
51. Under Cross-examination by Mr Sailo, KB said that she told Aporosa to stop but she admitted that she did not fight, scream or cry for help.
52. Complainant said that she can't recall the exact dates in 2014 those incidents happened. When referred to her statement made to police, she admitted that the first incident happened sometime in May, 2014 to July 2014. She admitted that this matter was reported to police about 7 to 9 months later in February, 2015 by her and her grandmother. When she was shown her statement made to police, she said she could not read.
53. When she was asked if her grandmother reported the matter to police about the 1<sup>st</sup> incident soon after it happened, she said that they came to the police station, and a police officer informed them to go back to the hospital for a medical check-up.
54. In her statement to police, she had told 'I didn't tell my grandmother as I was scared Koko will hit me if I tell her'. In Court, she said she told her grandmother about the incident. When asked to explain about the contradiction, she said that what she told Court is the truth.
55. KB admitted that she went to Koko's house to visit her friends although she was scared of Koko and went inside the house to drink water when Koko was inside the house.
56. She admitted that she did not scream out for help from her friends who were sitting on the porch and complain to them after the incident. She said she tried to struggle to get away from Koko but he pulled her hand. She did not cry but was shocked and upset when she met with her friends.
57. KB said that she did not complain about the 2<sup>nd</sup> incident because she was scared. She did not explain why she did not complain to the grandmother about the second incident if she was not scared to complain about the 1<sup>st</sup> incident.
58. When referred to her statement to police in which she had told police that, after the first incident, she saw blood stains on her panty, and when asked whether she showed blood stained panty to her grandmother, she said grandmother just

saw the blood stain on the bed spread. Complainant greed that she did not mention about blood stains on bed spread to police.

59. Complainant agreed that the third incident happened sometimes between October 2014 and November 2014, and that she was aware that Koko was in Nausori Highland when she was attending the funeral in Nausori Highland.
60. Complainant agreed that she did not protest when Koko was pulling her hand. She also agreed that she did not ask for help from Koko's sisters.
61. Under Re-examination by Ms Kiran KB said that the allegation against Koko was true. She said that blood stains were on her panty as well as on the bed spread. She said that she was not able to read her statement given to police; only her mother read it.

### **PW 3 Jokaveti Votabula**

62. Jokaveti is the mother of KB. She said that KB was residing with her grandmother in Nawaka. KB was attending Nadi Centre for Special Education because she was unable to walk properly, her eyesight is poor and she is a slow thinker.
63. On 6th of February, 2015, after selling crops in the market, she decided to go and spend a night at her mother's house at Nawaka where KB was also residing. She observed a noticeable change in KB's behavior and her attitude. KB was not like the way she was before. She was not happy. When inquired about this change, KB started crying. She sat down with her mother and inquired about the problem KB was facing.
64. KB informed what Aporosa had done to her. Aporosa came home and asked for the *dari* or the bowl for grog. While she was still trying to take the *dari* out from underneath the bed, Aporosa entered the house, closed the doors, forcefully pulled her, made her lie on the bed, forcefully removed her trousers and had sexual intercourse.
65. Her mother asked KB why she didn't mention it when Aporosa did that to her. KB said that she was scared and if she told anyone about it he might do something to her.

66. KB also informed about two other incidents where same thing happened to her. One day when she was visiting Aporosa's twin sisters at his place, he pulled her and took her into his room and then they had sexual intercourse.
67. KB had also informed about the third incident. It had happened when she went for one funeral in Aporosa's village at Nausori Highland. KB spent most of her time with Aporosa's twin sisters. When she was visiting them at Aporosa's house, Aporosa did something to divert her twin sister's attention and took her to a room. KB did not tell in detail what happened inside the room. KB didn't know the date when those incidents happened.
68. KB also informed that she was always feeling scared. KB was scared that if she were to inform anyone about this Aporosa will do something to her. KB also said that was also scared of her and her grandmother.
69. Under cross examination Jokaveti said that KB informed about the incidents on the 6th of February, 2015 in the presence of her and her mother. She usually visited KB twice or thrice a week in 2014. KB informed about the incidents only in February 2015.
70. Jokaveti said that she informed police after 1 week after hearing this. She first went to inform Aporosa's father. Because they did not do anything, she went and lodged a report at the police. She was present when the complaint was being made to the police.

#### **PW 4 Merewalesi Tinai**

71. KB's grandmother Merewalesi gave evidence next. On 06th of February, 2015, she came back from Nadi Market. KB was sitting at the door. KB started crying when she saw her. Then she asked her why she was crying. KB said that she was very scared of her uncle Aporosa of what he did to her.
72. KB said that Aporosa came into the house, closed all the doors, made her lie on the bed, took off her clothes and then had sexual intercourse. Jokaveti was also present when she relayed the incident. KB also informed that it happened three times. She did not tell about the other two incidents. She informed in 2014 when the third incident happened to her because she was scared that she might get pregnant.

73. KB said that she did not inform her earlier because she was scared that she will be beaten up. She in fact beat her up because KB had allowed visitors to come inside the house.
74. Under Cross-examination by Mr Sailo, Merewalesi said that KB told her about the incident in 2014. She reported this matter to police in 2014. When she questioned KB, she was only able to relay the incident happened at her house. KB informed about all these three incidents at one time and the very next day they reported the matter to police. She could remember KB went to police with her mother. Then she said that she can't recall when she reported the matter to the Police.
75. Witness admitted that her statement had been recorded on the 15th of April, 2015. She had no suspicion about Aporosa having a sexual relationship with KB because he was her uncle. She did not notice any change in KB's behavior at any time before KB informed her about those incident.

#### **PW 5 DC 3379 Nitesh Kumar**

76. Final witness for Prosecution is the police investigating officer Kumar. He said that victim's mother-Jokaveti reported the matter to police on the 7th of February, 2015. The victim KB was escorted to Nadi Hospital for a medical checkup. He said under cross examination that victim's grandmother was also present when victim's statement was being recorded. Grandmother- Merewalesi Tinai's statement was recorded in on the 15th of April, 2015 during investigation.
77. That is the case for the Prosecution. At the closure of the Prosecution case, you heard me explain to the Accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
78. Accused elected to remain silent. That is his right. He does not have to prove anything in this case. You must not draw any negative inference from his decision to remain silent. Burden of proof remains with the Prosecution throughout. Accused called a witness. Her evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

#### **CASE FOR DEFENCE**

## DW 1 Valerie Margaret

79. Margaret, the sister of the Accused gave evidence for Defence. She was summoned by the Prosecution as a prosecution witness. However, she was not called by the Prosecution. She said that, in 2014, her brother Aporosa was living in Nausori Highlands. KB is her niece.
80. In August 2014, KB visited her when Accused was present. She could remember sitting down at the porch, talking with KB. KB went inside to drink water and return back less than 5 minutes and resumed the talk. She did not see any change in KB.
81. In October or November 2014, her father's small uncle passed away. The funeral took place in Nausori Highlands. She was busy with funeral work at the village community hall. KB was also present in the funeral but she had no time to hang out with KB.
82. Under Cross-examination by Ms Kiran Margaret said that KB used to be a good friend until the allegation against her brother was made. KB is no longer a friend. Margaret said she does not want to see her brother going to jail.
83. That is the case for Defence.

## ANALYSIS


84. Madam and gentlemen assessors, the Accused is charged with one representative count of Rape between 1<sup>st</sup> January, 2014 and 31<sup>st</sup> December, 2014. Before you could find the Accused guilty, you must be satisfied beyond reasonable doubt that Accused had penetrated the vagina of the Complainant without her consent in the year 2014.
85. There is no dispute as to the identity of the Accused. It is agreed that Accused is Complainant's uncle.
86. Prosecution called 5 witnesses. They based their case substantially on the evidence of the Complainant. Complainant's mother and grandmother were called to support the version of the Complainant. Neither Complainant's mother nor her grandmother witnessed any of the alleged rape incidents. They merely told us what they had heard from the Complainant. Therefore, evidence they

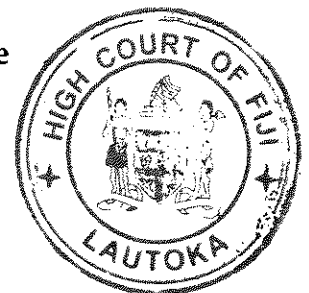
gave about what they heard from the Complainant can only be used to test the consistency or credibility of the Complainant's evidence.

87. You have to be satisfied that the evidence Complainant gave is truthful and believable. If you are satisfied that the evidence Complainant gave is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration is required from an independent source.
88. Prosecution says that the Complainant is genuine and she told the truth in Court. Defence on the other hand rejects the version of the Prosecution and denies that Accused had penetrated Complainant. Bearing in mind that Prosecution has to prove the charge beyond reasonable doubt, it is up to you to decide what weight you give to the version of the Prosecution and that of the Defence.
89. Complainant said that the Accused penetrated her on three occasions. She could not give exact dates. However, she related those incidents to specific occurrences in 2014, for example the funeral she attended in Nausori Highlands. You are not to speculate about specific dates but must be satisfied that, on three occasions in the year 2014, Accused had penetrated the Complainant without her consent.
90. Prosecution adduced evidence from Complainant's teacher, mother and grandmother to show that Complainant is not a normal person in that she is mentally and physically impaired. You had the opportunity to observe her in Court. If you are satisfied that she is not a normal person, then, in forming your opinions, you are expected to give special consideration to her mental capacity in relation to her ability to give consent to certain things and how such a person would react in such a situation immediately after, at the police station and in Court.
91. Defence argues that Complainant did not complain about any of those alleged incidents to her friends, grandmother or mother immediately after the incidents. According to Complainant's mother, Complainant had relayed all three alleged incidents somewhere in February, 2015. According to police investigating officer, the Complaint had been lodged to police on 7<sup>th</sup> February 2015.
92. Complainant gave certain explanations in this regard. She said she was scared of her mother, grandfather, grandmother, and also of the Accused. Grandmother said she actually beat her up with a stick when she came to know about the incidents. Prosecuting Counsel submitted to you that, given Complainant's mental capacity, she could not be expected to react the way a normal person

would react in such a situation. You had the opportunity to observe her and her manner of giving evidence. It is up to form your own opinions whether there is a reasonable explanation for the delay. You are to ask yourselves whether the complaint she ultimately made to police was genuine.

93. You may also consider whether there is a reason or motive on the part of the Complainant or her mother or grandmother to make up an allegation against the Accused. If they had such a motive, then you may think that this allegation has been fabricated.
94. Defence called one of the sisters of the Accused, Margaret, to give evidence. Prosecution says she is not reliable because she is an interested witness as far as the Defence case is concerned. Margaret said she does not want to see his brother going to jail. She also said that she ceased to be a friend of KB after this allegation was made against her brother. It is for you to decide what weight you should give to her evidence.
95. If you are sure that Accused had penetrated KB's vagina with his penis without her consent and you are satisfied that the Prosecution has proved the case beyond reasonable doubt then you must find him guilty. If you are not sure if Accused had penetrated or not then you must find him not guilty.
96. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
97. Any re-directions?

  
Aruna Aluthge  
Judge



AT LAUTOKA  
30<sup>th</sup> November, 2017

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