

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 94 OF 2015

STATE

v

EDWIN ALVIN KUMAR

Counsel: Ms. S. Kiran for State

Ms. S. Vaniqi for Accused

Date of Trial: 4th 5th and 6th of April, 2018

Date of Summing Up: 12th April, 2018

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. Matters of facts however, are a matter 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. In other words you are the judges of fact. All matters of fact are for you to decide.
4. The Counsel for Prosecution and Defence made submissions to you about the facts of this case. That is their duty as Counsel. You are not bound by their submissions. However, you may properly take their submissions into account when evaluating evidence.
5. 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.
6. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the prosecution and never shifts.
7. 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. Remember if you have any doubt, it must be reasonable. You cannot speculate. These doubts must be based solely on the evidence or lack of evidence that you have seen and heard in this court room.
8. Your opinions must be solely and exclusively based 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 court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial. Approach the evidence with detachment and objectivity.

9. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw reasonable inferences from facts proved by evidence. However, the inferences should not be based on mere speculation.
10. An incidents of rape and sexual assault 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 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.
11. 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 witness.
12. 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. 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.
13. 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 a trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

14. I have given you a copy of the Information which contains one count of Rape and one count of Sexual Assault. The Information read as follows:

First Count

Statement of Offence

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

Particulars of Offence

Edwin Alvin Kumar on the 6th day of May, 2015, at Nadi in the Western Division, penetrated the vagina of **Sofiya Begum** without her consent.

Second Count

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Edwin Alvin Kumar on the 6th day of May, 2015, at Nadi in the Western Division, indecently assaulted **Sofiya Begum** by licking and sucking the vagina of the said **Sofiya Begum**.

15. In order to prove the 1st charge, the Prosecution must prove beyond reasonable doubt that the Accused penetrated Complainant's vagina with his penis without her consent. Insertion of penis fully into vagina is not necessary. A slightest penetration is sufficient to satisfy this element.
16. On the issue of consent, it must be proved that the Accused either knew that the Complainant did not consent or was reckless as to whether she consented. The Accused was reckless as to whether the Complainant consented to penetration if

you are sure that he realised there was a risk that she was not consenting and carried on anyway when in the circumstances known to him it was unreasonable to do so.

17. Consent as defined in Section 206 of the Crimes Act, 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.
18. I will now deal with the elements of the offence of Sexual Assault. A person commits the offence of Sexual Assault if he,
 - (a). Unlawfully and indecently,
 - (b). Assaults another person.
19. For the assault to be indecent it must be accompanied by a circumstance of indecency. A conduct is unlawful when it is done without a lawful excuse. A conduct is indecent when it is as such that ordinary people would so describe it, in light of prevailing standards of morality and, more specifically, in light of whether the victim has consented to the conduct in question. However, Prosecution is under no burden to prove that the particular assault took place without the consent of the victim so long as it constitutes an unlawful and indecent act.
20. 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 complainant 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.
21. Documentary evidence is evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that

contemporaneous recordings were made at the relevant time upon examination of the Complainant.

22. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. 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. 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 expressed on a particular fact to aid court to decide the issues/s before court on the basis of their learning, skill and experience. In this case, the doctor gave evidence as an expert witness. Doctor's 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 her opinion had been 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 led in the case. You have to bear in mind that the expert evidence does not implicate the Accused or link him to the alleged offences even if you decide to rely on it. You can only use doctor's opinion to test the constancy of Complainant's story.
23. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who have gave evidence in court. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.
24. While cross-examining witnesses of Prosecution, Defence Counsel referred to previous witness statements recorded by police. A previous statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath as being true. You can of course use those statements to test the consistency and credibility of the witness.
25. In testing the consistency of a witness you should see whether the witness is telling a story on the same lines without variations and contradictions. 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 other person, for example by a police officer, in recording the statement.

26. You must remember that merely because there is a difference, a variation, 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.
27. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witness's 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? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
28. 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.
29. In testing the credibility of a witness, you may consider 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 is 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 for such delay.

30. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. There can be a reasonable explanation for the delay. It is a matter for you to determine whether, in this case, the lateness of the complaint and what weight you attach to it. It is also for you to decide, when complainant did eventually complain, whether it was genuine.
31. I now wish to direct you on recent complaint evidence. You heard that the Complainant said that she complained to her mother about the alleged rape when she returned home. Complainant's mother Sania gave evidence and said that she received a complaint from the Complainant when the Accused left home at 10 a.m. However, Sania was not present during the alleged incident and therefore, she is not capable of giving evidence as to what actually happened between the Complainant and Accused. What she heard from the Complainant is not evidence as to what actually happened between the Complainant and the Accused. Recent complaint evidence is led to show consistency in the conduct of the Complainant and is relevant in assessing her credibility. If you find Sania a credible witness than you may use the complaint she received to test the consistency and credibility of the Complainant.
32. Evidence was led that the complainant looked distressed, that her eyes were swollen and she was crying, when her mother arrived home shortly after the alleged incident. This is how you should approach the evidence of distress. You must be satisfied beyond a reasonable doubt that the Complainant's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged sexual offence. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred. The distress evidence must not be used to connect the Accused to the alleged offence. Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause. In deciding these matters, you must take into account all relevant circumstances. If you are so satisfied then you may give such weight to the evidence of distress as is appropriate. But if you are not so satisfied then you must disregard the evidence of distress.

33. You may also consider whether there is a reason or motive on the part of the Complainant to make up an allegation against the Accused. If she had such a motive, then you may think that this allegation has been fabricated.
34. The offence of Rape requires proof that the complainant did not consent. The offence may or may not be accompanied by violence, 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 or that Complainant had received injuries.
35. 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.
36. I will now remind you evidence led in the trial. It is a short trial and things should be fresh in your memory. I will only summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant.

Case for Prosecution

PW 1- Sofiya Begum, (Complainant)

37. Prosecution called the Complainant, Sofiya Begaum, as their first witness. In May, 2015, Sophia was residing in Sabeto, Nadi with her two daughters, and her mother, Sania Begum.
38. On the 5th of May, 2015 Edwin Alvin Kumar, her ex – husband called her that evening and informed that he will be coming to visit her. She said '*don't come to my place*'. She did not want him to come because they had been separated for over one year. But he still insisted that he will be coming.
39. At night, mother went to her grandmother's place. After mother had left, Edwin visited her around midnight. The daughters were both sleeping at that time. When Edwin called out her name, she opened the door. Her eldest daughter Sania woke up. She was happy to see her father. Then her younger daughter also woke up, and then Alvin came inside the house and sat in the sitting room.

Sofiya asked him *'why you came here when I told you not to come?'* He never answered. The two daughters were on his lap hugging and kissing their father.

40. After 1.30 a.m., she told daughters- *'we go to sleep'*. But they did not want to go. They wanted to play with the father. Then Edwin shouted at them to go to sleep and then the girls started crying. Sofiya followed them to make them sleep in the bedroom. Edwin also followed them. She told him not to follow them. He never listened and came and sat beside her on the bed where the daughters were.
41. While she was making them sleep, Edwin put his hand from the back on her shoulder and started touching her. Sofiya pushed his arm and said *'there's nothing between us that you have any right to touch me, don't touch me.'* He did not listen and started touching whole of her body. She stopped him and her youngest daughter woke up and, shouted *'Abhu, no'*. Edwin shouted at the daughter and told her to sleep. Then Edwin pushed Sofiya on her chest and told her to lie down on the bed. She fell on the bed. He came on her and started pulling her nightie up. She was just saying, *'no, I'll kick you'*. She pushed him on his stomach and chest but she could not push him. Then, he pulled her nightie up and pantie down. The panty got torn.
42. Sofiya started crying. By that time daughters were asleep. Then he dragged her hand and pulled the mattress from the single bed to the kitchen. He was holding the mattress with one hand and dragging her by the other hand. She was trying to hold on to the sofa but he pulled her and dragged her to the kitchen and threw the mattress on the floor. Then he pushed hard to fall her down on the mattress. Then he came on the mattress and started pulling her nightie up to take it out. He started kissing her tummy and told her to suck his penis. She sucked his penis. She was just pulling her head up and he was pushing her head down to do it. Then he started licking her vagina from his mouth and tongue.
43. Once the sucking and licking session was over, he made her turn and told her to do *'sit ups'*. She did the *'sit ups'* sitting on his penis. He was holding her hand forcing her to do it. Then he made her lie down on the mattress and started having sex with her. He fucked her. His penis was going inside her vagina. She pushed him and said, *'I don't want to do it'*. Then he said that he will release his sperms inside her vagina. She said, *'no, I'll get pregnant'*. He released his sperms

inside her vagina. He said that she won't get pregnant. Then he stood up and went inside the bathroom. When he was doing all these things she was feeling the pain in her vagina. She sat on that same mattress and started crying because he forcefully did it to her and for what had happened to her. Then Edwin returned back from bathroom. He saw her crying. He said, *don't go to police and report. If you will go to Police, I will take out one of your eyes and I will kill you*'.

44. Sofiya got up and went to the bathroom. When she came back it was 5.30 in the morning. Edwin went to the room where girls were sleeping. He slept with daughters while she was sitting in the kitchen waiting for her mum to come. Her mum came around 6.00 o'clock in the morning, and when mum saw her, she asked, *'what happened? You cried?'*, because her eyes were swollen. She said, *'yes'*. She informed that Edwin is here. Mum went inside the bedroom and saw Edwin sleeping with girls. Then, mum came and started cooking. Around 10.00 a.m., Edwin dressed up and left home without talking to mum. Then she told her mum what Edwin had forcefully done to her. Mum then said, *'go to Police, and report'*. She went to the Namaka Police Station to lodge a complaint even without having breakfast. Police officers took her report and took her to the Nadi Hospital for a medical.
45. Under cross examination, Sofiya admitted that the incident happened during quiet early hours in the morning. There is a concrete house about 5 or 6 steps away from her kitchen and a lot more houses in the neighbourhood.
46. She said that her mum sometimes went and spent the night with her sickly mother. She denied that she had called Edwin and asked him to come and spend the night with her and daughters because she knew her mother would be leaving that evening.
47. Sofiya denied that she had met Edwin in Nadi with some groceries and they both traveled home in the bus and arrived at Waimalika around 6 p.m. and, when they had arrived, her mother left to visit the grandmother.
48. Sofiya admitted that she began the relationship with the Accused in 2008 and got married in 2011, and lived separately even after marriage. She denied that her attitude, fuzziness and rudeness had led to the separation.

49. She admitted that she had not told her mother about the alleged incident as soon as she arrived home. She said she waited until Edwin left at 10.00 a.m. because mother was angry when she saw Edwin sleeping with girls.
50. She admitted that her statement was recorded on the 7th of May 2015 because she was taken to the medical the day she went to lodge the report. She admitted that her medical was done on the 6th May, about 11 hours after the alleged incident.
51. She said that at no time, she was co-operating with his sexual advances. She said she had refused to have sex and even told him that she will kick him.
52. She said that both the sexual assault and the rape happened in the kitchen. When she was referred to her previous statement to police, she admitted that she had told police that the sexual assault, the licking of the vagina, happened on the bed next to the sleeping children and the rape and the oral sex happened in the kitchen.
53. Sofiya admitted that the statement given to the police is right. Explaining the reason for inconsistency, she said that, after 3 years, she just can't remember everything what happened. She denied making up this allegation against the Accused and that she was lying.
54. She said that the sex was painful because he was forcing himself into her vagina. She complained to the doctor of redness or soreness, bruising on her private part. She also complained to the doctor of cuts and bruises on her chest, arm and upper chest. She denied the proposition that injuries on her arm and chest were self-inflicted to mislead the police. She also denied the proposition that she did not immediately complain to her mother when she arrived home because no rape in fact happened.
55. She agreed that when she had his private part in her mouth, it would have been possible for her to bite down or cause injuries to his penis and stop the rape. She admitted that she didn't defend herself by biting his private part. In her explanation, she said that she was pushing it and taking her mouth out from him while he kept on pushing her head.
56. She admitted stating to police that while Edwin was sucking her vagina he was forcing his erected penis on her mouth and they placed themselves in a '69'

posture. She agreed that that requires some cooperation between the couples having sex.

57. She denied that she made up this allegation of rape because she was angry on him and wanted to get back at her ex-husband or hurt him. She also denied that Edwin's friends often called her saying that Edwin is seen around town with different women. She said she did not have any problem with him having love affairs with other women because she had already divorced him. She denied visiting Tiam's workplace and screaming and shouting at her.
58. In her re-examination, Sofiya said that when the doctor asked her about the pain and injuries she showed her private part.

PW2 -Sania Begum

59. Sania is the next witness for Prosecution. She is the mother of Complainant. In 2015, she was living with her daughter Sofiya and Sifiya's two daughters at Waimalika.
60. On the 5th of May, 2015, at around 7.00 p.m., she went to visit her sickly mother and returned home at 6.00 a.m., in the next morning. When she arrived home Sofia told her that Edwin is in the house. She saw that Sophia was crying and her eyes were swollen. She looked around and saw Edwin sleeping in the house. She got angry and started to cook food. When Edwin went away at 10.00 Sophia told her everything. Sophia told her that Edwin raped her and she told Sofia to go and report it to the police.
61. Under cross examination, Sania denied that Sofiya sometimes used to call Edwin and asked him to come and stay with them because they were afraid to stay in the dark. She said that Edwin never came to her house and that was a first time he had come when she was not home. She also denied that Sophia and Edwin arrived home that evening around 6.00 p.m. with some groceries for the grandchildren.

PW3 - Dr. Sainimili Bulatale

62. Last witness for Prosecution was Dr. Bulatale. She came in as an expert witness in the field of medicine.

63. She had examined Sophia Begum at Nadi Hospital at 5.00 p.m. on the 6th May, 2015 and compiled a report. She tendered the medical report in her evidence marked as PE1. In her examination, doctor observed three findings on Sofia's body. The first one was bruises on the left breast and chest. The second one was a slight laceration on the left chest wall and the third one was the swelling on the left forearm. She said that the likely causes of contusion or bruises are a bump or being thrown at something by someone. She did not rule out the possibility of such bruises being caused to the patient if she was pushed on the chest to fall back.
64. The slight laceration or scratch on the left chest wall could have been caused by a sharp finger nail. The swelling on a left forearm could have been caused by a bump or when being held by force. She agreed that such a swelling on hand could have been caused if a significant force was applied when the patient was held, pulled or pushed down with the hands or held during a sexual activity.
65. Doctor found no bruising or any other injury in genitalia other than the hymen being not intact. She said that since the patient had given birth to two babies, she did not find any co-relation between the state of hymen and recent sexual activity. She said she would not expect injuries on genitalia after a recent sexual activity in a woman who had already given birth twice unless force was used on it because it would have been more elastic.
66. Under cross examination, the doctor agreed that generally in an un-cooperating rape victim, if the penetration was forced and painful, she would expect some redness, bruising, soreness, abrasions or laceration on the genitalia even after 14 hours of the incident. Doctor agreed that she saw no bruising, soreness, on this patient, and therefore she recorded -"*Genitalia- nil bruising noted; difficult to ascertain any recent sexual activity/penetration*" in her report. Doctor agreed that even in a mother of two, she would still expect to see redness, soreness, swelling, abrasions in her genitalia, if it's forced, painful sex.
67. Under re-examination the doctor agreed that she would not expect redness, soreness or bruising in all women with children whose genital area is more elastic.

68. That is the case for the Prosecution. At the close of the Prosecution case, you heard me explain to the Accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
69. As you are aware, Accused elected to give evidence and call a witness on his behalf. 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.

Case for Defence

DW1- Edwin Alvin Kumar (Accused)

70. Edwin said that he was in a boyfriend and girlfriend relationship with Sofiya from 2008 and he married her in 2011. They didn't actually live together as husband and wife because she didn't want to stay with his family, leaving her mother alone. They got separated because she used to call him and tell stories that he was going around with other girls while staying with her.
71. On 5th May 2015, Sofia called her in the day time and asked him to come over because her mother was going to her grandmother's place and for her to buy groceries for the kids. He was waiting at the carrier stand and met Sofiya at Shop & Save in Nadi town around 5 p.m. and did some shopping. Sofia invited him to come with her to her house because she was afraid to stay alone with daughters at night in a house which had no electricity and sometimes was stoned by neighbors at night.
72. He then accompanied Sofiya to her place at Waimalika. When they reached home around 6.30 p.m., Sofiya's mother and daughters were home. Daughters were so happy to see him and started playing with him. Sofiya's mother then left for her mother's place.

73. He was sitting in the sitting room with daughters while Sofiya was cooking. After dinner, he went to sleep at 9 p.m. on the mattress that was in the kitchen. He denied touching Sofiya in a sexual manner while her children were on the same bed. He denied the allegation of licking her private part and forcing her to have sex with him. He said that this serious allegation has been made because Sofiya was jealous of him that he had refused to stay with her permanently at her house in Waimalika.
74. Around 6.30 a.m., on 6th May, 2015, he left for work after Sofiya's mother had arrived. He came to know about this rape and sexual assault allegation 15 days later when an officer from Namaka called him. When he was interviewed on 25th May, 2015, under caution he told exactly the same story to police. When he was referred to D12 of the medical report, Edwin said that Sofiya could have inflicted the injuries by herself.
75. Under cross examination, Edwin agreed that by May, 2015, it was almost a year ago that they had decided to separate because they did not wish to live together in a marital relationship. He agreed that Sofiya was angry and fighting with him every day when they got separated. She also agreed that under these circumstances, Sofiya wouldn't be calling him to stay with her even if she was scared being alone at home. He did not however agree that her refusal to stay with him is not an appropriate reason for her to make such a serious allegation because she was already separated from him.
76. Edwin admitted that he had never told police that he went with Sophia to Shop & Save to do the shopping. He denied all the allegations against him.

DW2 -Imran Khan

77. Last witness for Defence is Imran Khan. He is the brother-in-law of the Accused. Khan is a carrier driver, based at the Nadi bus stand. On the 5th of May, 2015, between 5.00 and 5.30 pm., he was at the carrier stand in Nadi. He said he saw Edwin and his wife Sofiya going towards the bus stand with plastic bags in his hands.
78. Under Cross Examination, the witness said that he did not make a note of this day or make a diary entry that he saw Edwin and his wife on that particular day.

He had no particular reason for him to remember this day. Witness said that he is married to Edwin's sister and wouldn't want Edwin to be convicted or sent to prison.

Analysis

79. Lady and gentlemen Assessors, the Accused is charged with one count of Rape and one count of Sexual Assault. There are two counts hence you are supposed to consider evidence against each count separately.
80. To find the Accused guilty on the first count, you must be satisfied beyond a reasonable doubt that he penetrated Complainant's vagina with his penis without her consent. You should be satisfied beyond a reasonable that Accused licked or sucked Complainant's vagina to find him guilty on the 2nd count.
81. There is no dispute as to the identity of the Accused. Accused admitted that he is the ex-husband of the Complainant. All elements of Rape and Sexual Assault are disputed by the Accused. The Defence case is one of denial. They say that the Accused did not commit any of the alleged sexual acts.
82. Prosecution called three witnesses and based their case substantially on the evidence of the Complainant. The resolution of the dispute depends on whether you accept the Complainant as a truthful witness. If you are satisfied that the evidence she gave in Court is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration is required.
83. Prosecution says that the Complainant is consistent and reliable. They rely on recent complaint evidence to prove Complainant's consistency. Prosecution says that Complainant relayed the incident to her mother, Sania, and made a prompt complaint when she returned home. They had gone to police to report the incident on the same day. Sania said that she received the complaint of rape from the Complainant when the Accused left the house around 10 a.m.
84. Defence argues that, after the alleged incident, Complainant was awaiting her mother's return and, if the complaint were true, she could have relayed the incident to her mother soon after her arrival. You heard Complainant's explanations as to why she did not relay the incident to the mother until the Accused had left at 10 a.m.. Considering the directions I have given, you decide

what weight to be attached to the recent complaint evidence and if the complaint she ultimately made to police was genuine.

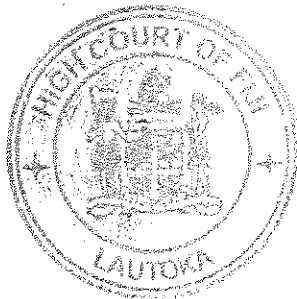
85. Prosecution relies on distress evidence. I have directed you as to how you should deal with distress evidence. If you are satisfied that the Complainant was in a distressed condition after the alleged incident and that distressed condition was not artificial and was only referable to the alleged sexual offences and not any other cause, then you may give such weight to the evidence of distress as is appropriate, having taken into account all relevant circumstances.
86. Prosecution also relies on medical evidence to prove consistency of the Complainant. They say that doctor's three findings on Sofia's body namely, bruises on the left breast and chest, the slight laceration on the left chest wall and the swelling on the left forearm are consistent with Complainant's evidence that she was raped and sexually assaulted.
87. Defence on the other hand says that those injuries were self-inflicted by the Complainant to mislead the police. They also argue that doctor's finding is inconsistent with Complainant's version that she was raped because the doctor had observed no injuries on genitalia of the Complainant. You heard what the doctor had to say about the arguments of both sides. Having taken into consideration the directions I have given and other evidence led in the trial, you decide what weight you should attach to doctor's opinion.
88. Defence says that the Complainant did not tell the truth in court. They say that her evidence is not consistent with her previous statement to police in respect of the place where the alleged sexual assault (licking of her vagina) took place. Complainant's explanation was that she could not recall every detail after three years. In light of the directions I have given, you decide what weight you should give to those so called inconsistencies.
89. You observed Complainant's demeanor in court. You decide if she is an honest and credible witness and what weight should be attached to her evidence.
90. Position of the Defence is that the allegation against the Accused is fabricated. Accused said that the allegation was made up to hurt him because the Complainant was jealous and angry that he refused to stay with her permanently

at her house in Waimalika. Counsel for Prosecution on the other hand argues that the alleged motive for fabrication cannot be true because they had already decided to live separately almost a year ago.

91. You heard Defence Counsel's arguments with regard to reliability of Complainant's version. It was argued that Complainant could have bitten Accused's penis if it were forced in to her mouth. Counsel for Prosecution asked you to consider this argument carefully because the people who are being subjected to nonconsensual sexual activity will respond in variety of different ways. In forming your opinion you should not assume that there is any classic or typical response to an unwelcome sexual activity.
92. It was also argued that the alleged sexual postures or positions namely, 'sit ups' and acts of licking her vagina and oral sex (sucking of his penis) at the same time in what she called a '69 position' is not possible without the cooperation of the Complainant. It is up to form your own opinion on that.
93. The version of the Defence is that the Accused was invited by the Complainant to her house to have a sleep over because she was scared to spend the night. You heard what the Complainant and her mother had to tell about this. The Counsel for Prosecution argues that this version is implausible because they had already decided to live separately after fighting each other almost a year ago.
94. Defence also called Accused's brother-in-law Imran Khan to support the version of the Defence that Accused and Complainant had done some shopping in Nadi town in the evening of 5th of May, 2015.
95. Prosecution says that Khan who is Accused's brother-in-law is an interested witness and therefore not reliable. They also say that it is not possible for him to remember the exact date of such an insignificant event unless it was noted down or something significant happened on that particular day. You decide if Khan is a reliable witness and what weight should be given to his evidence.
96. You watched Accused giving evidence in Court. It is up to you to decide which version is to believe and whether you could accept the version of the Defence. If you accept the version of the Defence you must find the Accused not guilty. Even if you reject the version of the Defence, still the Prosecution should prove their

case beyond reasonable doubt. Remember, the burden to prove the Accused's guilt beyond reasonable doubt on each count lies with the Prosecution throughout the trial, and never shifts to the Accused, at any stage of the trial.

97. If you believe the Complainant is telling you the truth that the Accused penetrated her vagina with his penis on the 6th of May, 2015, without her consent and that he licked or sucked her vagina, then you may express an opinion that the Accused is guilty on each count. But if you do not believe the Complainant's evidence regarding the alleged offences, or if you have a reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty.
98. Your possible opinion is either guilty or not guilty on each count. Please remember, you are to consider evidence against each count separately.
99. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
100. Any re-directions?



Aruna Aluthge
Judge

AT LAUTOKA
12th April, 2018

Solicitors: **Office of the Director of Public Prosecution for State**
 Vaniqi Lawyers for Defence