

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 081 OF 2012

STATE

VS

JOVESA SADRATA

Counsel : **Mr M. Vosawale and Ms U. Tamanikaiyaroi for the State**
: **Ms S. Ratu for the Accused**

Dates of Trial : **13th – 16th March 2017**

Summing Up : **17th March 2017**

SUMMING UP

Madam and Gentlemen Assessors,

- [1] We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear more. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2] As the presiding judge, it is my task is to ensure that the trial is conducted fairly and according to law. As a part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give you on matters of law. It

is also important to note that, if I give you a caution, you have to take it also into consideration, in coming to your opinion.

- [3]** It is your duty to decide all questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of fact, first you must decide what evidence you accept as truthful and reliable. You will then apply relevant law, to the facts as revealed by such credible evidence. In that way you arrive at your opinion.
- [4]** During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent view.
- [5]** In forming your opinion, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6]** It is also important to note that, in forming your opinion on the charge against the accused, it is desirable that you reach a unanimous opinion; that is, an opinion on which you all agree, whether he is guilty or not guilty. However, the final decision on questions of fact rests with me. I am not bound to conform to your opinion. However, in arriving at my judgment, I shall place much reliance upon your opinion.
- [7]** I have already told you that you must reach your opinion on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8]** The evidence is what the witnesses said from the witness box, the documents, the things received as prosecution or defence exhibits and any admissions made by the parties.
- [9]** If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have also heard in this Courtroom are not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The addresses made by the Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, another matter which will be of concern to you is the determination of truthfulness of witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting. Consider also the likelihood or probability of the witness's account.
- [14]** The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every victim has her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanor in Court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15]** The experience of the Courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report the incident could be also due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. There is, in other words, no classic or typical response by victims of Rape.

- [16] A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in this matter before us, the promptness or lateness of the complaint and what weight you attach to it.
- [17] Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question.
- [18] In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Credibility concerns honesty. Reliability may be different. A witness may be honest enough, but have a poor memory or otherwise be mistaken.
- [19] Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.
- [20] Lady and gentlemen, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [21] Having placed considerations that could be used in assessing credibility of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [22] When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon

the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.

- [23]** It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [24]** In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of Primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [25]** But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [26]** In order to illustrate this direction, I will give you an example. Imagine that when you walked into this Court room this morning, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [27]** It does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [28]** Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove. That burden rests on the prosecution to prove the guilt of the accused.

- [29] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. Whether the accused has given evidence or not, is immaterial in this regard as he has no burden upon him to prove his innocence. It is not his task to prove his innocence. When he does offer evidence it is your duty to evaluate then apply the same standards.
- [30] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or level of proof, as expected by law?
- [31] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond reasonable doubt. This means that in order to convict, you must be sure that the prosecution has satisfied beyond reasonable doubt of every element that goes to make up the offence charged. I will explain these elements later.
- [32] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence and the other matters of which you must be satisfied, such as identity, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such doubt, then your duty is to find the accused guilty.
- [33] You should dismiss all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion has any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinion.
- [34] Let us now look at the charge contained in the information.
- [35] There is only one charge preferred by DPP, against the accused:

COUNT ONE

Statement of Offence

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

Particulars of Offence

JOVESA SADRATA on the 2nd Day of March 2012 at Nasinu, in the Central Division, penetrated the anus of **LITIANA TABUAKULA** with his fingers, without her consent.

- [36] I shall first deal with the elements of the offence of Rape. In order to prove a charge of Rape, the prosecution must prove beyond reasonable doubt that the accused penetrated Litiana Tabuakula's or the complainant's anus, with his fingers. The slightest penetration is sufficient to satisfy this element.
- [37] Then we must consider the important issue of consent. It must be proved that the accused either knew that she did not consent or was reckless as to whether she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting but carried on anyway when the circumstances known to him it was unreasonable to do so. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond reasonable doubt.
- [38] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was over 13 years of age and therefore, she had the capacity to consent. More directions on the issue of consent will be made as we proceed.
- [39] If you are satisfied beyond a reasonable doubt that the accused penetrated the complainant's anus with his fingers without her consent then you may find him guilty of Rape.
- [40] Apart from the elements of the offence of Rape, the identity of the person who is alleged to have committed this offence must also be proved by the prosecution. What it means is that it was this accused and none other had penetrated the complainant's anus as per the date mentioned in the information. There must be positive evidence as to the identification of the accused.
- [41] If you find that the prosecution failed to establish any of these elements in respect of the offence of Rape, then you must find the accused not guilty.
- [42] In our law, no corroboration is needed to prove an allegation of Sexual Offence. The offence of Rape is obviously considered as Sexual Offence.
- [43] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [44] The parties have agreed the following facts have already been proved beyond a reasonable doubt:

1. *It is agreed that LITIANA TABUAKULA is the complainant in this matter.*

2. *It is agreed that JOVESA SADRATA is the accused in this matter.*
3. *It is agreed that on the 2nd of March 2012 the complainant and her friend met the accused inside RITZ Nightclub in Suva.*
4. *It is agreed that at about 11pm , the accused and the complainant left the nightclub and boarded the Tovata bus.*
5. *It is agreed that the accused and the complainant got off the bus at Valelevu.*
6. *It is agreed that the accused then told the complainant to follow him down a track.*
7. *It is agreed that the complainant and the accused had penile vaginal sex for a few minutes at a tree beside a creek.*
8. *It is agreed that the complainant was medically examined on 3/3/12 at 3.45am in CWM Hospital.*

Case for the Prosecution

[45] Evidence of the complainant

- (i) *It is her evidence that she is currently lives in Naboro with her brother. She was born on 18th November 1987 and would be 30 years in age in November. In July 2012 she was a resident of Naulu and even then had lived with her brother.*
- (ii) *The complainant said that on 2nd March 2012, she came to Ritz night club with one of her cousin sisters. At the club, they bought 3 "stubbys" and drank them. Then the accused joined them and they all had drinks together. That was the first time she saw the accused.*
- (iii) *At that time the accused suggested that the complainant to go to his place. She agreed. Then they got into a bus and got off at Valelevu. Then the two of them had walked along past Valelevu Police Station, Shop N Save Supermarket and also Kalabu housing scheme.*
- (iv) *Then they got onto a track which goes to Wakanisila. The accused then suggested they rest for a while beside a creek. The accused then asked the complainant to takes her clothes off. She obliged. He asked if he could have intercourse with her. She agreed. Then she laid down*

and thereafter they had consensual vaginal intercourse for about 10 minutes.

- (v) The complainant says that the accused then asked her to turn over so that he could have intercourse with her again. She did turn over and then the accused did “something” with her anus. She then clarified what that “something” is. According to her the accused inserted his fingers into her anus. She asked him not to as it was painful. She felt two fingers of his hand in her anus and he put it in for about 10 seconds. She also felt blood from her anus when she touched and confirmed it when she saw blood in her hand. She saw blood from the light coming from a house near the creek. The accused also tried to insert his penis into her anus.*
- (vi) Then she got dressed up and came along the track they have taken to come near the creek. She called the Crimes Office and asked for help, and when the lady officer asked details she said it is a “rape case”. She could not walk fast as she was in pain. She could not run away from the accused as a result. The accused asked her to whom she called. She lied to the accused by saying it was to her sister.*
- (vii) When they were crossing the bridge, the accused had already gone past her. They were taken by the Police vehicle that came and took them to the Station. Then she was taken for medical examination at about 3.45 in the morning after her statement was recorded. At the hospital she was taken to the surgery and the medical officer had then examined the injury to her anus.*

[46] Evidence of Dr. James Fong

- (i) This witness, after obtaining his M.B.B.S. degree, has over 27 years of experience as a medical practitioner in Obstetrics and Gynaecology and is currently the Head of that Department at CWMH. He also holds a Diploma and a Master’s degree in Obstetrics and Gynaecology. He has been a mentor for over 40 medical doctors including to Dr. Unaisi Tabua, who examined the complainant. He recognised her handwriting.*
- (ii) On 3rd March 2012, Dr. Tabua had examined the complainant at 3.45 in the morning in the presence of Woman Detective Constable. In the Medical Examination form, the history given by the complainant is*

recorded under heading D(10) and in D(11) it is recorded that the complainant was calm, collected and co-operative. However, the injury on the anus could not be examined internally as Dr. Tabua noted that the complainant was in severe pain.

- (iii) *In D(12) under Specific Medical findings and according to what Dr. Tabua has recorded, the witness said she had a blood clot under her skin between the anus and vagina. There was a 2 cm long laceration was also noted at the border of anus, close to vagina.*
- (iv) *The witness was of the opinion that formation of the blood clot under the skin could be due to the rupture of blood vessels under the skin and which in turn may have been caused by a blunt force.*
- (v) *In relation to the laceration, the witnesses expressed his opinion that it is a liner injury and may have been caused due to distension of anal opening. He is also of the opinion because of this injury, the complainant may have been in pain, had difficulty in walking and sitting.*
- (vi) *When asked for his opinion whether the history given by the complainant is consistent with the injuries, as recorded by Dr. Tabua, the witness agreed with it as it could be due to a "fingered anus". He further said that a significant amount of force is needed to cause the injuries as it had caused bleeding in underlying tissues. He also referred to the sketch prepared by Dr. Tabua.*
- (v) *The report prepared by Dr. Tabua was tendered through this witness as **P.E. No. 1.***

[47] That was the case for the prosecution. You then heard me explaining several options to the Counsel of the accused. I explained to her that the accused could give sworn evidence or call witnesses on his behalf or remain silent. He could also address Court. The accused was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests on prosecution at all times. His Counsel indicated that, under the circumstances, the accused wishes to exercise his right to remain silent.

Analysis of all evidence

[48] The prosecution relied on the evidence of the complainant and the medical officer who gave evidence on a medical report of the complainant to prove its case.

- [49] Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty to the charge of Rape, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence of Rape and also the identity of the accused beyond a reasonable doubt.
- [50] At the beginning of this summing up, I described some considerations you might want to apply to the evidence in order to satisfy yourselves as to the truthfulness and reliability of the evidence. One such consideration is the consistency of the evidence.
- [51] In relation to considering the consistency of the prosecution evidence, I shall first direct you with the evaluation of evidence on the aspect known as recent complaint. What this consideration is whether the complainant consistently made the allegation of sexual aggression to the person to whom she disclosed it for the first time since the alleged incident. You could also consider whether she consistently maintained her allegation thereafter.
- [52] The prosecution lead evidence from the complainant that she did describe the alleged act of sexual aggression to the lady officer at Crimes Office as "*it's a case of rape*". Then she made a statement to Police.
- [53] After that the complainant again narrated the incident to the medical officer who examined her. The history given by the complainant is there in **P.E. No. 1** under heading D(10).
- [54] You could consider these items of evidence, in order to decide whether the allegation of sexual aggression is consistently made and also in what detail. The fact that she complained of "*rape*" should not be used by you to decide the charge of Rape as it is your responsibility to decide it after considering all the evidence. What she has said to others outside Court is not evidence. You could only use this complaint of "*rape*" to decide the consistency of the allegation.
- [55] However, I must again caution you that these items of evidence should not be utilised by you to decide that they support the complainant's evidence led before this Court. You could only consider these items of evidence at this stage to consider whether the allegation is consistently made and made without undue delay, without leaving room for afterthought and fabrication.
- [56] In addition, it is your duty to consider all the evidence led before this Court for its consistency. I shall first deal with the inconsistencies in the prosecution's case.

Before I venture to refer to the inconsistencies, let me assist you by directing the manner in which you should consider the inconsistencies in determining truthfulness and reliability of a particular witness.

- [57] In assessing credibility of the testimony of a witness on consistency means to consider whether the evidence of that witness differs from what has been already said by the same witness on the same issue in another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question.
- [58] You may have observed that when the complainant gave evidence, there were some inconsistencies between her evidence before this Court and the statement given to the police. What you have to take into consideration is only the evidence given by the complainant in Court and not what she said in any other previous statement. The reason is what she said to Police or to the examining Doctor is not evidence. The portion of the statement to Police could only be used to consider whether she said something different to what she said in Court. These portions only assist to decide whether she was consistent in that particular issue.
- [59] As I have already directed you earlier on in this summing up, in weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence.
- [60] One of the inconsistencies of the complainant's evidence as highlighted by the accused was in relation to the fact that whether the accused joined the two girls at the Ritz or whether they joined the accused. The complainant said in evidence it was the accused who joined them. It was then highlighted by the accused that in her statement to Police she said "*... after a while one Fijian man invited us to join them in another table to go and drink together with them...*". When the accused confronted the witness with her statement, then she admitted the inconsistency.
- [61] The other inconsistency highlighted by the accused is the time the complainant made a statement to Police. She said in evidence it was 3.45 in the morning. Then her attention was drawn to the fact that commencement of the recording of her statement was at 8.00 p.m. She then admitted the inconsistency. The accused however did not address you on the inconsistencies but mainly addressed you on the probability of the version of events of the prosecution.
- [62] It is for you to decide the extent to which these inconsistencies affect the credibility of the complainant and the basic version of the prosecution. You will also have to

decide what weight you attached to her evidence. You may have also to consider any other inconsistency in evidence which you may have noted.

- [63] Similarly, you have to consider the version of events as suggested by the accused for its consistency. The prosecution challenged his version of events only on probability.
- [64] I also mentioned you that the manner of giving evidence is also an applicable consideration in evaluating witnesses for their truthfulness and reliability. You would have observed how the complainant and the medical witness have given evidence and faced cross examination.
- [65] In addition to above mentioned considerations on evaluation of evidence; there is another factor in considering whether the evidence of the prosecution is truthful and reliable. That is the relative probability of the versions of event as presented by the parties. In this trial both parties have placed reliance on this aspect in evidence.
- [66] The evidence of the prosecution is that the accused, having had consensual vaginal intercourse with the complainant, gone far beyond to what was already consented by the complainant, when he inserted his fingers into her anus.
- [67] In challenging the prosecution version of events on relative probability, the accused wants you to consider the fact that although the complainant said that she only consented for vaginal intercourse, the vaginal penetration and anal penetration had to be considered as one sexual act, to which she consented. In addition, the accused wants you to consider that the complainant later changed her stance in relation to her consent by denying it.
- [68] In addition, the accused wants you to consider the probabilities of the causes of the injuries that were noted on the complainant which could be attributable to:
- i. *the rocks that were there in the place on which they lay down to have vaginal intercourse;*
 - ii. *when they were engaged in vaginal intercourse the groping hand of the accused;*
 - iii. *when they switched positions by the complainant coming over on to the top of the accused her movements during their sexual intercourse;*
 - iv. *as Dr. Fong admitted that he could not rule out the possibility of a single rock with a pointed end could have caused the trauma that was observed by the Dr. Tabua.*

- [69] Having considered these probabilities, if you find that the claim of the accused raises a reasonable doubt in your minds, and then you must find the accused not guilty of the charge of Rape, since the prosecution has failed to prove its case. If you reject these claims of the accused that does not mean the prosecution case is automatically proved. They have to prove their case independently of the accused and that too on the evidence they presented before you.
- [70] With this caution in mind, we could proceed to consider the claim of the accused for its probability of the version. It is claimed by the accused, the rocks that were there in the place on which they lay down to have vaginal intercourse may have caused the injuries that were noted by the medical witness. The complainant admitted there were rocks at the place where they had sexual relations and her buttocks were resting on them. Dr. Fong was of the opinion that except for the possibility of one rock with a point causing the injury, why he said that the history is consistent with the injuries noted was there were no other injuries noted on that specific area of the complainant's body.
- [71] The accused also wants you to consider the possibility that when they were engaged in vaginal intercourse, his groping hand may have caused these injuries. Dr. Fong says that a significant force was needed to cause the rupture of blood vessels under the skin and the complainant said "No" when this position was suggested to her.
- [72] The accused also wants you to consider the fact that when they switched positions by the complainant coming over on to the top of the accused and her movements during the sexual intercourse may have caused it. When it was suggested the complainant denied switching positions.
- [73] The accused invited you to consider the evidence of the complainant, during cross examination, that if not for the fact of seeing blood, she would not have complained to Police. The accused claimed that having consented for the sexual act to which he is now charged with, the complainant changed her mind later, and therefore he has become the real victim in this case.
- [74] I must caution you over one important matter. When I present the accused's version, alongside the version of the complainant, you might get an impression that the accused must prove that he did penetrate her anus with her consent and the injuries that were noted were in fact a result of the causes he suggested. That is wrong. He is under no duty to disprove the case for the prosecution. He is not even under a legal duty to offer evidence.
- [75] So far I have directed you on the assessment of credibility of the witnesses for the prosecution and the version of events as suggested by the accused. If you reject the suggestions of the accused and preferred to accept the prosecution evidence as

truthful and reliable then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of Rape, beyond a reasonable doubt.

- [76] The prosecution has also relied upon the evidence of the medical witness. This kind of evidence is given to help you with scientific matters about the witness has expertise. As you have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefits, and to express opinions about them, because they are used to doing that within their particular field of expertise. You will need to evaluate expert evidence for its strengths and weaknesses, *(if any)* just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [77] In this instance the complainant was examined by Dr. Tabua. She did not give evidence before us. It was Dr. Fong, who knew Dr. Tabua, and gave evidence before this Court. His opinion on them is solely based on the observations recorded by Dr. Tabua. Dr. Fong did not examine the complainant at any point of time. When you assess the weight to be given to his evidence you may consider these factors.
- [78] You would recall that the medical witness said in evidence that he agrees that the injuries that were noted on the complainant's body are consistent with the history given by her. He explained to you of the reasons why he has formed that opinion.
- [79] The accused, during his cross examination of the medical witness sought to clarify certain positions. In relation to the claim of rocks causing the injury was clarified and I have already referred to this evidence. It is for you to decide whether to accept his opinion on these points and whether it supports the prosecution case or the accused position.
- [80] It is time we consider whether the prosecution has proved the elements of the offence they charged the accused with.
- [81] Let us consider the charge of Rape now. As already noted the complainant had clearly stated that the accused inserted his fingers into her anus. The prosecution claims that the medical evidence does support their claim of penetration, even though no collaboration is needed by law.
- [82] If you accept these items of evidence as sufficient proof of digital penetration of the complainant's anus, then in addition, the prosecution must prove that it was the accused who had anal digital penetration and that he had no consent of the complainant or was reckless about it.

- [83] I shall direct you on the issue of consent, before proceeding to the issue of identity of the accused. It is our law that consent of a woman must freely and voluntarily be given. She must have the necessary mental capacity to give consent. It is important to note that mere submission to sexual act without physical resistance by the woman cannot be considered as consent. Even if there is consent, if that consent is obtained by force, threat, fear of bodily harm, or exercise of authority then also it cannot be considered as consent acceptable to law.
- [84] The prosecution wants you to believe the evidence of the complainant in which clearly said that she did not consent to the insertion of fingers into her anus by the accused. Having had consensual vaginal intercourse she said “*don’t*” to the accused when he inserted his fingers into her anus. Consider these legal provisions in the light of the evidence presented by the prosecution whether the complainant has consented for the digital penetration of her anus by the accused.
- [85] In relation to the issue of consent, there is another aspect you must consider. As I have already directed you earlier in my summing up, the prosecution must prove that there was no consent by the complainant or the accused was reckless about it. What that means is whether the accused realised that there was a risk that she was not consenting but carried on with his act anyway when in the circumstances known to him it was unreasonable to do so.
- [86] If you are not sure that he would have realised she was not consenting then you must proceed to consider whether the accused might have been reckless as to whether she consented. Then you must consider, whether he genuinely believed she was consenting, when you consider these circumstances I have mentioned to you just now. If you think so, then you must find the accused not guilty of Rape. If you do not accept that he thought she was consenting when you consider all the circumstances, then you could convict him of Rape if you find the other elements also have been proved.
- [87] You will recall that I have already directed you on this topic by referring to the identity of the accused. The prosecution primarily relied upon the evidence of the complainant to prove identity of the accused. However, there is no challenge by the accused to the complainant’s claim that she identified the accused that night and the parties have agreed that the “*complainant and the accused had penile vaginal sex for a few minutes at a tree beside a creek*”.
- [88] In summary and before I conclude my summing up let me repeat some important points. If the prosecution has proved all the elements of Rape beyond a reasonable doubt then you may find the accused guilty of Rape. If not, then you must find the accused not guilty of Rape.

[89] If you have any reasonable doubt about the prosecution case as a whole or an element of the offence of Rape, then you must find the accused not guilty.

[90] You will note that the accused is not before us and it is not for you to wonder why. I must direct to you now about making a finding on an absent accused:

(a) *You obviously have heard no evidence from him and only the suggestions put to the prosecution witness by his counsel. Even if he was here it would have been his right to remain silent and to require the prosecution to make you sure of his guilt; there is no burden on him to prove anything.*

(b) *You must not assume that an absent accused is guilty because he is not here. His absence does not help the prosecution to prove its case against him in any way at all.*

(c) *Similarly you must not speculate or guess as to the reasons for his absence, and you must not hold his absence against him.*

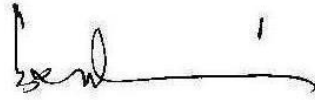
(d) *You try this case according to the evidence, and you will assess it just as carefully as you would have done if the accused was here.*

(e) *But you will appreciate that there is no evidence from him at this trial to undermine, contradict or explain the evidence put before you by the prosecution, except the suggestions put to the prosecution witnesses on his behalf by his Counsel.*

[91] Any re directions the parties may request?

[92] Madam and Gentlemen assessors, this concludes my summing up of law and evidence. Now you may retire and deliberate together and may form your individual opinions. When you have reached your separate opinions on the charge of Rape you will come back to Court, and you will be asked to state your opinion on them.

[93] I thank you for your patient hearing.



ACHALA WENGAPPULI
JUDGE



At Suva

This 17th Day of March 2017

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