

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

**CRIMINAL CASE NO.: HAC 227 OF 2011**

**STATE**

**-v-**

**VIO CAKAU**

**Counsels** : Ms W. Elo for the State  
Mr R. Kumar for the Accused

**Date of Trial** : 20<sup>th</sup> – 21<sup>st</sup> October 2014  
**Date of Summing Up** : 22<sup>nd</sup> October 2014

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

**SUMMING UP**

Madam Assessor 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 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 counsel for Prosecution 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 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.
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. The charge against the accused is a charge of rape under section 207(1) (2) (a) of the Crimes Decree No.44 of 2009. The particulars of the offence, as alleged by the prosecution, are:

***Statement of Offence***

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

***Particulars of Offence***

**VIO CAKAU** on the 4<sup>th</sup> of December, 2011 at Lautoka in the Western Division, penetrated the vagina of **TN** with his penis, without her consent.

15. I will now deal with the elements of the offence. 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 extend 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 extend with the person's penis without the other person's consent.

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

17. Other parts of the offence are irrelevant to the facts of this case.

18. 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.

19. 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.

20. So, the elements of the offence in this case are that the accused **penetrated the vagina of victim to some extent with penis**, which means that the insertion of a penis fully into vagina is not necessary.

21. Although the accused is not charged with any other offence, if you are sure that the accused tried to insert his penis into vagina of the victim and you have a reasonable doubt whether the penis penetrated the vagina to some extent then you could find the accused Guilty for Attempted Rape.

22. As a matter of law I am directing you that there is no need look for any corroboration of the complainant's evidence for an Accused to be convicted on a charge of Rape. If the evidence of the complainant is so convincing that you can place reliance beyond reasonable doubt, you can solely act upon it even in the absence of any corroborative evidence. As a matter of law I am directing you that the absence or marks for physical resistance on the complainant does not necessarily mean that she consented to sexual intercourse.

23. 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.

24. 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.

25. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, Medical Report is an example if you believe that such a record was made. Then you can act on such evidence. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time on the document upon examination of the victim.

26. 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.
27. 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.
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 the victim as the first witness. She stated that she is living with her father, her brother, her sister-in-law and their two kids. On 3.12.2011 she was drinking at home with the accused, one of her cousins and one of her nephews. They were having a wine bottle. After they finished they have gone towards the Saweni Supermarket with the accused. She had met some friends there. They have called her to drink. The accused had gone to his uncle's house. They have bought 6 beer bottles and went and drank those.

When they finished they have come back to Shankar's liquor shop. They have bought 6 more beer bottles and were drinking beside Shankar's liquor shop. The accused had come with two beer bottles and joined them. When drinks were finished those boys have gone saying they are going buy more drinks. She and the accused were left there. The others have not returned.

32. She was drinking the two bottles left, with the accused. Then the accused used his hand to cover her mouth. He was punching her thighs. She was told not to shout. When she shouted he repeated not to shout and continued punching her thighs. She felt weak. She felt the accused inserting his penis into her vagina. She was lying down as she was weak. She was crying and sad. When a police officer arrived, the accused was on top of her. The officer had kicked the accused. She was told to get dressed. Then they were taken to Saweni police post. The accused was taken to Lautoka police station and she was taken to the hospital.
33. Under cross examination she said that four people drank the wine from 3.00 p.m. to 5.00 p.m. that day. She denied it was a Gin bottle. She admitted then they had 7 bottles of Beer. She denied that she went to Supermarket in van. She admitted that she drank 6 bottles of Beer with 6 boys thereafter at Alvin's house. Then she had gone to Shankar's liquor shop with Osea and Peni. She had given money to buy four more bottles of Beer. The accused was not there at that time. The accused had joined later with two bottles of Beer. They were drinking near the toilet beside the market. There was a house about 3m away from the public toilet. The only light was coming from the house. She denied that another Indian boy was present with her and the accused when the others left. She denied that accused passed out while drinking. She admitted that she was drunk that night. But she could recall what happened.
34. She denied that she was standing with the accused after drinking and the accused hugged her. The accused used one hand to remove her clothes while covering her mouth with one hand. The accused had dealt plenty punches on her thighs until she felt weak. There was a long black mark which she saw following day. Her thighs were paining. She had told the doctor about the pain. But the Black mark was observed later. The accused had inserted his penis into her vagina for about 20minutes. There were no bruises on her ankle and elbow. She had not received any bruises or cuts. Her vaginal area was not that painful but sore. She had just informed the doctor that she was raped. The police officer saw the accused lying on top of her. He came and kicked the accused. She was sad, upset and crying when she went to doctor. The doctor examined her thoroughly.
35. Under reexamination she said the accused opened her zip of her pants and pulled it down with one hand. She was shouting when the accused continued to punch her thighs.
36. 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? What is relationship between her and the accused. Was there any reason for her to make a false allegation. Is there any evidence confirming that she resisted

accused's action. 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 the victim beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charge.

37. The second witness for the prosecution was SC Ilatia Sivo. On 3.12.2011 he was based at the Saweni police post. He started his shift at 11.00 p.m. At 1.00 a.m. he had gone on foot patrol. As he head for the Saweni supermarket he had heard girl's voice calling for help in i-Taukei language. When he flashed the torch at where the sound is coming at the back of the toilet he had seen the accused on the top of the victim. When the accused saw him he got up and wanted to wear his underwear. The victim was lying down only wearing her top. She had told that she want to lodge a complaint against the accused. He had taken both of them to the police post and the victim lodged the complaint. The victim was covered with mud and crying full time. The accused looked fully drunk at that time. He identified the accused in Court.
38. Under cross examination he said the public toilet is next to a house. The Saweni market stalls are next to the toilet. He denied that the accused was not lying on top of the victim but lying beside her. He admitted that in his statement he had not stated that the accused was on top of the victim. The victim told her that the accused was trying to have sex with her. He had not kicked the accused. The complainant was drunk. She complained about accused punching her on face and body. He did not see any injury on her face.
39. This is an independent witness. If you believe his evidence beyond reasonable doubt there is confirmation that the victim was shouting for help at the time of the incident. This witness had failed to mention in his statement that he saw the accused on top of the victim. That is an omission. I have explained earlier the legal position regarding an omission. Further there are contradictions from this witness's evidence reading punching by the accused. Victim stated that she was punched on her thighs. This witness stated that victim told him that she was punched on the face and the shoulders. It is up to you to decide this witness's evidence is confirming the prosecution version or supporting the accused's version and creating a reasonable doubt in the prosecution case.
40. The third witness for the prosecution was Doctor Kelera. She had examined the victim on 4.12.2011 at 3.40 a.m. at the Lautoka hospital. In short history she had stated that she was at a drinking party with several Fijian men including her nephew. During that she was raped by Vio. She was seen by a police officer and brought to the hospital. She was calm and smelt of Alcohol. She was well aware of her surroundings. Her general physical condition was well. This was not normal. Some of the victims are shocked and distressed with difficulty to speak. Some others are too intoxicated that they do not respond to questions and you have to wait for couple of hours to question them.



41. She had no lacerations or bruises. In 50% cases you find such observations. She could walk normal and follow the commands. Her cloths were muddy. There was no sign of force as there were no lacerations or bruising. This was not a normal observation. The complainant said that she was hit on the thighs by the accused. Within 2-3 hours you don't see the bruising at all. They tend appear in 4-6 hours later. Initial force would rupture the superficial blood vessels in areas of large fat tissues and mussels. It takes time for blood to disseminate and show up. It is dependent upon the colour of the person as well. If the person is dark it tends to appear later compared to fair person. Her findings were not consistent with the history related to her. She could not find any signs of force. She tendered the Medical Officer's report marked P1.
42. Under cross examination she admitted that she had not mentioned that victim was hit on the thighs in her report. She remembers that the victim told her that. Not all the rape victims show symptoms of cold. Some are crying and agitated. The victim was calm. Some victims complain of lower back pain and stomach pain. The victim did not make such complain. There were no signs of force on the victim. Normally you see bruising around vagina and inside the vaginal walls. There could be lacerations on the same area. She does not expect to find bruising and lacerations if there was penetration for 20 minutes. A swab was taken by her and given to the police. There is no result forwarded to her from that. If a person is continuously punched several times with heavy force you could see immediate bruises and redness from rupture of blood vessels. Heavy force means if it is hit by an instrument or timber. From single punch or smack you will see the bruising later. The victim had no bruises. The history given by the victim does not match with the findings.
43. In reexamination she stated that bruises will depend on the colour of the skin and the force used.
44. The Doctor in an independent witness. The victim had given same version to the doctor. There are no medical findings which are consistent with forceful sexual intercourse. You are to decide whether the doctor's evidence confirms the prosecution case or it creates reasonable doubt in the prosecution case and supports the accused's version.
45. The next witness for the prosecution was WDC Aseneca. She is an officer with 9years experience. She was attached to Sexual offences Unit at Lautoka police station on 4.12.2011. She had received instructions to caution interview the accused. She identified and original interview notes and the translation prepared by her. The interview was in Fijian language started at 3.11 p.m. The accused was arrested drunk and he was locked in the cell till he is sober. She tendered the original caution interview statement marked P2A and the translation marked P2B. She read over both to the Court. She identified the accused in Court.
46. Under cross examination she admitted the she recorded the victim's statement as well and was aware of what happened. The accused had stated that he was so drunk and could not

recall when he was asked about inserting his penis into complainant's vagina. On allegation of punching the thighs the accused also said he could not recall as he was drunk.

47. The defence did not contest the voluntariness of the caution interview. Therefore you have to only decide whether this statement is truthful. If you accept this caution interview statement as truthful then the accused had said that he could not recall what happened as he was so drunk.
48. The last witness for the prosecution was PC Simione. He is an officer with 9 years experience. On 4.12.2011 he was attached to Criminal investigation Division at the Lautoka police station. He had received instructions to formally charge the accused on allegation of Rape. He identified and tendered the original Charge statement marked P3A and the translation marked P3B. He read out the content in Court and identified the accused.
49. Under cross examination he stated that the accused had not admitted penetrating the vagina of the victim in the charge statement.
50. The defence had not disputed the voluntariness of this charge statement. Therefore you have to only decide whether this charge statement is truthful. If you decide the charge statement as truthful then the accused had stated that "I admit the offence I have been charged with and I wish to be forgiven for my actions. I was so drunk and I promise not to commit the same offence." You have to decide whether this is an admission of the allegation.
51. After the prosecution case was closed you heard me explaining the accused his rights in defence. Accused decided to exercise the right to remain silent. That is his right. No adverse inference should be drawn from that. The prosecution still has to prove the case beyond reasonable doubt.
52. 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.
53. 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.
54. 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.

55. 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.

56. Your possible opinions are as follows:


- |                          |                              |
|--------------------------|------------------------------|
| (i) First charge of Rape | Accused Guilty or Not Guilty |
| If Not Guilty for Rape   |                              |
| Attempted Rape           | Accused Guilty or Not Guilty |

57. 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.

58. Any re-directions?



At Lautoka  
22<sup>nd</sup> October 2014

  
Sudharshana De Silva  
JUDGE

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