

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 107 OF 2013

STATE

v

TUTUNISAU CAUCAU

Counsel: Ms. R. Uce for the State
Ms. S. Dunn for the Accused

Date of Trial: 26th and 27th June, 2017

Date of Summing Up: 28th June, 2017

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. 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 Accused made submissions to you about the facts of this case. That is their duty as the Counsel. They were their arguments, which you may properly take into account when evaluating the evidence. It is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the Accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the Accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this Courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial. 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.

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. 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.
12. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witnesses.
13. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a Complainant in a rape case such as this should react to the experience. Any person who has been raped, will have undergone trauma whether the accused were known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in Court or at the Police Station. 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.
14. 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.

15. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.
16. 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 or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.
17. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreed facts of this case are:
 - I. Tutunisau Caucau (the Accused) was born on the 14th of December 1955.
 - II. Tutunisau Caucau on the 27th of March 2013 came to Judith Tirotume's house at Sukanaivalu Road in Lautoka to massage Judith Tirotume.
 - III. On the same day (27th of March 2013), Tutunisau Caucau massaged the complainant, Therese Mari Charlene in Judith Tirotume's room.
 - IV. The following day (28th of March 2013), Tutunisau Caucau again came to complainant's house where he massaged Judith Tirotume and then massaged the complainant, Therese Mari Charlene in her bedroom.
18. The charges against Accused are as follows:

COUNT 1
Statement of Offence

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

Particulars of Offence

TUTUNISAU CAUCAU, on the 27th day of March 2013, at Lautoka in the Western Division, inserted his finger into the vagina of **THERESE MARI CHARLENE**, without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

TUTUNISAU CAUCAU, on the 28th day of March 2013, at Lautoka in the Western Division, inserted his finger into the vagina of **THERESE MARI CHARLENE**, without her consent.

COUNT 3

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree, 2009.

Particulars of Offence

TUTUNISAU CAUCAU, on the 28th day of March 2013, at Lautoka in the Western Division, unlawfully and indecently touched the vagina of **THERESE MARI CHARLENE**, without her consent.

COUNT 4

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree, 2009.

Particulars of Offence

TUTUNISAU CAUCAU, on the 28th day of March 2013, at Lautoka in the Western Division, unlawfully and indecently kissed the breast of **THERESE MARI CHARLENE**, without her consent.

COUNT 5

Statement of Offence

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

Particulars of Offence

TUTUNISAU CAUCAU, on the 28th day of March 2013, at Lautoka in the Western Division, had unlawful carnal knowledge of **THERESE MARI CHARLENE**, without her consent.

COUNT 6

Statement of Offence

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

Particulars of Offence

TUTUNISAU CAUCAU, on the 28th day of March 2013, at Lautoka in the Western Division, inserted his finger into the vagina of **THERESE MARI CHARLENE**, without her consent.

19. I will now deal with the elements of the offence. 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.
20. On 1st 2nd and 6th counts, the Accused is charged with digital rape. The elements of the offence of digital Rape in this case are that:
- a. the Accused, **TUTUNISAU CAUCAU**
 - b. penetrated the vagina of **THERESE MARI CHARLENE** to some extent with his finger/fingers
 - c. without **THERESE MARI CHARLENE**'s consent.

21. On the 5th count, the Accused is charged with penile rape. The elements of the offence of penile Rape in this case are that:
 - a. the Accused, **TUTUNISAU CAUCAU**
 - b. penetrated the vagina of **THERESE MARI CHARLENE** to some extent with his penis
 - c. without **THERESE MARI CHARLENE**'s consent.
22. Insertion of finger fully into vagina is not necessary. Slightest penetration is sufficient to satisfy this element.
23. Consent as defined in Section 206 of the Crimes Decree, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.
24. Prosecution needs to prove that **TUTUNISAU CAUCAU** had sexual intercourse with the Complainant **THERESE MARI CHARLENE** without her consent. What is consent? It's a legal term. I will try and explain to you what consent is in simple terms. It means to agree to something. Saying yes, doesn't end there. Consent needs to be given, freely and voluntarily and it must be an informed one. The person who is saying 'yes' must know what he is getting into. Consent has to be genuine.
25. A person's consent to an act is not freely and voluntarily given if it is obtained —
 - (a) by force; or
 - (b) by threat or intimidation; or
 - (c) by fear of bodily harm; or
 - (d) by exercise of authority; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.
26. Accused is charged with Indecent Assault on 3rd and 4th counts. Prosecution must prove the following elements:

- (a). The Accused,
- (b). Unlawfully and Indecently
- (c). Assaulted the Complainant

- 27. The Accused is guilty of Indecent Assault, if he unlawfully and indecently assaulted the Complainant. The word "*unlawfully*" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. Assault can be defined as an application of unlawful force on another's body.
- 28. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the Accused-person and connect him to the offence that he is alleged to have committed.
- 29. Proof can be established only through evidence. Evidence can be 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 Complainant was a witness who offered direct evidence as to what she saw, heard or felt.
- 30. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.
- 31. In testing the credibility of a witness, you can consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If 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.
- 32. Bear in mind, 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 case, complaint Complainant made to police is genuine and what weight you attach to the complaint she eventually made.
- 33. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and

whether what the witness has told Court contradicts with his/her earlier version. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another, for example by a police officer, in recording the statement where the witness is alleged to have given that version.

34. 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.
35. 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.
36. You may also see whether there is a motive or obvious reason to fabricate a false allegation against the Accused. If there is an obvious reason to make up a case, then you may attach less weight to Complainant's evidence.
37. Please remember, there is no rule in Fiji for you to look for corroboration of Complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of Complainant, depending on how you are going to look at her evidence.
38. I will now remind you of the Prosecution and Defence cases. In doing this it would not be practical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

Case for Prosecution

Therese Mari Charlene

39. First witness for the Prosecution is the Complainant Therese Marie. On the 10th of March 2013, when Therese was at home with her mother, a young gent was brought home by her sister's workmate to massage her mum who was suffering from a knee problem or arthritis. After massaging her mum, this gent said that his dad will come later to massage her mum again.
40. On the 27th of March 2013, Therese's mum had received a call from the father of this gent, Caucau (Accused) and inquired about their address so that he could come and massage her mum. She went down to Lautoka City Mall to pick him because her mum could not go there due to her knee problem.
41. Therese brought this masseur in a taxi to her place in Waiyavi. Then Therese went down to LTA office to sign some documents leaving her mum and the masseur behind. When she returned home, Caucau was sitting on a chair waiting and had told her mum that he was going to massage her as well. Caucau had told her mum that he had seen 'something' in her, that's why he needed to massage her.
42. Therese's mum asked Therese to change into a *sulu* so that this man could massage her. Caucau wanted her to be massaged in a room, so they went to her mum's room. When he came to massage her, she had to change into a *sulu*. The door was closed; but not fully closed. He told her to lie down so that he could massage her. Caucau started to massage her and started asking questions about her personal problems, marriage problems while he was massaging her. He massaged her abdomen, stomach, and then he started massaging her thighs and put his finger inside her vagina. She started to feel uncomfortable because he was moving his fingers around inside. He kept on asking her about how often she had had sex with her husband. He massaged her for about 20 minutes.
43. Caucau did not inform Therese why he was putting his finger inside her vagina. When he was putting his finger inside her vagina, she didn't do anything because she was scared. She had returned from a maxillofacial surgery about a year ago and any blow on the head or the face would have been very serious for her.

44. There was no man in the house. If she got up and screamed, this man would have retaliated probably by hitting her on the face.
45. Caucau continued massaging and when he had finished she stood up and went to the washroom to relieve herself. She was in a lot of pain. Then Caucau said, he had to go and then he will come back and massage her mother again. These did not relay to anyone what had happened to her.
46. Caucau came back the next day, 28th March, 2013 a little after mid-day. He massaged her mum first in the living room and said that he had to massage her again and asked her to go to the room. She went to the room and instead of going into her mum's room; he asked her that he will massage her in her room. Then they went into her room. He closed the door and asked if the door could be locked. She said 'yes'. And he wanted to know if the door could be opened from outside, she said 'no'.
47. He told her to take off her clothes and lie down face upwards so that he could massage her again. As she lied down, he started massaging her abdomen. He received a phone call during that time. After this phone call, he took her hand to put it in his *sulu* for her to touch his penis. She pulled her hand away. Then he started kissing her breast. She just felt uncomfortable. Then he went down to have oral sex and started licking her vagina. As she turned her head towards the bed, he came on top of her. He put his penis inside her vagina and turned her face to kiss her. She pulled her face away and told him that her stomach was paining. He got off and then he put his fingers inside her vagina again. By this time she was really uncomfortable so she told him that the pain had gone away. Then he stopped. There was a towel which he grabbed and wiped himself then he wiped her and said 'what he had come to do was done'.
48. When asked what her reaction was when he was doing all these, she said that she was scared because he had betrayed the trust knowing that both her father and brother were dead and only two women lived in the house. Then he opened the door and went into the toilet to relieve himself and came out to say he was going.
49. When she came out from the room her mum was in the kitchen cooking because they had to go to church that night. She didn't relay the incident to her mum till they came back from church that night. She relayed it to her mum because this man wanted to go to Suva and massage her sister as well.

50. When asked why she didn't relay the incident to her mum earlier before she went to church, she said that she couldn't as she was too ashamed. When asked why she didn't refuse to go to the room with this man on the second day after what had happened on the first day, she said that she didn't want to get massaged but her mum insisted that she get massaged by this man. She was ashamed to tell her mum what he did the first time and she didn't expect him to do what he did.
51. When asked whether she made any effort to try and resist him or try and stop him from further massaging she answered in the negative and said that she was scared because there was no male in the house to call for help. She also said that she had told Caucau about the facial surgery she had undergone and was scared that he would blow on her face.
52. When she relayed the incident to her mother, her mother called Therese's sister in Suva who was waiting for this man to come and massage her as well and told her what he did.
53. Then her sister advised them go down to the Police station and report it. Then she called her husband who was separated from her at that time to come home and told him the story of what had happened. They went down to the Police station the next day and reported.
54. Under Cross-examination by Defense Counsel, Therese denied that, after Caucau massaged her mother, it was she who made the request to massage her stomach because she felt as if something was moving around in her stomach. She admitted that she knew that he was going to touch her stomach and that her upper body would be naked during the massage.
55. She denied that it was her decision to go to the room for massaging. She admitted that she did not scream, cry for help and complain to her mother. She also admitted that she did not ask Caucau not to come again when he told her mum that he'll be coming back the next day. She did not tell her mum not to bring him back.
56. She admitted that Caucau didn't threaten her on the first day. She also admitted that it was her mother that had insisted that he massage her because he had insisted her mother that he had seen 'something' within her.

57. She admitted that, in her statement to police, she had not told that Caucau had uttered that he had to massage her because he had seen 'something' in her.
58. She admitted that, on the second day, she was leading the way to her room. He had asked her to change into a *sulu*. Therese denied that, while he was massaging her stomach, she had informed Caucau that she felt something moving around on the top part of her vagina.
59. When asked why she did not complain promptly to her mother, she said:

"what does a person do in a state of shock? I would have told her earlier, Yes. We have waited for a while to come to the court house today. Had it happened back, then if we came to court back, then everything would have been fresh in my mind, Yes. But everything that I have sworn by this bible everything that I have said has and did happened".

60. She said that she did let him know that the door cannot be opened from outside, if locked from inside, because she did not know what was going to happen behind the door that day.
61. When asked why she didn't tell her mother what had happened during the massage on the first day, she said she was ashamed of what had happened and didn't know how to tell her mother that somebody had come to massage her and put his hand in her vagina.
62. She said that she was in a state of shock while she was giving her statement and was crying half the time.

PW 2 Judith Teirotume

63. Second witness for Prosecution is Judith, the mother of the Complainant. On the 27th of March 2013, she received a call from Caucau to say that he was at the Mall. Since she had a knee problem caused by arthritis she sent her daughter Therese, to meet him and to bring him home.
64. Therese brought him home. Caucau introduced himself as a former Police Officer. They had a talk and then he said he will massage her leg. He saw Therese and said that there is something in her (Therese) and he needs to massage her.

65. Caucau massaged her and then he asked Therese that he will massage her and that he will take her to the room. Whilst Caucau was massaging Therese in her room, she was in the sitting room. He massaged Therese and told her that he will come back the next day for massaging.
66. Caucau came the next day, on the 28th of March 2013. He massaged her and after he had massaged her, he told Therese that it was time for him to massage Therese and that he is going to massage her. Judith was in a phone call for a while and after the phone call, she realized that they had gone to Therese's room.
67. After massaging Therese, Caucau came out and said that something was with her daughter and that he will go and come back again, but he didn't give a date. She said 'okay'. They went to church in the afternoon. She could see the anger in Therese but she (Therese) didn't want to say anything. She asked Therese, what was wrong? Did the man do something to her? She said, 'yes'. Therese said that he didn't only massage but he went further than that. So they both cried. Judith said she is really sorry for what happened, 'this is all her fault he came to massage her, please forgive for everything', she said.
68. Judith just presumed what had happened because the door was locked. After Therese had relayed this to her, she called her daughter in Suva and was told to report this to police. She called Therese's husband home, told him the story and told him to take Therese down to the Police Station.
69. Under cross examination, she said that she was not aware whether it was her daughter that had asked if he could massage her stomach. Caucau said that he had to massage Therese because 'something was with her'. She elaborated and said that Therese was carrying a baby at that time.
70. She said that, after the massage, even though she did not complain, she was very moody.
71. She also said that her daughter Crystal later came to the house and got massaged first. On the 28th Therese looked as if she was about to cry, she looked fugitive. She did not elaborate or didn't say anything exactly what was done to her.
72. That Ladies and Gentlemen was the case for the Prosecution.
73. When the Prosecution had closed its case, you heard me explain to the Accused his rights in defence. He could remain silent and say that the Prosecution had not

proved the case beyond reasonable doubt; he could give evidence and be subjected to cross examination and call witnesses on his behalf. I explained his rights because I am required by law to do so. Not because he had to prove anything in this case.

Defence Case

74. The Accused elected to give evidence under oath even though he had nothing to prove in this case. That is his right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. Even if you don't believe a single word accused person says, you must still be sure that he is guilty of the crimes that he is charged with.
75. Accused said that upon his arrival at Judith's place, he informed Judith that his son had told him to come and massage her leg. She then massaged Judith.
76. Upon completion of Judith's massage, Therese said that she is also sick and something running on her stomach and she needs to be massaged. Judith told Therese, to change her dress to wear a *sulu*. Therese went to the bedroom and called Caucau. He followed her into the room.
77. Once he had gone into the room, she mentioned that something is running in the stomach. He told her to pull the *sulu* up and massaged her stomach. She then said that something is moving into her stomach. Then she asked him to move his hand a little bit on the vagina but he never touched the whole of the vagina, only part of it. She's wearing her panty. The door was not properly closed, there was a little gap.
78. Caucau massaged top part of her vagina for about 10 minutes. She was just relaxing. He denied inserting his finger into her vagina. After he had finished massaging, he informed Therese that he'll be coming the next morning.
79. He came back the next day on the 28th of March 2013 and massaged the mother first. Once he had completed massaging the mother, Therese called him to her bedroom. She asked him to lock the door because her son was about to come from school. On the second day, he only massaged her stomach and left. He

denied penetrating Therese's vagina with his finger or penis. He also denied kissing her breasts and licking her vagina.

80. Under cross examination, Accused denied having informed Judith that he noticed something was inside Therese. He admitted that it was Therese's mother who had insisted that he massage Theresa. Accused admitted that whilst massaging Therese inside the room, she mentioned about her surgery.

Analysis

81. The Prosecution based its case substantially on the evidence of the Complainant. If you are satisfied that the evidence Complainant gave in Court is reliable and trustworthy you can safely act upon her evidence in coming to your conclusion. No corroboration is required from an independent source.
82. Considering all the evidence led in the trial, if you are satisfied that Complainant had told the truth and her evidence is believable, then you have to consider whether the Prosecution has discharged its burden and proved each element of each offence beyond reasonable doubt. You have to consider each count separately.
83. There is no dispute in this case with regard to the identity of the Accused. Accused admitted that he come to Complainant's house on 27th and 28th March, 2013 and massaged Complainant's body. Both Prosecution witnesses identified the Accused in Court.
84. Prosecution says that Accused committed unlawful acts alleged in the Information and those acts were committed without Complainant's genuine consent; namely that he committed those acts under the guise of massaging or medical therapy and Complainant gave consent only to massaging in the belief that there is 'something' in her body which Accused could eliminate, but Accused went beyond his limit. Accused completely denies physical acts alleged, namely, kissing of Complainant's breasts, licking her vagina, and penetration of her vagina with his penis and finger.
85. Prosecution called two witnesses, the Complainant Therese and her mother Judith. Prosecution based its case substantially on the evidence of the Complainant.

86. You must decide whether you are sure that Accused did all unlawful acts alleged in the Information and that the Complainant did not consent to any of those acts. That will require an assessment by you of the Complainant's evidence.
87. Defence says that Complainant did not make any complaint about the alleged incidents to her mother or anybody at the first available opportunity until her mother questioned her and the complaint she ultimately made to police is a fabrication. Defence also argues that she had not raised any alarm, not screamed, not thrown a fuss and allowed the Accused to massage her on the second day because nothing had happened on the first day. Defence also says that evidence of the Complainant is not consistent with her mother's evidence when she stated that, her mother had insisted that her to be massaged by the Accused and also with her previous statement to police. Defence further says that Prosecution had failed to prove the fourth element of Rape beyond reasonable doubt.
88. Complainant explained why she failed to report the matter promptly at the first available opportunity. She said that she was ashamed of what had happened and didn't know how to tell her mother that somebody had come to massage her and put his hand in her vagina. In light of directions I have given, you consider whether the explanation given by the Complainant is reasonable in the circumstances of this case and from her perspective.
89. On the second day, they went to Therese's room for massaging and she disclosed the information to the Accused that, when the door is locked from inside, it can't be opened from outside. Complainant said that she did not know what was going to happen behind the door that day. Accused said that it was upon a request of the Complainant that they went to the room. He further said that the Therese had a son and she did not want the son to see her naked waist up being massaged that is the reason they went to the room. He also said that she was the one who asked him to lock the door so that the son could not come in when he is massaging the Complainant.
90. Lady and the gentlemen Assessors, Defence Counsel asked you this question. Would a reasonable person in that position knowing that he had done something wrong to her the day before, disclose that information (that the door cannot be opened from outside) she did? She argued that she disclosed that information because nothing had happened on the first day and she was comfortable in going with him.

91. You have to give a serious thought to this question. You may think that she did not raise alarm or complain on the first day because she had consented to the digital penetration. You may also take the view that she did not complain because nothing had happened and she has made up a story. You may also think that she did not complain because she had given consent to the Accused in the reasonable belief that Accused, by his therapy or massage, could eliminate her sickness or whatever was in her body or stomach. If you take this last view, her consent is not genuine because it had been obtained by false and fraudulent representations about the purpose of the act. You have to seriously consider whether she was mistaken as to the purpose of the act of the Accused.
92. Counsel for Accused in her closing remarks stated that, according to the version of the Complainant, the Complainant did not throw a fuss, did not shout, didn't scream, and when a finger was inserted into her vagina on the first day, she did nothing, she just looked away and, when he told that he will come again she did not say 'no'; and on the second day, she was the one who was leading, showing the Accused which room to go to. In this context, the Counsel for Defence argues that, even if her version were to be believed, conduct of the Complainant did not indicate to the Accused that she was not consenting and therefore the 4th element of Rape had not been satisfied by the Prosecution. Defence Counsel posed this question; did the Accused know at that time that she was not consenting? and invited you to return with a not guilty opinion if you answer this question in the negative.
93. I must tell you that, according to the Crimes Act, there is no requirement in this case that the Prosecution must prove the so called 4th element of Rape, namely that accused knew or believed that Complainant was not consenting or did not care if she was not consenting. This common law element is no longer a part of Rape in Fiji. It is not necessary to prove that Complainant must send a clear message to the Accused for him to know or believe her dissent by way of shouting, struggling or in some other way. The offence of Rape charged requires proof that the Complainant did not consent. The offence may or may not be accompanied by force or the threat of force, but please note that it is no part of the Prosecution's obligation to prove that the accused used force or the threat of force.
94. In her closing argument Defence Counsel submitted to you that her failure to protest and react positively demonstrates that she was not telling the truth. This is an argument which you should consider with care when you do, you should not assume that there is any classic or typical response to an unwelcome demand

for sexual acts. The experience of the Courts is that people who are being subjected to nonconsensual sexual activity may respond in variety of different ways.

95. You may also consider if there is a reason or motive for the Complainant to make up a story against the Accused.
96. Placing before the Complainant and her mother their previous statements to Police, Defence Counsel highlighted some omissions and says that they have not been consistent. You must consider whether those omissions are material and significant so as to affect the credibility or whether they are only in relation to some insignificant or peripheral matter. Complainant said she was in a state of shock and in tears when her statement was being recorded. It was also stated that police officer who recorded the statements did not question to get some answers. You must consider whether the variation was due to loss of memory, 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.
97. Accused flatly denies the allegation and gave evidence in his defence although he was not required to prove his innocence or prove anything at all. You must consider his evidence and evaluate it using the same tests that you have used to test the credibility of Prosecution version. If you believe his version, you must find him not guilty. Even if you don't believe him Prosecution must prove the charges beyond reasonable doubt.
98. If you are satisfied that the version of the Prosecution is credible and believable, then you have to be satisfied that each element of the offence of rape and Indecent Assault has been proved beyond reasonable doubt. If you are sure that Accused penetrated the Complainant's vagina with his finger without her consent you can find him guilty on counts 1, 2 and 6. If you are sure he penetrated the Complainant's vagina with his penis without her consent, you can find him guilty on 5th count. If you are sure Accused touched the vagina of the Complainant without her consent you can find him guilty on count 3. If you are sure Accused kissed the breasts of the Complainant without her consent you can find him guilty on count 4.
99. Complainant clearly said, under cross examination, that she was never subjected to any threat or intimidation. You have to decide whether the consent was

obtained by the Accused by making false and fraudulent representations about the nature or purpose of the act.

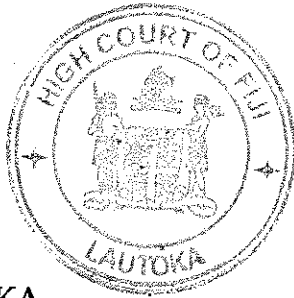
100. Remember, the burden to prove that the consent was obtained by false and fraudulent representations about the nature or purpose of the act rests on the Prosecution. Accused is under no obligation to prove that he did not make false or fraudulent representations to obtain her consent.
101. I must 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.
102. 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 offence. 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.
103. If you accept the Prosecution's version of events and you are satisfied that the Prosecution has proved the case beyond reasonable doubt, so that you are sure of Accused's guilt you must find him guilty. 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 as charged.
104. Your possible opinions are as follows:


1 st Count Rape -	Accused Guilty or Not Guilty?
2 nd Count Rape-	Accused Guilty or Not Guilty?
3 rd Count Indecent Assault	Accused Guilty or Not Guilty?
4 th Count Indecent Assault	Accused Guilty or Not Guilty?

5th Count Rape
6th Count Rape

Accused Guilty or Not Guilty?
Accused Guilty or Not Guilty?

105. You may now retire to deliberate on the case, and once you have formed your opinions, you may inform our clerks, so that we could reconvene, to receive the same.
106. Any re-directions?




Aruna Aluthge
Judge

AT LAUTOKA
28th June, 2017

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