

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 6 of 2018

STATE

V

PENI QARO

Counsel : Ms. R. Uce and Ms. S. Navia for the State.
: Ms. J. Singh for the Accused.

Dates of Hearing : 20, 21, 24 September, 2018
Closing Speeches : 25 September, 2018
Date of Summing Up : 26 September, 2018

SUMMING UP

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as

important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.
8. During the closing speeches the learned Defence Counsel told you to think why the accused was not charged for the offence of being drunk and disorderly at the Cuvu Police Post. It is not for you to speculate why the police did not charge the accused with such an offence. I direct you to disregard this submission you are not required to speculate on anything.

BURDEN OF PROOF AND STANDARD OF PROOF

9. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
10. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
11. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
12. You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.
13. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

14. The accused is charged with the following offences: (a copy of the information is with you).

COUNT 1

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

PENI QARO on the 24th of December, 2017 at Sigatoka in the Western Division had carnal knowledge with **UNAI SI NAREZIA** without her consent.

COUNT 2

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to section 275 of the Crimes Act 2009.

Particulars of Offence

PENI QARO on the 24th of December, 2017 at Sigatoka in the Western Division assaulted **UNAI SI NAREZIA** thereby causing her actual bodily harm.

COUNT 3

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to section 375 (1) (a) and (i) (v) of the Crimes Act 2009.

Particulars of Offence

PENI QARO on the 24th of December, 2017 at Sigatoka in the Western Division without lawful excuse threatened to injure **UNAI SI NAREZIA** with a chair, with intent to cause alarm to the said **UNAI SI NAREZIA**.

COUNT 4

Statement of Offence

BREACH OF DOMESTIC VIOLENCE RESTRAINING ORDER:

Contrary to section 77 (1) (a) of the Domestic Violence Act 2009.

Particulars of Offence

PENI QARO on the 24th of December, 2017 at Sigatoka in the Western Division breached the Domestic Violence Restraining Order number 218/17 of the Sigatoka Magistrate Court dated 5th of December, 2017 by committing the above named offences against **UNAISI NAREZIA**, a protected person.

15. To prove count one the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant Unaisi Naresia with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant Unaisi Naresia was not consenting or didn't care if she was not consenting at the time.

16. It is not necessary for the prosecution to prove that there was ejaculation or full penetration of the vagina by the penis. The slightest of penetration of the complainant's vagina by the accused's penis is sufficient to satisfy the act of penetration.

17. The first element of the offence of rape is concerned with the identity of the person who allegedly committed the offence.

18. The second element is the act of penetration of the complainant's vagina by the accused with his penis.
19. In respect of the third element that is of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own freewill. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
20. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
21. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
22. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of rape as explained above, then you must find the accused guilty of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty.
23. As a matter of law, I have to direct you that an offence of sexual nature as in this case the first count does not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.

24. In this trial the accused has denied the offence of rape he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time that is on 24 December, 2017.
25. To prove count two the prosecution must prove the following elements of the offence of assault causing actual bodily harm beyond reasonable doubt:
 - (a) The accused;
 - (b) Assaulted the complainant;
 - (c) Causing actual bodily harm.
26. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
27. The second element is the act of assault on the complainant. Assault is the unlawful use of force on the complainant.
28. The final element is the actual bodily injuries caused to the complainant.
29. If you are satisfied the accused had assaulted the complainant by punching her back and the punch caused the complainant injuries then you must find the accused guilty of the offence of assault causing actual bodily harm. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of assault causing actual bodily harm then you must find the accused not guilty.

30. To prove count three the prosecution must prove the following elements of the offence of criminal intimidation beyond reasonable doubt:
 - (a) The accused;
 - (b) Without lawful excuse;
 - (c) Threatened to injure the complainant with a chair;
 - (d) With intent to cause alarm to her.
31. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
32. The second element is without law excuse.
33. The third element is threatening to injure the complainant with a chair.
34. The final element is with intent to cause alarm to the complainant.
35. If you are satisfied the accused without lawful excuse had threatened to injure the complainant with a chair with intent to cause alarm to the complainant then you must find the accused guilty of the offence of criminal intimidation. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of criminal intimidation then you must find the accused not guilty.
36. To prove count four the prosecution must prove the following elements of the offence of breach of Domestic Violence Restraining Order beyond reasonable doubt:
 - (a) The accused;
 - (b) Breached DVRO no. 218/17 of the Sigatoka Magistrate's Court dated 5th December, 2017;

(c) By committing the above-named offences (count one to four) against the complainant a protected person.

37. If you are satisfied the accused had breached the Domestic Violence Restraining Order number 218/17 of the Sigatoka Magistrate's Court dated 5th December, 2017 by committing the above named offences (counts one to four) against the complainant a protected person then you must find the accused guilty of the offence of breach of Domestic Violence Restraining Order. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of breach of Domestic Violence Restraining Order then you must find the accused not guilty.
38. In this case the accused is charged with four counts you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
39. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

40. The prosecution called five (5) witnesses to prove its case against the accused.
41. The complainant Unaisi Naresia informed the court that she has been married to the accused for the past 10 years. On 24 December,

2017 at about 4am she was sleeping in her house when the accused came shouting trying to open the louvers of the house. To maintain peace of the neighbourhood the complainant opened the door.

42. The accused came into the house and started swearing at the complainant. The accused was drunk he called the complainant a bitch and that she was having an affair. When the accused went to the bathroom she ran out of the house because she was scared. The complainant had run about 10 meters when the accused came and pulled her top and forcefully dragged her into the house.
43. When inside the house the accused punched her three (3) times on her back. After this the complainant was pulled and dragged on the floor the accused forcefully removed her panty and inserted his penis into her vagina and had sexual intercourse for about 5 minutes. The complainant could not do anything since she was scared the accused might stand up and punch her again.
44. The complainant did not want to have sexual intercourse with the accused, he was forcing her. After the complainant had her shower the accused started forcing her to go to the Cuvu Police Post.
45. On their way to the Police Post the accused again started swearing and punching the complainant she did not say anything because people were watching by this time it was about 7am. At the Police Post she informed the police officer that the accused had punched and swore at her. In front of the policeman the accused lifted the chair and wanted to throw the chair at the complainant he threatened her that he will kill her. This made the complainant frightened.

46. From Cuvu Police Post the complainant was told to go to Sigatoka Police Station. The accused was kept at the Cuvu Police Post. At Sigatoka Police Station the complainant lodged her complaint thereafter she went for a medical examination at the Sigatoka Hospital. She took with her the medical examination form and after she was seen by the doctor she took the form back to the Police Station.
47. Due to the accused's swearing and threatening behaviour to kill, the complainant was able to get a Domestic Violence Restraining Order (hereinafter referred to as DVRO) issued against the accused. From two weeks prior to this incident the accused was not staying with the complainant.
48. A copy of the DVRO was served on the accused by police officer Akisi. When the accused was arrested and remanded she received messages from people visiting the accused to visit him in Prison. When the complainant went to visit the accused she was asked by the accused to write a letter to withdraw the case and have him bailed out.
49. The accused apologized for his actions, when the complainant went home it took her about one month to think about what to write. After writing and typing the letter the complainant went to see the accused at the Prison with the letter. The complainant was worried about what was written in the letter. The accused had told the complainant to write that she had given false information to the police due to jealousy and that the accused was having an affair and due to peer pressure.
50. In cross examination the complainant agreed when she went to the hospital the doctor had asked her what had happened to her. She

told the doctor that she was punched by her husband the previous night she said this because this was written in the police medical examination form. She did not tell the doctor that she had been raped by her husband.

51. The complainant denied the suggestion that the reason why the accused was not staying with her after DVRO was issued was because she used to threaten him that she will report him to the police.
52. The complainant stated that under the DVRO the accused was to stay with her but not to do anything contrary to the order. The complainant denied she had made calls to the accused mobile phone between 23 and 24 December.
53. When the accused was trying to open the louvers of the house the complainant stated that she was screaming and yelling, to maintain peace in the neighbourhood she opened the door to let him in since the complainant was frightened.
54. The complainant agreed she told the police she was shouting and screaming. The complainant was referred to the police statement she had given after the incident on 24 December, 2017 particularly line 10 to line 15:

“I can totally recall this morning Sunday, at about 3am this man (Peri) who has moved out came home shouting around opening the louvers. I got frightened and thought of the privacy of my neighbours so I opened the door for him to come in then he started to verbally abuse me.”
55. The complainant agreed it was not in her statement that she was yelling and shouting but she recalled shouting at the time.

Ladies and Gentleman Assessors

56. The learned counsel for the accused in this regard was cross-examining the complainant about some inconsistency in the statement she gave to the police immediately after the incident when the facts were fresh in her mind with their evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant with her evidence given in court. You are allowed to take into consideration the inconsistency in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
57. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
58. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witnesses.
59. Moving on the complainant agreed she ran away when the accused was having his shower the reason why she did not run to her neighbours house was because she did not want to disturb them. Furthermore, the complainant stated in the morning she was

supposed to go to work so she dressed herself to go to work but the accused was forcing her to go to the Police Post.

60. The complainant agreed she had prepared an affidavit on her own which she had taken to be witnessed by a Commissioner for oaths. The contents were read by the complainant in court.
61. The affidavit sworn by the complainant on 12 July, 2018 was marked and tendered as defence exhibit no. 1. The complainant maintained that she wrote the affidavit after she was told by the accused to write it and that she had voluntarily made the affidavit.
62. The complainant maintained that the accused forcefully had sexual intercourse with her on 24 December, 2017, also had assaulted her and threatened her with the chair and breached the DVRO issued against him.
63. The complainant stated that she did not make up a story against the accused although she was upset of the accused's affairs.
64. In re-examination the complainant clarified that when she went to visit the accused at the Prison he had told her what to write in the affidavit which was to withdraw the case, have him bailed out and to have the affidavit witnessed by a Commissioner for oaths. The complainant further clarified that the word voluntarily meant she was told to write the affidavit.
65. The second prosecution witness was Dr. Suzzana Raza. Dr. Raza graduated with an MBBS degree from the Fiji School of Medicine in 2015 she has 3 years' experience as a Medical Practitioner.

66. The doctor confirmed examining the complainant on 24 December, 2017. The Fiji Police Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.

67. The specific medical findings were:

Front view

Upon examining the abdomen the doctor noted the abdomen was soft, there was no guarding meaning the patient did not have any abdominal pain, no rigidity meant no hardness was noted.

Back view

Tenderness was noted which meant the patient suffered pain upon touch, no bruises, no deformity, the patient was able to flex at hip meant the bones were intact.

68. The professional opinion of the doctor was that her findings were consistent with the history given that there was recent soft tissue injury caused by use of blunt force such as a punch.

69. In cross examination the doctor stated that the patient had told her that she was punched by her husband. To get a bruise the punches would depend on the force used, if hard punches 3 or 4 times there might be bruises.

70. You have heard the evidence of Dr Raza who has been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.

71. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor.

When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.

72. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
73. The third prosecution witness Special Constable Rohiteshwar Singh informed the court that on 24 December 2017 he was on duty at the Cuvu Community Police Post. The complainant came with the accused she complained that she had been assaulted and raped by the accused. The witness observed that the complainant was scared.
74. When the accused entered the Police Post, the witness noticed the accused smelt of liquor. In front of the witness the accused threatened the complainant when he comes out of Prison he will kill her. At this time the accused lifted a chair to throw on the complainant. The complainant came and hid behind the witness.
75. The witness told the accused he was not supposed to do that. The accused then left the Police Post in a taxi. The witness identified the accused in court.
76. In cross examination the witness maintained the accused had lifted the chair to throw at the complainant and he tried to stop the accused.

77. The fourth prosecution witness was WPC 4693 Akisi on 19 December, 2017 the witness received an interim Domestic Violence Restraining Order from the Magistrate's Court at Sigatoka. After registering the document in the record's register she went to serve the accused.
78. After serving the accused she went to a Justice of Peace to sign the affidavit of service and then filed it at the Court Registry. The affidavit of service sworn on 24 December, 2017 is marked and tendered as prosecution exhibit no. 2. The accused had acknowledged receipt of the interim DVRO by signing the affidavit of service.
79. The document the witness had served was an interim (non-molestation) DVRO issued by the Magistrate's Court at Sigatoka dated 5 December, 2017. The interim DVRO was marked and tendered as prosecution exhibit no. 3.
80. The final witness was Sergeant 2607 Ram Karan he was the investigating officer. On the day in question he received a call from Special Constable Rohitshwar Singh that there was a drunken man with his wife at the Police Post and his assistance was needed. Upon arriving at the Police Post the witness was told by Special Constable Rohitshwar Singh that the couple had left in a taxi for Sigatoka Police Station. At the Police Station the witness met the couple since it was a case of domestic violence the suspect was taken into custody. The witness visited the crime scene, recorded the police statements and analyzed the evidence.
81. The witness as a matter of clarification sought a further statement of the complainant in respect of sexual intercourse whether it was consensual or not. After the clarification the suspect was charged.

82. This was the prosecution's case.

DEFENCE CASE

Ladies and Gentleman Assessors

83. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath. The accused is not obliged to give evidence. He is not obliged to call any witnesses. He does not have to prove his innocence in effect he does not have to prove anything.

84. However, the accused decided to give evidence and call one witness. You must then take into account what the accused and his witness adduced in evidence when considering the issues of fact which you are determining.

85. I now draw your attention to the evidence adduced by the defence during the course of the hearing.

86. The accused informed the court on Friday 23rd December, 2017 he was working at Deep Sea Night Club as a Bouncer. He knocked off at 2.00 am on the 24th.

87. Before knocking off the accused saw three (3) missed calls from his wife the complainant he could not answer the call because he was inside the night club which was noisy. The accused called his wife but she did not answer the phone. He thought something must have happened to her since she was alone at home.

88. After a while the accused stopped a minivan and went to Naidovi. He was aware there was a DVRO against him but he went in case there

was some emergency. At this time the complainant and the accused were separated, he was living at Sanasana.

89. At Naidovi the accused went to the house of his wife, he knocked on the door and she opened it. He went inside and both had a conversation for a while. After this both had consensual sexual intercourse he did not force or punch her.
90. After having sex the complainant started accusing the accused of having affairs with other women. The argument got heated up and the complainant told him she wanted to report at the Police Post. The accused agreed, after having his bath the accused and the complainant went together to the Police Post.
91. At the Police Post there was one Police Officer by the name of Rohit on duty the accused and the complainant were taken into a room which had a long table. The police officer was seated on top of the table whereas the complainant and the accused were seated on either side of the table facing each other.
92. The complainant was giving her statement to the police officer, after a while the police officer called Sigatoka Police Station and told both the complainant and the accused to go to the Sigatoka Police Station.
93. The accused denied the allegation of rape, in respect of assaulting the complainant the accused stated that if he would have assaulted the complainant, she would have received severe injuries. Furthermore, the accused said in the Police Post he did not lift the chair to hit the complainant but because of his anger he told the complainant if she wanted him to lift the chair and whack her with it. He only said those words but did not do it.

94. Upon cross examination by state counsel the accused stated that he was not drunk. The accused agreed he was served with a copy of the DVRO the police officer had read and explained the contents of the DVRO which was understood by the accused.
95. The accused stated that he did not try and open the louvers of the house where the complainant was staying or was calling the complainant loudly and making noise.
96. The accused denied raping the complainant and assaulting her. According to the accused it was the complainant who wanted to go and report the matter so he told her to go and report. He also denied verbally abusing and assaulting her on the way to the Police Post.
97. In respect of the allegation of lifting the chair and threatening the complainant the accused denied lifting the chair but agreed he had stated "you want me to lift this chair and whack it on you". He said these words because he was really mad at the complainant. The accused agreed he threatened the complainant out of anger.
98. The accused stated that the complainant had visited him at the remand center and that he had not sent any messages for her to visit him. When the complainant came to visit him she had sought forgiveness for giving false information about the allegations against him.
99. Furthermore, according to the accused the complainant had written the affidavit herself and he did not tell her to write the affidavit. The complainant had brought the letter at the remand center to the accused, both talked, she asked for forgiveness but the damage had already been done by her which had hurt the accused.

100. In re-examination the accused clarified he was angry with the complainant because this was the second time the complainant had taken out a DVRO against him.
101. The final defence witness was Rosleen Devi Singh she recalled witnessing the affidavit of the complainant which was brought to her house at Naidovi. The witness recognised the affidavit which was marked and tendered as defence exhibit no 1. The witness read the whole document then started questioning the complainant upon asking whether her husband had really raped her, the complainant replied "no".
102. The complainant was alone, when the witness asked the complainant the reason for making a false allegation against her husband the complainant replied she did it in anger and jealousy but now she wanted to settle down with her husband.
103. The witness only signs a document after she is sure that the deponent understood the contents. The complainant told the witness that she understood everything in the document and regrets whatever she had done.
104. In cross examination, the witness stated that she was a Commissioner for Oaths from June, 2013. She witnesses affidavits and certifies documents except summons and bench warrants. The witness agreed she was familiar with affidavits but the document she had witnessed was not a proper affidavit.
105. The witness agreed an affidavit was a sworn statement. According to the witness the complainant had taken an oath orally but did not hold a holy book because the holy book was in her office. She agreed explaining the contents of the affidavit to the complainant who

understood the contents. The witness did not ask the complainant whether she was forced by anyone to make the affidavit. The complainant said she was signing the affidavit voluntarily.

106. Upon questioning by court whether the complainant had affirmed instead of swearing an oath the witness stated that it was something like affirmation.

107. This was the defence case.

ANALYSIS

108. The prosecution alleges on 24 December, 2017 at about 4am the complainant was awoken by the accused shouting and trying to open the louvers of her house. To maintain peace of the neighbourhood the complainant opened the door.

109. When inside the house the accused punched her three (3) times on her back. The accused forcefully removed her panty and inserted his penis into her vagina and had sexual intercourse for about 5 minutes.

110. The complainant did not consent to the sexual intercourse with the accused. After the complainant had her shower the accused started forcing her to go to the Cuvu Police Post.

111. At the Police Post in front of the policeman the accused lifted a chair and wanted to throw the chair at the complainant. This made the complainant frightened.

112. From Cuvu Police Post the complainant went to Sigatoka Police Station to lodge her complaint thereafter she went for a medical examination at the Sigatoka Hospital.
113. Two weeks prior to this incident the accused was not staying with the complainant due to the accused's swearing and threatening behaviour to kill her she was able to get a Domestic Violence Restraining Order issued against the accused.
114. Dr. Raza confirmed examining the complainant on 24 December, 2017. The professional opinion of the doctor was that her findings were consistent with the history given there was recent soft tissue injury caused by use of blunt force such as a punch.
115. Special Constable Rohiteshwar Singh was on duty at the Cuvu Community Police Post. In front of this witness the accused threatened the complainant when he comes out of Prison he will kill her. At this time the accused lifted a chair to throw on the complainant. The complainant came and hid behind the witness.
116. WPC 4693 Akisi after serving the accused with the interim DVRO went to a Justice of Peace to sign the affidavit of service and then filed it at the Court Registry. The witness had explained the contents of the order to the accused who understood the same.
117. The defence on the other hand denied all the allegations.
118. The accused went to the house where his wife was, he knocked on the door and she opened it. Both had consensual sexual intercourse he did not force or punch her.

119. The accused denied the allegation of rape, in respect of assaulting the complainant the accused stated that if he would have assaulted the complainant she would have received severe injuries. Furthermore, the accused said in the Police Post he did not lift the chair to hit the complainant but because of his anger he told the complainant if she wanted him to lift the chair and whack her with it. He only said those words but did not do it.
120. Rosleen Devi Singh, who had witnessed the affidavit of the complainant after reading the document started questioning the complainant upon asking whether her husband had really raped her, the complainant replied “no”.
121. When the witness asked the complainant the reason for making a false allegation against her husband the complainant replied she did it in anger and jealousy but now she wanted to settle with her husband.

Ladies and Gentleman Assessors

122. You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.
123. You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence. In testing the credibility of a witness, you can consider whether there is a delay in making a complaint to someone or to an authority or to Police on the first available opportunity about the incidents that is alleged to have occurred. If the complaint is prompt that usually leave no room for fabrication.

124. 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 the complaint made to Special Constable Rohiteshwar Singh and Sigatoka Police Station were genuine and what weight you attach to this.
125. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
126. In deciding the credibility of the 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 is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
127. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own

evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

128. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
129. 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 must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
130. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
131. In this case the accused is charged with a count of rape, assault causing actual bodily harm, criminal intimidation and breach of domestic violence restraining order you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
132. Your possible opinions are:-

COUNT ONE: **RAPE** ACCUSED - GUILTY OR NOT GUILTY.

COUNT TWO: **ASSAULT CAUSING ACTUAL BODILY HARM**

ACCUSED - GUILTY OR NOT GUILTY.

COUNT THREE: **CRIMINAL INTIMIDATION** ACCUSED – GUILTY
OR NOT GUILTY.

COUNT FOUR: **BREACH OF DOMESTIC VIOLENCE**
RESTRAINING ORDER ACCUSED – GUILTY OR
NOT GUILTY.

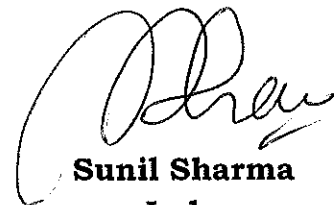
Ladies and Gentleman Assessors

133. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.

134. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



At Lautoka
26 September, 2018


Sunil Sharma
Judge

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.