

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 98 OF 2013

STATE

-v-

1. JOSAI A NABOU
2. WAISALE NAMAKONIO
3. DANIEL VARO SMITH

Counsels : Mr. J. Niudamu for the State
Ms. L. Juita for the 1st accused
Mr. Anil J. Singh for the 2nd and 3rd accused

Date of Trial : 10 July 2014-15 July 2014

Date of Summing Up : 15 July 2014
(Name of the victim is suppressed. She is referred to as ESG)

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 each 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 counsels 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 each 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 each 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. You must judge the case solely on the evidence that you heard in this Court room. There will be no more evidence and you are not to speculate on what evidence there might have been or should have been. You Judge the case solely on what you have heard and seen here.
11. 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.
12. 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.

13. In accessing 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.
14. 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.
15. The information against the three accused is as follows:

COUNT 1

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

JOSAIA NABOU on the 26th day of April 2013 at Nadi in the Western Division had carnal knowledge of **ESG** without her consent.

COUNT 2

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

WAISALE NAMOKONINO on the 26th day of April 2013 at Nadi in the Western Division had carnal knowledge of **ESG** without her consent.

COUNT 3

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

DANIEL VARO SMITH on the 26th day of April 2013 at Nadi in the Western Division had carnal knowledge of **ESG** without her consent.

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

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 elements of the offence of Rape in the Charges are that each 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 complainant 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. 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 each accused-person and connect him to the offence that he alleged to have been committed.

23. Evidence that the accused has been identified by a witness as doing something must, when disputed by the accused, be approached with special caution because experience has demonstrated, even honest witnesses have given identification which have been proved to be unreliable. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.

24. In assessing the identification evidence, you must take following matters into account:

- (i) Whether the witness has known that accused earlier?
- (ii) For how long did the witness have the accused under observation and from what distance?
- (iii) Did the witness have any special reason to remember?
- (iv) In what light was the observation made?
- (v) Whether there was any obstacle to obstruct the view?

25. 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.

26. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, the medical report of the complainant

and caution interview statement of each accused, are examples if you believe that such a record was made. Then you can act on such evidence.

27. Expert evidence is also important to borne in mind. 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, as described earlier. 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 express on a particular fact to aid court and you to decide the issues/s before court on the basis of their learning, skill and experience.
28. The doctor in this case, for example, came before court as an expert witness. The doctor, unlike any other witness, gives evidence and tells us her conclusion or opinion based on examination of the victim. That 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 her reasons are convincing and acceptable to you; and, if such opinion is 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.
29. 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.

30. 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.

31. I will now deal with the summary of evidence in this case.

32. Prosecution called complainant ESG as the first witness. She was on her way home after work on 26.4.2013 around 1.00 a.m. She got down from bus near Natally and walked through a shortcut to reach home. She had seen someone running toward her. That person

had punched her on the mouth. She was bit unbalanced as the road was gravel road. That person pulled her hand bag and she fell on the ground. Then she saw two other guys running towards there. While the first guy was holding her, the second guy unzipped her pants and took off her pants and underwear. Third guy was standing at the back acting like a watchman. Second guy had sexual intercourse with her for a minute or two. Although she struggled she could not move. She heard them telling in iTaukei 'put the knife on her so that she will keep quiet'. She felt something sharp on her side.

33. Then first guy had sexual intercourse with her. He was putting a knife on her neck. It was for about minute or two. When he was done the third guy who was standing as watchman had his turn. He told her not to shout and that he has a knife with him. The other two were checking her bag. He had intercourse for about 1-2 minutes. Then he took off with others. She stood up and put her pants. She could not find her underwear. Then she grabbed her bag which was on the ground and went straight home. She was frightened and crying. She woke up her husband and told him that she was attacked and raped by three guys. He called the police.
34. The three guys and Fijian. (itaukei) Two of them are of her height and just bit taller. The other one was bit taller. When she went to police she was taken to the hospital and medically examined same morning. She was afraid that these guys will kill her.
35. Under cross examination by the counsel for the 1st accused she said that there were bushes on the middle and two houses on the side in the track she followed. She could not recognize the face of the guy who had sex with her first. She said that doctor only noticed that she had blood on her mouth and examined her private parts. No head to toe test was done. She showed marks on her shoulders and bruises on her thighs to her husband. She denied that there was no sexual intercourse that night. When it was suggested to her that she was only assaulted that night, she said that she was assaulted, robbed and raped.
36. Under cross examination by the counsel for the 2nd and 3rd accused she stated that she arrived at Natally shop around 1.00 a.m. She went home around 1.15-1.30 a.m. She went to hospital around 2.00-2.15 a.m. The incident took place for about 15 minutes. She said that doctor did not examine her full body or took clothes worn by her. She had given a description of assailants to police. She was not called for ID parade or photo identification. She denied that she was not sexually assaulted.
37. 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? 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 ESG beyond reasonable doubt then you have to decide whether that

evidence is sufficient to establish elements of each charge except for identification of each accused.

38. The next witness for the prosecution was Christopher Paul Green. He is married to the complainant for 2 years. On 26.4.2013 he was awoken by her. She was distressed and upset. She had told him that she had been attacked by three men. She had been hit on the face and raped by those three. He had called Namaka police station and explained briefly what happened. Police have come within 5-10 minutes. He had told them briefly what happened. They have immediately gone to the scene and had come back quickly. Then they went to Namaka police station. From there they have gone to Nadi hospital. Complainant was examined by a doctor. They have gone back to Namaka police station and their statements were taken. When complainant came home it was difficult to talk to her as she was distressed and upset. She had a cut on the lip and mouth was swollen. That evening he had noticed that complainant had bruises on shoulders and thighs which was giving her pain.
39. Under cross examination by the counsel for the 1st accused he stated complainant normally reach home by 1.05 or 1.10 a.m. She came home at 1.20 a.m. that day. He was not with her when her statement was taken or when she was examined by the doctor.
40. Under cross examination by the counsel for the 2nd and 3rd accused he admitted that in his police statement he had stated that complainant normally comes home at 1.15 a.m. but times vary. He denied that he discussed about injuries to the complainant during the lunch break. He denied fabricating rape allegation. He said it is ridiculous to suggest that.
41. You saw him giving evidence in Court. He had given prompt answers to questions put to him by the defence. It is up to you to decide whether you could accept his evidence beyond reasonable doubt. If you accept his evidence it confirms the evidence of the complaint regarding a recent complaint.
42. Doctor was called as the next witness for the prosecution. She is a doctor with 4years experience. She had examined the victim on 26.4.2013 at 2.54 a.m. She had given a history that she was forcibly taken by 3 Fijian boys and raped. She was also hit during the attack. She was in a state of shock and distress. There was blood on her lips. Her hymen was not intact. There were no injuries in the vaginal area. There was no discharge form the vagina. Her professional opinion was medical evidence is inconclusive of rape. There is medical evidence that she was hit on the mouth. It is possible for a woman who had sexual intercourse before, if she submitted willingly due to distress or she was pinned down without moving to have no injuries in the vaginal area. The doctor had not removed all her clothes to examine her. The doctor submitted the medical report marked P1.
43. Under cross examination by the counsel for the 1st accused she said that she normally expect a discharge from a victim who had sexual intercourse. Under cross examination by the counsel for the 2nd and 3rd accused she stated that evidence on rape is inconclusive form her experience and observations. She did not take a vaginal swab as police failed to

bring the kit. She had not read purpose for examination before she examined the complainant.

44. The doctor is an independent witness. It is your duty to decide what weight that you could attach to the weight of this evidence. Is this evidence confirming the evidence of the victim as doctor observed she was in a state of shock and distress and there was blood on her lips. Is this evidence is raising a reasonable doubt in the prosecution case as evidence on rape is inconclusive. Those are matters for you to decide.
45. The other witnesses for the prosecution were all police officers. They were called by the prosecution to prove that the caution interviews of each accused were obtained voluntarily. Before you look at their evidence I have to give you some legal directions on the caution interviews. Firstly whatever stated in caution interview of one accused against other accused cannot be used as evidence against the other accused. Further you will see that portions of the caution interviews are blocked and you can't see those portions. That is because both parties have agreed that those portions should not go to the assessors as those portions are in respect on another charge of Robbery for which accused have already pleaded guilty in open Court. You may have heard about that. I am warning you merely because they have pleaded guilty to that charge it does not automatically make accused guilty for these charges as well. You have to only consider the evidence against the accused on the Rape charges in respect of each one of them.
46. Prosecution called PC Apakuki as the next witness. While he was on duty as station orderly on 11.5.2013 he had received three accused persons at 15.21 hours. He had made an entry in the station diary when he received the three accused from PC Ravinesh. One of them had red eye in his left eye. When asked he said that he received the same while playing Rugby same day. He tendered this entry marked P2. He had escorted the three accused to Nadi Magistrates Court on Monday. The accused had not made any complaint to him.
47. Under cross examination by the counsel for the 2nd and 3rd accused he admitted that he did not caution the accused. He did not know that 2nd and 3rd accused were in Sabeto police station before. He also admitted that he should not question the accused without caution.
48. In reexamination he said that he questioned the accused as the escorting officer told him that one of them is having an injury so he questioned him about the injury.
49. The next witness for the prosecution was DC Semi Cakaunibula. He is in Fiji police force for 14 years. On 11.5.2013 he had received instructions to caution interview the 1st accused. It was conducted in CID building. The interview was under caution. Witnessing officer was also present. The accused was not under threat or influences to confess. He was not intimidated in any way. He was not coaxed or oppressed. He did not make a complaint before, during or after the interview. He appeared well. He was given sufficient breaks. The interview was in iTaukei language. The accused voluntarily signed the interview. He and witnessing officer counter signed. It was in question and answer format. He recognized and tendered the

original marked P3 and translation prepared by him marked P4. He read out P4 and identified the 1st accused in Court. He is related to the accused. The accused is a nephew.

50. He had arrested the accused earlier that day from where he was working in Naisoso. He was explained the reasons for arrest in iTaukei. No assault was done during the arrest. The accused did not make a complaint and voluntarily surrendered. Two other officers had accompanied him.
51. Under cross examination, he said that the accused did not resist during the arrest. He denied forcibly putting handcuffs to the accused during the arrest. He further denied verbally abusing the accused on the way to the police station. He had not seen other officers punching the accused on the way to the police station. He denied that crime officer assaulted the accused before the interview and rubbed chilies on his face. He denied that the witnessing officer was not present during the interview and came only to sign the papers. He denied assaulting the accused during the interview to confess to the allegations.
52. The next witness for the prosecution was WD Cpl. Salote. She was a police officer for a period of 9 years. She received instructions from Crime officer to be the witnessing officer of the caution interview of the 1st accused. It was in the crime office at Namaka police station. She was present throughout the interview. She identified the 1st accused. The accused was normal before the interview. She did not force, threaten or induce the accused to make a statement. The accused was treated fairly. He did not make any complaint.
53. Under cross examination she stated that she was present duration of the interview. Her signature is in every page.
54. The next witness for the prosecution was DC Inoke. He stated that he assisted in the arrest of the 2nd and 3rd accused. However he had not gone with PC Emori who arrested the accused. He had not made any entry. Therefore his evidence has no value for the prosecution case.
55. Under cross examination by the counsel for the 2nd and 3rd accused he stated that 2nd and 3rd accused were not assaulted at the Sabeto police station. He had escorted these accused from Sabeto to Namaka. He denied that they were assaulted on the way.
56. The prosecution called DC Viliame Waqalevu as the next witness. On 11.5.2013 he had received instructions to conduct the caution interview of the 3rd accused. It was in iTaukei language conducted at the crime office. The witnessing officer was present. He identified the 3rd accused in Court. The accused did not make a complaint. It was in question and answer format. He was given opportunity to consult a lawyer. No inducement, threat or promise was made to him. He was not intimidated in any way. He was not coaxed or oppressed. The accused appeared well. He was given sufficient breaks. It was signed by the accused and counter signed by him. He identified and tendered the original interview notes marked P5. He also marked and tendered cell book entries made by him marked P6.

57. Under cross examination by the counsel for the 2nd and 3rd accused he stated that he did not notice any injury on the accused. He denied Inspector Sumesh forcing the accused to sign the interview. He had not telephoned the Legal Aid Commission before the interview. He did not take the accused to hospital after the interview.
58. The next witness for the prosecution was DC Tevita. He was the witnessing officer of the caution interview of the third accused. He was present throughout the interview. The accused looked fit for the interview. He did not force, threaten or offer any inducement to the accused. The accused was treated fairly. He did not make any complaint. He identified the 3rd accused in Court.
59. Under cross examination by the counsel for the 2nd and 3rd accused, he said that he was present in station when 3rd accused was brought to the station. He denied that IP Sumesh assaulted the accused with a door stopper and made him eat chilies while he was waiting for the interview. He denied forcing the accused to sign the interview.
60. The prosecution called DC Josua Cakau as the next witness. He is an officer with 10years experience. He had conducted the caution interview of the 2nd accused on 11.5.2013. It was in English language. Inspector Sumash was the witnessing officer. The accused did not make any complaint. The accused was given opportunity to consult lawyer. No inducement, threat or promise made to the accused. He was not intimidated in any way. He was not coaxed or oppressed in any way. The accused appeared OK. He was given sufficient breaks during the interview. He identified the original interview notes marked P7. The accused signed the interview. He counter signed. He also had made a typed version of the interview of the 2nd accused. He identified and tendered the same marked P8. He read out the content to Court. He had also translated the interview of the 3rd accused to English. He identified and tendered the same marked P9. He read out the content to Court.
61. Under cross examination by the counsel for the 1st accused he stated that he only accompanied DC Semi to arrest the 1st accused. He denied forcefully putting hand cuffs or pushing the 1st accused to police vehicle. He denied punching 1st accused several times on the way. He denied IP Sumeshwar rubbed chilies on the face of the 1st accused and threatening the accused to admit the allegations. He also denied assaulting the 1st accused during his interview.
62. Under cross examination by the counsel for the 2nd and 3rd accused he stated that the 2nd and 3rd accused were handcuffed with hands in front. He denied IP Sumeshwar cutting some chilies and putting those into the mouths of the 2nd and 3rd accused. He also denied IP Sumeshwar assaulting 2nd and 3rd accused on their knees and shoulders using a doorstopper.

63. The last witness for the prosecution was IP Sumeshwar Prasad. He is an officer with 33 years experience. He is the Crime officer at Namaka police station. He was the head of the investigation team. The 1st accused was interviewed at the general office. The 2nd accused was interviewed at his office. The third accused was interviewed at the crime writer's office. He was the witnessing officer for the 2nd accused's interview. He did not threaten, force or offer any inducement to the 2nd accused. He was treated normally. No complaint was made by him. The all three accused were taken before Pastor Taito. No complaint was made to the Pastor.
64. Under cross examination by the counsel for the 1st accused he denied verbally abusing the 1st accused. He denied rubbing chilies on the face of the 1st accused and kicking him while he was on the floor
65. Under cross examination by the counsel for the 2nd and 3rd accused he denied cutting chilies and putting those to mouths of 2nd and 3rd accused. He also denied assaulting them with doorstopper on their knees and shoulders. He said that he briefed to continue with the interview of the 3rd accused without waiting for his uncle.
66. He said in reexamination that he briefed not to wait as the 3rd accused was not a juvenile.
67. It is up to you to decide whether each accused made a statement under caution voluntarily to these witnesses. If you are sure that each caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of each charge are proved by that statement.
68. After the prosecution case was closed you heard me explaining each accused his rights in defence.
69. Each Accused elected to give evidence.
70. The first accused stated that he did not rape the complainant on 26.4.2013. He was arrested from Naisoso on 11.5.2013 by three police officers. He did not agree to go with them. He was brought to Namaka station. On the way he was punched many times by police officers. At Namka police station Indian police officer came and rubbed chilies on his face. It was very hot. He was also kicked. After that interview commenced.
71. Semi interviewed him. There were three officers present. He was not explained his rights. He was not taken to the hospital after the interview. He was threatened and assaulted to sign some papers. He met his family members in police station. He did not complaint to them or the Magistrate. During the interview he was assaulted by Josh. He did not have any

injuries but felt pain in chest, stomach and leg. He did not make a complaint to Judge when he was brought to High Court as he did not know that he can complain.

72. Under cross examination by the state he stated that he was not at the Natally shop on 26.4.2013. When the allegation was put to him in detail his answers were he cannot recall. He said Semi was not related to him. He said that Semi and Josua were punching him on the chest all the way from Naisoso to Namaka. He said Josua assaulted him again on the chest during the interview. He was in pain when his relatives came to visit him. He did not tell them and they did not ask him why he was in pain. He did not complaint to the Magistrate or the Judge.
73. Second accused stated that the allegation that he raped complainant is false. He said on 26.4.2013 at 1.00-1.15 a.m. he did not rape the complainant. Other two accused are his cousin brothers. On 11.5.2013 four officers came to his house and took him to Sabeto police station. At there he was asked about the allegation. He gave information on him. He told them that he did not know about the allegation. The third accused was also called and both of them were punched. He was handcuffed with the co-accused and taken to Namaka police station.
74. Then they were taken to a room. They were told to sit on the floor beside the wall and lie on the floor. A door stopper was brought and they were hit from shoulders to knees. They were forced to eat chilies. After that they did not agree to take part in the interview. He saw one police officer writing something. He was not asked questions. He was not given his rights. He was threatened to sign the papers. Indian officer punched him to do so. He was not taken to a doctor. No body particle was taken from him. Only finger prints were taken.
75. Under cross examination he stated that he was at the Natally shop that day but he did not know at what time he was there. He can't recall whether it was midnight. He did not know whether he saw the complainant that day. When it was suggested that he fall on the complainant his answer was I can't recall there were plenty of people around at the bus stop. He denied assaulting the complainant and having forceful sexual intercourse with her. He said that he was forcefully assaulted on his ribs by two officers from Sabeto to Namaka.
76. At Namaka he was assaulted with a wooden door stopper which was 1 feet long with width 4"x4" from shoulder to knee. During the interview they were all assaulting him. He did not answer the questions. He was limping till he was taken to the remand. He did complain to the Magistrate. There were no visible marks on his body due to assaults. He still has pain in cold weather.
77. The 3rd accused stated that he did not rape the complainant on 26.4.2013. He was arrested on 11.5.2013 by four police officers at his house. He was taken to Sabeto police station. Then he was assaulted by Qilo to answer the questions put to him. He was assaulted on face and stomach. Then he was taken to Namaka police station. On the way police officer standing beside him was punching him. At Namaka police station he could not recall one

officer writing down his injury. But he did not tell him that the injury was from a Rugby match.

78. At Namaka police station he was taken to crime office. He was told to sit in a corner. Indo Fijian officer pulled his leg. While they were on the floor, he brought a piece of timber and assaulted him on his shoulders, knees. Then he went and brought chilies. He cut those to pieces and gave them to eat. He told them to open their mouths and forcibly put those inside. This was done trice. Then Indo Fijian officer asked Viliame and Tavita to deal with him. He wanted his uncle to be present for the interview. He told his uncle is on the way. But they continued with the interview. In regards to allegation of rape the interview is all lie. Although his uncle came he was not allowed to come in. He did not give any answers in the interview. He was not allowed to talk to his parents of pastor in the absence of police officers. When he was taken to the Magistrate, police officers were there.
79. Under cross examination he stated that his left eye was red with surround black. Only assault on the face was one punch on the eye. Three officers assaulted him on the way from Sabeto to Namaka on his stomach and leg. The door stopper was 1 feet long with width 4"x4". He could not walk properly after assault. He was limping when he was taken to the Magistrate. But the Magistrate did not see the injuries. He did not complaint to the Magistrate. He gave no answers in the interview. He had not played Rugby at all. He never complained to parents and they never asked about the injuries.
80. You watched each accused giving evidence in court. What was his demeanour 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 each accused is inconsistent with the position taken up by him at the caution interview. 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 that accused should be discharged of Rape. Even if you reject his version still the prosecution should prove it's case beyond reasonable doubt.
81. I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
82. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:
- (i) You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offence.

- (ii) Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.
- (iii) The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offences. The situation then would be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be Guilty.

83. 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 form 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.

84. 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.

85. Remember, the burden to prove each 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. Each 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.

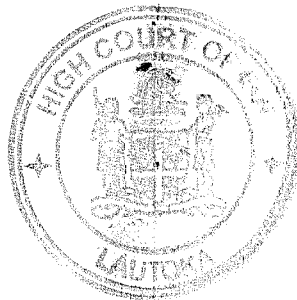
86. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of the charge you must find him guilty for the charge. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of each accused's guilt, you must find him not guilty for the charge. You have to consider evidence against each accused separately.


87. Your possible opinions are as follows:

- | | | |
|-------|-----------------------|--|
| (i) | First charge of Rape | 1st Accused Guilty or Not Guilty |
| (ii) | Second charge of Rape | 2 nd Accused Guilty or Not Guilty |
| (iii) | Third charge of Rape | 3 rd Accused Guilty or Not Guilty |

88. 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.

89. Any re-directions?




Sudharshana De Silva
JUDGE

At Lautoka
15 July 2014

Solicitors : Office of the Director of Public Prosecution
 Office of the Legal Aid Commission for 1st Accused
 Anil J Singh Lawyers for the 2nd and 3rd accused