

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

**CRIMINAL CASE NO.: HAC 207 OF 2011**

**STATE**

**-v-**

**OTETI SIVOINATOTO**

**Counsels** : **Mr. J. Niudamu for the State**  
**Ms. J. Nair for the accused**

**Date of Trial** : **24 March 2014**

**Date of Summing Up** : **25 March 2014**

(Name of the victim is suppressed. She is referred to as MN)

**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 on law and evidence. 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 state counsel and the defence counsel made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the defence 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, and 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 decisions 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.
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. 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.

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. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.

13. I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinions. That is – as you could hear from evidence – this case involved an alleged incident of rape. 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. According to Section 130 (2) of the Criminal Procedure Decree

In any case of a sexual nature, no evidence shall be given, and no question shall be put to the witness, relating directly or indirectly to-

- (a) the sexual experience of the complainant with any person other than the accused; or
- (b) the reputation of the complainant in sexual matters, except by leave of the court.

15. The information against accused is as follows:

***First Count  
Statement of Offence***

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

***Particulars of Offence***

**OTETI SIVOINATOTO** between September 2010 and May 2011 at Lautoka in the Western Division had carnal knowledge of **MN** without her consent.

16. I will now deal with the elements of the offence.

17. The offence of rape is defined under Section 207 of the Crimes Decree. Section 207(1) of the Decree makes the offence of rape an offence triable before this court. Section 207 (2) states as follows:

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.

18. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man of the vagina of a woman to any extent. So, that is rape under Section 207 (2) (a) of the Crimes Decree.

19. So, the element of the offence of Rape in the Charge is that the accused penetrated the vagina of victim to some extent with penis which means that the insertion of penis fully into vagina is not necessary.

20. Consent as defined by Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a woman with a necessary mental capacity to give such consent. A woman under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The girl in this case was above 13 years of age at the time of the incident and therefore, she had the capacity under the law to consent. So, the prosecution has to prove the absence of consent on the part of the girl and the accused knew that she was not consenting. Further, bear in mind submission without physical resistance by a person to an act of another person shall not alone constitute consent.

21. A person's consent to an act is not freely and voluntarily given if it is obtained-

- (i) by force; or
- (ii) by threat or intimidation; or
- (iii) by fear of bodily harm; or
- (iv) by exercise of authority; or

- (v) by false and fraudulent representations about the nature or the purpose of the act.
22. Although the accused is not charged for any other offence, in the event you find the accused Not Guilty for Rape on the basis that the complainant consented for sexual intercourse then you have to consider whether the accused is Guilty of Defilement.
23. The offence of Defilement of young person between 13 and 16 years of age is defined in the Section 216 of the Crimes Decree. Accordingly;
- (i) A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years.
  - (ii) It shall be a sufficient defence to any charge under sub-section (i) if it shall be made to appear to the court that the person charged had reasonable cause to believe, and did in fact believe, that the person was of or above the age of 16 years.
  - (iii) It is no defence to any charge under sub-section (i) (a) to prove that the person consented to the act.
24. Thus the elements of the offence of defilement are that the accused penetrated the vagina of victim to some extent with penis which means that the insertion of penis fully into vagina is not necessary and the accused knew that the person is between 13 to 16 years of age. The consent is immaterial.
25. Apart from the elements of the offence, the identity of the person who 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 alleged to have been committed.
26. 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 victim who saw, heard and felt the offence being committed. In this case, for example, the victim was witness who offered direct evidence, if you believe her as to what she saw, heard and felt.
27. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, caution interview statement, is an example if you believe that such a record was made. Then you can act on such evidence.

28. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

**Test of means of opportunity:** That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically created just out of a case against the other party.

**Probability and Improbability:** That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case. Or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

**Belatedness:** That is 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 was 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 to such delay.

**Spontaneity:** This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

**Consistency:** That is whether a witness telling a story on the same lines without variations and contradictions. You must see whether a witness is shown to have given a different version elsewhere. If so, what the witness has told court contradicts with his/her earlier version.

You must consider 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.

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.

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.

In dealing with consistency you must see whether there is consistency *per se* and *inter se* that is whether the story is consistent within a witness himself or herself and whether the story is consistent between or among witnesses. In deciding that, you must bear in mind that the evidence comes from human beings. They cannot have photographic or videographic memory. All inherent weaknesses that you and I suffer, insofar as our memory is concerned, the memory of a witness also can be subject to same inherent weaknesses.

Please remember that there is no rule in law that credibility is indivisible. Therefore, you are free to accept one part of a witness's evidence, if you are convinced beyond doubt and reject the rest as being unacceptable.

29. You need to consider all those matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.
30. I will now deal with the summary of evidence in this case.
31. Prosecution called complainant MN as the first witness. She was 15 years old at the time of the incident. She was living with the accused and his partner at the accused's house. Accused is a distant cousin brother of the complainant's mother. Accused was supporting her education. Her aunt (accused's partner) was running a small business of selling clothes in Coral coast. She normally goes there on Wednesday and return either on Friday or Saturday.
32. In 2010 in one night accused had come to her room wearing a towel. Accused had undressed her and inserted his penis into her vagina. It was painful and she had started crying. She had tried to move but he was holding her. She did not consent to sexual intercourse at anytime. She had not reported the matter to Police as the accused used to threaten her with a knife and slap her.
33. Under cross examination she admitted that she had good relationship with the partner of the accused, her friends at the school and the teachers. Further, she had visited her mother and grandparents. She admitted that she never made a complaint to anyone of them. She

further admitted that she did not tell police about accused threatening her with a knife or slapping her. She denied that she approached the accused for sexual intercourse or consenting for sex.

34. In re-examination she told that she did not tell mother or grandmother as the accused supported her in education and the accused threatened not to tell anyone. She was afraid to tell the teachers or friends as the accused had threatened her. She did not mention to police about threats as she was in great shock.
35. You watched her giving evidence in court. What was her demeanor like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? You must bear in mind the age of this witness at the time of the incident. It is up to you to decide whether she was in a position to give consent voluntarily. Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of MN beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish elements of the charge.
36. The next witness for the prosecution was Mereani Lomawai. In April 2011 the accused had come to her house and told her about the stomachache of the girl. She had gone to the accused's house. She had found out that the girl is pregnant. She had asked the girl three times. Third time the girl had started crying. The girl had told her that the accused was threatening her to stay with him. This witness was not cross examined by the defence.
37. This is an independent witness. Her version is not cross examined by the defence. So you could accept her evidence. Her evidence will help you to understand the mental status of the complainant by April 2011.
38. The last witness for the prosecution was WDC 3692 Asenaca. She is an officer with 9 years experience. She is the investigating officer of this case. She had received instructions to record the caution interview of the accused on 9.8.2011 at 8.00 a.m. No inducement, threat or assault was made to the accused. He was not intimidated in anyway. The accused had not made any complaint. She identified and tendered the original typed version of the caution interview marked P1. She also read out the same. This witness too was not cross examined by the defence.



39. Therefore you could accept her evidence and the caution interview statement as evidence. You should consider that evidence is sufficient to establish the charge against the accused.
40. After the prosecution case was closed you heard me explaining the accused his rights in defence.
41. The Accused elected to give evidence. His position was that on a date in September 2010, while he was in the kitchen cooking, the complainant came to kitchen after a shower wearing a towel and took him to her bed room saying “come quickly, I want to show you something”. His partner and a neighbor were talking at the sitting room. At the door he was dragged into the room by the complainant using both her hands. Then she had locked the door. Then the complainant was on the bed naked and told him to put his penis into her vagina quickly. He could not do anything but followed her instructions. After 5-7 seconds he begged that someone will come. He had told her that we will continue tomorrow when aunty is away. He did not force her to have sex with him at any time. He did not threaten or slap her. He had continued to have sex with her.
42. Under cross examination he admitted that he had sexual intercourse with the complainant in September 2010 and he knew that she was 14 years old at that time. When prosecution version was put to him he denied that version. When asked by Court whether he got an erection at the time the complainant dragged him and asked him to put his penis into vagina he said ‘no’.
43. You watched the accused giving evidence in court. What was his demeanor like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? The position taken up by the accused is inconsistent with the position taken up by him at the caution interview. Further, this position was never put to the complainant at the time she gave evidence. It is up to you to decide whether you could accept his version and his version is sufficient to establish a reasonable doubt in the prosecution case. If you accept his version accused should be discharged of Rape. But he could be convicted for defilement. Even if you reject his version still the prosecution should prove it’s case beyond reasonable doubt.
44. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should be reminded yourselves of all that evidence and from your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.

45. Please remember, there is no rule for you to look for corroboration of the victim's story to bring home an opinion of guilty in a rape case. The case can stand or fall on the testimony of the victim depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the victim's evidence if you think that it is safe to look for such supporting evidence. Corroboration is, therefore, to have some independent evidence to support the victim's story of rape.

46. Remember, the burden to prove, the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt.

47. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of the charge you must find him guilty for the charge. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty for the charge.

48. Your possible opinions are as follows:

- |      |                                       |                              |
|------|---------------------------------------|------------------------------|
| (i)  | First charge of Rape<br>If Not Guilty | Accused Guilty or Not Guilty |
| (ii) | Alternatively charge of Defilement    | Accused Guilty or Not Guilty |

49. 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.

50. Any re-directions?

Sudharshana De Silva  
**JUDGE**

**At Lautoka**  
**25<sup>th</sup> March 2014**

**Solicitors : Office of the Director of Public Prosecution for State  
P & Nair Lawyers for Accused**