

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 143 of 2017

STATE

V

MOTUISELA TAWAKE

Counsel : Ms. P. Lata for the State.
: Ms. L. Volau for the Accused.

Dates of Hearing : 18, 19 and 20 November, 2020
Closing Speeches : 23 November, 2020
Date of Summing Up : 23 November, 2020

SUMMING UP

(The name of the complainant is suppressed he will be referred to as "PS")

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. 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.
6. 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.

BURDEN OF PROOF AND STANDARD OF PROOF

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused person. 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.

8. 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 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.
9. 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 court room.
10. You must decide the facts without prejudice or sympathy for either the accused person or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. 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

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

COUNT ONE

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to section 209 of the Crimes Act 2009.

Particulars of Offence

MOTUISELA TAWAKE on the 10th of July, 2017 at Nadi in the Western Division assaulted “PS” with intent to rape the said “PS”.

COUNT TWO
(Representative Count)
Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) and (2) of the Crimes Act 2009.

Particulars of Offence

MOTUISELA TAWAKE on the 10th of July, 2017 at Nadi in the Western Division, unlawfully and indecently assaulted “PS”.

COUNT THREE
Statement of Offence

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

Particulars of Offence

MOTUISELA TAWAKE on the 10th of July, 2017 at Nadi in the Western Division penetrated the anus of “PS” with his penis without his consent.

Ladies and Gentleman Assessors

13. As you are aware after the prosecution closed its case, this court had ruled that the accused had a case to answer in respect of count two for the lesser offence of indecent assault and not for the offence of sexual assault as charged. This means you are to only concentrate on the lesser offence of indecent assault when you are considering count two.
14. To prove count one the prosecution must prove the following elements of the offence of assault with intent to commit rape beyond reasonable doubt:

- (a) The accused ;
 - (b) Assaulted the complainant “PS”;
 - (c) With intent to commit rape.
15. The first element of the offence of assault with intent to commit rape is concerned with the identity of the person who allegedly committed this offence. Assault is the unlawful use of force on the complainant “PS” by any form of hostile or adverse act done towards him with the intent to commit rape. The prosecution alleges that the accused had punched the complainant 3 times on his face.
16. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. You decide intention by considering what the accused did, you should look at his actions before, at the time of, and after the act.
17. If you are satisfied that the prosecution has proved all the above elements beyond reasonable doubt then you must find the accused guilty of the offence of assault with intent to commit rape.
18. If on the other hand, you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused not guilty of the offence of assault with intent to commit rape.
19. To prove the lesser offence of indecent assault the prosecution must prove the following elements beyond reasonable doubt:
- (a) The accused;
 - b) Indecently and unlawfully;

- c) Assaulted the complainant "PS" by biting his neck, lower lip and chest.
20. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence.
21. The words "indecently and unlawfully" in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
22. Assault is the unlawful use of force on the complainant "PS" by the act of biting his neck, lower lip and chest.
23. If you are sure that all the elements of the offence of indecent assault have been proven beyond reasonable doubt, then you must find the accused guilty. However, if you have a reasonable doubt in respect of any elements of the offence of indecent assault then you must find the accused not guilty.
24. Furthermore, I also direct you that if you find the accused not guilty of indecent assault that is you are not sure whether the accused had unlawfully and indecently assault the complainant by biting his neck, lower lip and chest then based on the evidence that the bite marks were teeth marks which were brutal teeth marks you should also consider the offence of assault causing actual bodily harm.
25. To prove the offence of assault causing actual bodily harm the prosecution must prove the following elements 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. The prosecution alleges that the accused had assaulted the complainant by making brutal teeth marks on his body.
28. The final element is the actual bodily harm or injuries caused to the complainant.
29. If you are satisfied the accused had assaulted the complainant by biting his neck, lower lip and the chest with his teeth which caused injuries to the complainant's neck, lower lip and chest 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 rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the anus of the complainant "PS" with his penis;
 - (c) Without his consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if he was not consenting at the time.
31. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the anus of the complainant with his penis without the complainant's consent.

32. The slightest of penetration of the complainant's anus by the accused penis is sufficient to satisfy the act of penetration.
33. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
34. The second element is the act of penetration of the complainant's anus by the penis.
35. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of his own free will. 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. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
36. If you are satisfied that the accused had penetrated the anus of the complainant with his penis and he 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 he was not consenting at the time.
37. 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.
38. You must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for you to find the accused guilty of the offence of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused not guilty.

39. As a matter of law, I have to direct you that offences of sexual nature do 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.
40. In this case, the accused is facing more than one count you are to consider the evidence in respect of each count separately from the other. If you find the accused guilty of one count that does not automatically make him guilty for the remaining counts. You must not also assume that because the accused is guilty of one count he must be guilty of the other count as well.

ADMITTED FACTS

41. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended final admitted facts.
42. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
43. 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. 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

44. The prosecution called two witnesses to prove the charges against the accused.
45. The complainant informed the court that on 9th July, 2017 he made plans to go and drink grog at Namotomoto village with some of his friends. At about 11pm the grog finished. The complainant was with Sai, her husband, the accused and some others. Sai is the complainant's distant relative who is also known as Sainiana. It was at Sai's house the complainant had come to know the accused.
46. Thereafter, all of them decided to go and drink alcohol beside Carpenters Hardware shop at Namotomoto. They drank 3 bottles of red wine and a carton of Woodstock beer. From there the group went to a night club where they drank till 5am then they went to a short cut to Denarau to Sitikuru village by this time it was morning.
47. By this time, the complainant was left with the accused and two others, when all the drinks finished they started walking back because the accused had told him that he was taking the complainant to where Sai and the others were drinking. After a while the complainant realized that he was alone with the accused, after crossing a drain they were approaching a cassava patch it was at this time the accused told the complainant to have anal intercourse with him.
48. The complainant refused, the accused then threatened the complainant and punched him three times on his face this made the complainant fall. When the complainant fell down the accused lifted his legs and put it on his shoulders and then after removing the complainant's underwear inserted his penis into the complainant's anus.

49. The accused did this repeatedly, the complainant felt pain he wanted to shout but the accused was biting his lip and had threatened him if he shouted he will kill the complainant. The accused stopped when he ejaculated, the accused and the complainant were in the cassava patch for about 10 minutes. On this day the complainant was wearing a t-shirt and a sulu.
50. The complainant also stated that when the accused was penetrating his penis into his anus he felt pain, was injured and also stools came out. The accused then left, the complainant was frightened he walked from the cassava patch to Namotomoto village where Sai lived. He told Sai the accused had raped him, he did not tell her the details.
51. The matter was reported to the police the same day and he was medically examined at the Nadi Hospital.
52. In cross examination the complainant agreed at the cassava patch it was the accused who had said in the ITaukei language "*we have sexual intercourse*" but the complainant had refused. According to the complainant the accused had punched his face 3 times on the left. The punches were forceful which made him fall on the ground as a result he received bruises on his face.
53. When it was suggested, the accused had not punched the left side of the complainant's face the complainant disagreed. He stated that he had received marks like a black eye. The complainant stated that when both his legs went on the shoulders of the accused, the accused was pressing his legs and hands while bending over towards him. They were in this position and having anal intercourse for 10 minutes.
54. The complainant explained when the accused had put him down and whilst trying to lock him the accused removed his underwear and at that time he was weak. According to the complainant only his right hand was free. The complainant's underwear was removed when he had fallen to the ground

after the punching and whilst the accused was locking him. At this time the accused also bit his lower lip.

55. The complainant agreed that he was taller and broader than the accused and his right hand was free including the opportunity for him to head butt the accused. He couldn't do this because he was weak and he did not have enough energy to release himself. The reason why he was able to walk from Sikituru village to Namotomoto village was because he was in fear and afraid.
56. The complainant denied he had agreed to have anal intercourse with the accused, he agreed that he was quite drunk that morning. The complainant denied that the accused had pushed his pants half way down and that he had knelt down and sucked the accused penis, after the accused got an erection the accused had asked the complainant to lie down.
57. The complainant agreed the accused placed his legs on his shoulders and inserted his penis into his anus gently. The complainant denied he felt good when the accused was penetrating his penis into his anus and that he was moaning softly.
58. The complainant denied that because he was sexually aroused he had told the accused to bite his nipple and his chest according to the complainant the bites on his body were not love bites. According to the complainant when the accused bit his neck it was painful like deep teeth mark on his neck.
59. The complainant denied he did not shout for help because he had consented to have anal intercourse with the accused. The complainant was referred to his police statement dated 30th July 2017, page 2, last paragraph which was read as:

“After the incident, we then made our way to the roadside to look for transport”.

60. When it was put to the complainant that he had told the police that both he and the accused had walked together to Namotomoto village but in court he had said the accused had left and then he followed later. The complainant stated that he had told the police officer writing his statement that he was on the main road on his way to Namotomoto whereas the accused took the short cut to his village in Sikituru.

61. Again the complainant was referred to his police statement, page 2, 2nd paragraph line 7 which was read as follows:

“Tawake came towards me pulled my blue t – shirt and pushed me to the ground. He punched me 3 times on my face. He pulled my ‘Sulu’ and underwear away from my body. He pushed me back on the ground and lay on top of my stomach”.

62. The complainant agreed he had not mentioned to the police officer that the accused had locked him to the ground but he had told the court that the accused had locked him down and removed his undergarments. The complainant stated that what he told the police in his police statement and what he told the court was the truth.

Ladies and Gentleman Assessors

63. The learned counsel for the accused in this regard was cross examining the complainant about some inconsistencies in the statement he gave to the police when facts were fresh in his mind with his evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant with his 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.

64. 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.
65. 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 about the reliability of the witness.
66. The complainant denied the suggestion that he was making up a story that he was forced to have anal intercourse with the accused to save himself and his family from embarrassment.
67. In re – examination the complainant stated that he did not shout because he was weak, the accused mouth was on his lips and he was threatened by the accused that if he shouts he will kill the complainant. The complainant also stated that he was not expecting what the accused had done to him. He did not have any feelings towards the accused.
68. The final prosecution witness Dr. Kashika Anshika Dharan informed the court that she graduated with an MBBS Degree from the University of Fiji in the year 2014. This is her 6th year of practice as a Medical Practitioner.

On 10th July, 2017 the witness had examined the complainant at the Nadi hospital. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.

69. The specific medical findings of the doctor were as follows:

- a) Right side neck bite marks, right chest bite mark, left chest bite mark, left upper back bruises, left neck bite mark, left shoulder bite mark and laceration on anal area, minimal blood noted.
70. The doctor explained bruises meant the area of the skin was discoloured which was caused by any force or blunt trauma. Laceration was a cut on the superficial layer of the skin which can be either deep or superficial.
71. In this case the doctor had seen a superficial laceration on the anal area. The injury could have been caused by a sexual act and the other causes could have been by constipation, bile or chronic diarrhea. The professional opinion of the doctor was that the patient was forced into the sexual act. The doctor stated normally when there is a sexual intercourse the body is receptive towards it. A laceration will occur if the body is not expecting and a person is forced into the act which means this person was not relaxed.
72. According to the doctor she had observed brutal bite marks on the patient, by brutal bite marks the doctor meant teeth marks on the body which was not nice but something bad to see. The doctor had illustrated her findings at appendix 1 of the medical report.
73. In cross examination the doctor stated that she had stated in her medical report what she had seen during her medical examination of the patient. There were no injuries on the left side of the patient's face or cheek only injuries on his lip. The doctor had also not seen any swelling on the left side of the patient's face.
74. When questioned what made the doctor come to the opinion that the act on the patient was forced the doctor stated her professional opinion was based on the bite marks and the laceration. She further stated that when she said bite marks she meant teeth embedded on the skin which wasn't a love bite.

75. In re – examination the doctor could not say if the patient was suffering from any bowel disease at that time and whatever she had observed she had written in the medical summary.

Ladies and Gentleman Assessors

76. You have heard the evidence of Dr. Dharan who had 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.

77. 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.

78. 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.

79. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

80. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilt beyond reasonable doubt remains on the prosecution at all times.
81. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination.
82. 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 which you must take into account when considering the issues of fact which you are determining.
83. The accused informed the court that in the afternoon of 9th July, 2017 the accused was at Nomotomoto village drinking grog with the complainant and some others at the house of one Sainimere. After the grog finished all went to buy beer to “wash down” except for Sainimere’s mother.
84. The group then went to drink beer and red wine at the MM Timber from here all went to a night club where they had consumed more beer till 5.00am when the night club closed. The group then went to Sikituru they again drank at 2 places. The first place was where the villagers of Sikituru have their plantation called Bila. The second place was on the way that went to Maqalevu called Gopal. Before going to Sikituru Village more beer was purchased.

85. At Gopal's place Sainimere left the group, after drinking the complainant wanted to go and see Sainimere, the accused told the complainant Sainimere was drinking at Bila place. The accused took the complainant to Bila place on the way the complainant was flirting with the accused. The accused told the complainant to cross over to where Sainimere and others were drinking. When they reached the cassava patch the accused told the complainant not to take more time because it was becoming day light and for them to have anal intercourse. The complainant responded by saying that he only wanted to suck the accused penis. The accused told the complainant that it would take time for him to ejaculate if his penis is sucked. The complainant told the accused that he had never had anal sex before. The accused then told the complainant that he will penetrate his anus slowly.
86. The complainant agreed so the accused told the complainant to first suck his penis so that his penis could be erected after which he then penetrated his penis into the anus of the complainant. The complainant was lying down on his back his legs were on the shoulders of the accused. After this they started having intercourse where the accused was penetrating his penis into the anus of the complainant slowly as requested by the complainant. The accused and the complainant were in that position until the accused ejaculated. All this time the complainant was moaning.
87. The accused further stated that while he was having intercourse he bit the neck of the complainant on both sides. The complainant told the accused not to bite his neck but to bite his chest. When the accused bit the complainant's neck the complainant hugged the accused with his hands around the accused back.
88. The accused also bit both sides of the complainant's chest twice. When the accused was pressing the complainant down to bite the chest of the complainant and to suck his nipple the complainant was hugging him.

89. According to the accused when he was doing all these things the complainant liked what was done to him and that the complainant had told him to kiss. While having intercourse the accused was so much into it that he put his entire penis into the complainant's anus. At this time the complainant moaned and then hugged him tightly. After this both kissed each other and thus the accused ejaculated.
90. The accused did not mean to bite the complainant's lower lip but he did so when he ejaculated. The complainant turned his head when he bit the complainant's lip. After this both came together to the main road the accused left the complainant at the main road.
91. The accused denied all the allegations raised by the complainant he did what he did with the consent of the complainant. Both had discussed what was to be done, the complainant was taller and bigger than him both agreed to do what they did that day. The accused does not know why the complainant made those allegations. The accused did not assault the complainant he did not punch the complainant as alleged.
92. In cross examination the accused agreed on 10th July he had anal intercourse with the complainant, he had bitten the complainant on his lips and made marks on the neck of the complainant as well. The complainant had refused to have anal intercourse because it was his first time.
93. The accused maintained that the complainant wanted to only suck his penis but it was the accused who told the complainant rather than sucking his penis it will be better for the accused to insert his penis into the complainant's anus so that he can easily ejaculate. When he started penetration of the anus he did so gently in the beginning and he was biting the complainant gently on his neck and chest.
94. The accused also agreed he had made those marks on the complainant's body despite the complainant being taller and bigger than him. According to the accused the complainant was relaxed when he was having anal

intercourse. He did not force the complainant at any time since they had discussed it already.

95. The accused agreed had made bite marks on the body of the complainant but disagreed those were brutal bite marks. He also disagreed the injuries and blood noted on the complainant's anus was due to force applied by the accused. The accused explained at first the complainant had said he had never had anal sex before, however, when he started penetrating both were enjoying it and that is when he fully inserted his penis into the anus of the complainant.
96. When it was suggested that since the complainant had told the accused he had never had anal intercourse before, the accused said he only proceeded to insert his penis since they had discussed about it and that is why the third person who was with them had left.
97. The accused denied committing the offences as alleged by the complainant, the complainant had consented to what he had done that day. The accused agreed when the complainant was flirting with him he assumed the complainant wanted to have sex with him but the complainant did not say that he wanted to have sex with him.
98. According to the accused he was persuading and asking the complainant to have anal sex with him the complainant eventually agreed, the accused denied he had lied to the complainant that he was taking the complainant to where Sainimere was.
99. In re-examination the accused stated the bite marks he made on the complainant's body was gently done by him.
100. This was the defence case.

ANALYSIS

101. The prosecution alleges that during the morning of 10th July, 2017 the complainant and the accused were walking along the cassava patch when the accused told the complainant that he wanted to have anal intercourse with him. The complainant refused.
102. Upon hearing this, the accused punched the complainant three times on the left side of his face. This made the complainant fall on the ground, when the complainant was on the ground the accused got hold of the complainant's legs and put it on his shoulders in the process he locked the hands and legs of the complainant to prevent him from resisting the accused.
103. The prosecution says the accused had assaulted the complainant with the intention to rape the complainant reason being after removing the underwear of the complainant (the complainant was wearing a sulu) the accused forcefully penetrated the anus of the complainant.
104. To show his aggression the accused bit the complainant's neck, lower lip and his chest which were brutal bites made forcefully by the accused. The bites were teeth marks and not love bites. The bite marks on the body of the accused were contrary to normal decency. After removing the underwear of the complainant the accused penetrated the anus of the complainant with his penis repeatedly. The accused did not consent to what the accused was doing to him.
105. The prosecution is also asking you to take into account the medical report of the complainant which shows the injuries suffered by the complainant. The prosecution submits the injuries suffered by the complainant were as a result of force exerted by the accused on the complainant without his consent.

106. On the other hand, the defence is saying that the allegations are a made up story to falsely implicate accused. Firstly, he did not assault the complainant as mentioned by the complainant, what the complainant told the court cannot be true because the medical report of the complainant does not show any injury on the left side of the complainant's face or cheek.
107. The complainant said he was punched three times on the left side of his face resulting in a black eye but no such noting was made by the doctor.
108. Secondly, the defence also says the marks made by the accused on the body of the complainant were love bites with the complainant's consent which was a normal occurrence of an intercourse. Both the complainant and the accused were so engrossed in expressing their affection for each other that the accused made love bites on the body of the complainant.
109. The defence is also asking you to consider the fact that marks on the body of the complainant were not indecent or an assault on the complainant but an expression of pleasure towards the complainant during the cause of the intercourse which both enjoyed.
110. Finally, defence submits the accused had done whatever he did with the consent of the complainant. The accused had penetrated the anus of the complainant with his penis with the consent of the complainant this was only possible after they had a discussion about what is to be done prior to what the accused did.
111. For this reason, the accused did not do anything which was contrary to what had been discussed between him and the complainant. The complainant had all the opportunity to shout, to push the accused away and resist the acts of the accused but he did not because he had consented to what the accused was doing.

112. Moreover, the defence is also asking you to consider the fact that the complainant was bigger and taller than the accused he could have resisted the acts of the accused but he did not.
113. In respect of the medical report the defence is saying that there are other causes for the injuries suffered by the complainant and not what the complainant had told the court.
114. Finally, the defence is saying the accused did not commit the offences as alleged the complainant made up a story against him which should not be believed.

Ladies and Gentleman Assessors

115. You have seen all the witnesses give evidence keep in mind that some witnesses react differently when giving evidence.
116. 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 give 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.
117. 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.

118. 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 person has 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 previous statement 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.
119. 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.
120. 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 guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
121. The accused person is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
122. In this case, the accused person is charged with more than one count. As mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count separately from the other. If you find the accused guilty of one count that does not automatically make him guilty for the remaining counts. You must not also assume that because the accused is guilty of a count he must be guilty of the other as well.

123. Your possible opinions are:-

1. COUNT ONE - **ASSAULT WITH INTENT TO COMMIT RAPE:**
ACCUSED - GUILTY OR NOT GUILTY.

2. COUNT TWO - **INDECENT ASSAULT:** ACCUSED - GUILTY OR
NOT GUILTY.

If you find the accused not guilty for the offence of indecent assault
then you are to consider whether the accused is guilty or not guilty of
the offence of **ASSAULT CAUSING ACTUAL BODILY HARM.**

3. COUNT THREE - **RAPE:** ACCUSED - GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

124. 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 the staff so that the court can be reconvened.

125. 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.



(Handwritten signature)
Sunil Sharma
Judge

At Lautoka

23 November, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.