

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 106 OF 2018**

**BETWEEN** : **STATE**

**AND** : **KEVERIELI VUNISA**

*Counsel* : *Mr. T. Tuenuku for the State*  
*Ms. G. Henao for the Accused*

*Hearing on* : *03<sup>rd</sup> – 04<sup>th</sup> of November 2020*

*Summing up on* : *10<sup>th</sup> of November 2020*

**SUMMING UP**

Ladies and gentleman assessors;

1. It is now my duty to sum up the case to you. Your opinion is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the assessors of facts.

2. As the representatives of the society, your duty here is sacred. Your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to you in my opening address, your opinion should be based only on them. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel

during the examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the available evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe none, a part or all of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.

8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provide for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept.

12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there more than one reasonable inference to draw, against the accused, as well in his favor, based on the same set of proved facts, then you should draw the most favorable inference to the accused.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond a reasonable doubt, for you to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.
15. You are not required to decide on every point the Counsels in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against the accused.

16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not a must.
17. Let us look at the Information. The Director of Public Prosecutions has charged the accused of a count of rape.

### COUNT

#### *Statement of Offence*

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

#### *Particulars of Offence*

Keverieli Vunisa, on the 23<sup>rd</sup> of May 2018 at Dreketi Settlement, Nalawa, Ra, in the Western Division, penetrated the vagina of Lavenia Savai with an Ace Syrup Paracetamol bottle.

18. Now I will deal with the essential elements of the offence of Rape alleged in the counts. Section 207(1) of the Crimes Act reads as;  
207. — (1) Any person who rapes another person commits an indictable offence.  
Section 207 (2) (b) of the Crimes Act reads as;  
(2) A person rapes another person if —  
(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent;
19. Accordingly, in this case, to prove the offence of Rape as for the alleged count the prosecution must prove the following elements beyond a reasonable doubt.
  - (i) The accused;
  - (ii) penetrated the vagina of Lavenia Savai with a Paracetamol bottle,

- (iii) Without the consent of Lavenia Savai; and
- (iv) Either the accused;
  - knew or believed that Lavenia Savai was not consenting; or
  - was reckless as to whether or not she was consenting.

20. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

21. The second element is penetration of the Lavenia Savai with Paracetamol bottle. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration.

22. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the vagina of the complainant, without the complainant's consent.

23. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact, that there was no physical resistance alone, shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;

- i) by force; or
- ii) by threat or intimidation; or
- iii) by fear of bodily harm; or
- iv) by exercise of authority.

24. Apart from proving that the complainant did not consent for the accused to penetrate her vagina with the bottle, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
25. It is not difficult to understand what is meant by the words "the accused knew or believed". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina with the bottle, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
26. Please remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based upon relevant proven facts and circumstances.
27. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the count of Rape.
28. The following were recorded as the admitted facts by the prosecution and the defense.
  - i) That the complainant in this matter is Lavenia Savai, 23 years, Domestic duties of Dreketi Settlement, Nalawa, Ra.



- ii) That the accused is Keverieli Vunisa, 32 years, Carpenter of Dreketi Settlement, Nalawa, Ra.
- iii) That the complainant is the wife of the accused.
- iv) That in the early hours of the 23<sup>rd</sup> of May 2018 at Dreketi Settlement, Nalawa, Ra, the complainant and the accused had returned to their home from drinking grog. Whist they were in their bedroom the accused asked the complainant if they can have sex and the complainant refused.

These admitted facts need no further proof. You should consider them as already proved. If there happens to be any inconsistency between the admitted facts and the evidence, the admitted facts should prevail.

### **Summary of Evidence**

29. The PW1, Lavenia Savai is the sole witness of the alleged incident for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. Her evidence is that;

- i) The accused, Keverieli Vunisa is her husband and they were married for 5 years. They have a daughter who is presently 5 years old.
- ii) On the 23<sup>rd</sup> of May 2018, she was at home. They have had grog at her sister-in-law's place. Having had grog she and her husband has come to her home, the father-in-law's place to sleep.
- iii) While in the bedroom, the accused has requested them to have sexual intercourse. She has declined for the time being as they have been having sexual intercourse every now and then. Thereafter, he has kept sitting by the side of the bed and she has fallen asleep.

- iv) After about 2 hours, she has felt a pain in her vagina. Then she has sat and seen the accused sitting beside the bed and has asked him. He has told her to lie down for him to take it out. She has stood up and gone to the toilet to try and take it out herself. She has pushed it out like giving birth and it has come out. It was a bottle of Paracetamol. She has hidden that in the toilet and gone and lied down again. She has asked the accused why did he do that to her and he has not said anything.
- v) In the following morning, she has told him that she is going to buy bread and gone straight to her mother's home. At there, she has told her aunt Lavenia Vulawai about it. Then she has called the Police and when the police came, with them, she has gone to the accused's house and handed over the bottle of Paracetamol to the police.
- vi) She identifies, marks and produces the said bottle of Paracetamol as PE1. The police took her to the police station and thereafter to the hospital. She did not see the accused inserting it into her vagina. Anyway she did not consent him to insert it into her vagina.

30. In answering the cross examination by the counsel for the accused, the witness states;

- i) She admits that her mother and the Father of the accused are cousins and she is related to the accused and known him even before their marriage.
- ii) They started residing together in 2014 and the accused was a Carpenter by profession. He used to be away for his employment.
- iii) She admits that rumors were going around and the accused has asked her of them. In 2018, the accused was at Votualevu and from there he went to Matawalu. During those times they were separated. While in Matawalu, he has called her and asked about a phone watch she was using. That phone watch belonged to Joe. The rumors were that she was having an

affair with Joe and there were heated arguments between the accused and her. Thereafter she has gone to live with her mother.

- iv) When the accused came from Matawalu, he came straight to her mother's house and he brought yaqona to apologize to her family for the way he has spoken. He spend a couple of days there. Thereafter she went with him and the daughter to the accused's house.
- v) On the 22<sup>nd</sup> of May 2018, she did not go to Town, but went to Waimicia. She denies having had any argument with the accused on that day. That evening, after dinner, she has gone together with the accused to her sister-in-law's place to drink grog. The grog session ended around 02.00am on the 23<sup>rd</sup> of May 2018.
- vi) Then she has gone home with the accused and her mother-in-law and the husband's grandmother were sleeping in the living room next to their room. She denies having any conversation about the rumors then. When in the room, her husband has asked her of having sex. She refused. He has asked her 3 times and she has refused it. She denies that she woke him up around 3.00-3.30am, but states that he was awake and she has seen him sitting beside the bed when she woke up.
- vii) She admits that after going to the toilet she came back to bed. Though she is related to his parents and knows them, she has not told anything to them. In the morning she has told her husband that she is going to buy bread and she has left the house.
- viii) She agrees that on that day, the accused did not talk with her of the rumors. When asked whether she was angry with him of the accusations, the witness states that she was angry not of the accusations but of what he did to her in the early hours.
- ix) She states that she was not angry of the accusations then, because they have already happened. She denies that she wanted to take revenge from the accused. Because of what he did to her, she wanted to go and report to the police.

- x) When the police arrested and produced the accused in court, he was remanded. Then she went to live with her family. Once the accused was bailed out, she has gone and asked him for the forgiveness. She has sought forgiveness because of the rumors that she was having an extra marital affairs. She denies that she sought forgiveness because she made this allegation up.
  - xi) At the time of the incident, she was wearing a t-shirt, a sulu and tights. She did not drink grog much that night. The tights was lowered and the bottle was inserted. She did not feel anything at that time. The witness claims that really happened and she took out the bottle in the toilet.
31. In answering the re-examination, the witness states that arguments about the rumors took place about 6 weeks prior to this incident. She did not tell her father-in-law or the mother-in-law as many times before, during the fights between her and the accused, they have not done anything about them.
32. The PW2 was Lavenia Vunivesilevu. She is the aunt of the PW1, Lavenia Savai. Her evidence was that;
- i) The accused is her uncle's son and they are neighbors. Their housed are next to each other. PW1 is her sister-in-law's daughter.
  - ii) On the 23<sup>rd</sup> of May 2018, she was at home. The PW1 came with her daughter and came straight to her in the room and told she wanted to share her problem with her. Then they have come to the sitting room.
  - iii) She has told that last night when she went to sleep, her husband wanted to have sexual intercourse and she refused since she was tired and wanted to sleep. While sleeping, she had a stomach ache and woke up and asked her husband, what did he do and he has said nothing. Then he has told her to go to the toilet and that he has inserted a bottle of Panadol into her.

33. In answering the cross examination posed by the defence, the witness states that;

- i) When Pw1 came home, her mother was also at home.
- ii) She said that her mother will not believe what she will tell her.
- iii) She has not heard any rumors going around about the PW1.

34. The PW3 was Ms. Melaia Busa. She is a Nurse Practitioner attached to Waimaro Health Center at Nalawa, Ra. She examined and interviewed the patient on the 23<sup>rd</sup> of May at about 9.50am, and has completed the Police Medical Examination Form. The said Medical Examination Form is identified, marked and produced as PE2. As for her observations, the patient was in mild distress meaning that she was in some pain when she walked in. She examined her vagina. Though there were no visible injuries, she had pain when her vaginal walls were touched and she was not walking normally. She has told that a Panadol bottle was inserted to her vagina by her husband. The witness states that injuries were likely to have happened after 24 hours. When asked to explain the witness states that what she meant is within 24 hours. Lady and gentleman assessors, we all observed this witness. Though the words she used here are inconsistent with each other, you may give it an appropriate consideration. She states that her findings are consistent with the history given by the patient. She further states that the said injuries could have caused by the insertion of the bottle PE1.

35. In answering the cross-examination done on behalf of the accused, the witness states that;

- i) Prior to this, she has done more than 30 vaginal examinations and filled police examination forms.
- ii) She explains that trauma is something like a hit. You will not see any injury, but feel the pain.

- iii) She has stated that the injury may have sustained about 24 hours ago. The injuries were sustained by insertion of a foreign body, which may not necessarily be a bottle but anything other than a penis.
36. In answering the re-examination by the prosecution, the witness states that if the incident has occurred around 2.00am and she has examined around 10.00am on the same day, still her observations would be the same. Therefore it should be noted that her statement about the time of the alleged incident may not be accurate.
37. With leading the evidence of PW1 to PW3 and marking & producing PE1 and PE2, the prosecution closed their case. The Court being satisfied that there is sufficient evidence adduced by the prosecution covering the elements of the offence decided to call for defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.
38. The accused having understood his rights elected to give evidence on his behalf. His evidence was that;
- i) In 2018, he was at home in Dreketi Settlement.
  - ii) He works as a Carpenter and in 2018, he went to work in Votualevu, Nadi. He got married in 2014 and the relationship between them were good, till 2018.
  - iii) He was told of rumors of his wife having an extra marital affair, by his sister. When he heard the rumors, he was at Matawalu. He finished his work in March and came and stayed at home for a month during the April 2018. Then he left to Matawalu in the month of May 2018.
  - iv) He has had a heated argument with his wife on the phone and he has come to her house on the next day offering yaqona, apologizing for the words he used during the heated argument. Then he has spent about 2 weeks at her house and come back to his father's house with her. The alleged incident has happened when they were there for 2 days.

- v) On the 22<sup>nd</sup> of May 2018, his wife has gone to the town early in the morning. After about 2 hours later, he has gone in a bus to the town, following her. When he went to town he has seen her talking to someone on the phone and when he inquired, she has hidden the phone and told him that she was talking to her mother. He was angry then, but they did not have an argument over the said incident.
- vi) Then she has left for home and reached the home around 02.00pm and he has waited in the town and come home around 09.00pm. When he came home his wife was not at home and his mother has informed that she has gone to drink grog to his sister's place.
- vii) He has gone to that place and seen that his wife has just arrived there. It should be noted that this was never proposed to the PW1. They have had grog till around 02.00am.
- viii) Then he has come home with his wife. He has had a conversation with her in the living room about where she has gone. It should be noted that as for his version, his mother and the grandmother too were sleeping in the living room. His wife has not given a clear answer and they have gone to the bedroom thereafter.
- ix) They have slept then and she has woken him around 03.00am. She wanted to go to the toilet and he has escorted her to the toilet. She has not said anything else to him. He cannot recall what she was wearing that night. She has been in the toilet for about 15 to 30 minutes. Around 06.00am she woke him up and she wanted to go and buy bread. Thereafter, he has seen her when she came with the police around 9.00am.
- x) The police have come and taken him to the police station. He has been in remand for this matter for 2 months and 2 weeks. As for the case record it appears that he was remanded on the 25<sup>th</sup> of May 2018 and he was on bail by the 07<sup>th</sup> of July 2018. Therefore the maximum period he has been in remand would be 6 weeks. Furthermore, the accused stated that he went to Matawalu in May 2018 and worked there for 3 weeks before coming

home. Having come home too, he has stayed about 2 weeks at his wife's house and another 2 days at his father's house. This incident is alleged to have happened on the 23<sup>rd</sup> of May 2018. Therefore it should be noted that the time frames provided by the accused are highly unreliable and unrealistic.

- xi) He states that when he came home on bail, his wife had come and apologized for what she did to him. Accordingly, she has told that she has framed him together with her aunty. This statement has a few lapses. Firstly it was never suggested from the PW1, that she admitted to him of framing him. Secondly, it was never suggested from the PW2 that she has framed the accused together with the PW1.

39. In answering the cross examination, posed on behalf of the prosecution, the accused states that;

- i) He has had a child with his wife. He is not aware of the date of birth of the child. He knows that child will be 5 years old this year.
- ii) The witness states that she framed him because she came and apologized to him when he came out of the remand. It should be noted that irrespective of whether she apologized or not, he should have known whether he was framed or not from the inception.
- iii) He has not seen his wife with another man. His wife has told that those rumors are not true. He has not believed his wife as he has seen the phone watch with her. But again he states that he trusts her.
- iv) When she came with the police she brought the Paracetamol bottle from the toilet and handed it over to the police.



- iv) He states that, having returned from grog, he has discussed the issue and it was settled by the time they went to bed. This is inconsistent with his earlier evidence, where he stated that she did not give answer to him. The accused admits that he was angry with his wife when they came home, but states that he was not angry when they went to bed.
- v) Again the accused admit that when she refused to have sex with her thrice, he was angry with her by the time they went to bed.
- vii) When suggested that due to that anger, he inserted the Paracetamol bottle into her vagina, the accused denies that he did so.

40. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.

41. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence has been proved beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

42. The Accused has indicated his stance and it was that he has not inserted the Paracetamol bottle into her vagina. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.
43. With the submission of the accused's stance, one of the three situations given below would arise;
- (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
  - (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged count.
44. Any re-directions? — none —
45. Ladies and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

46. Your opinion should be;

Whether the accused is guilty or not guilty of the alleged count of Rape?



**Chamath S. Morais**

**JUDGE**

***Solicitors for the State*** : ***Office of the Director of Public Prosecutions.***  
***Solicitors for the Accused*** : ***Legal Aid Commission, Lautoka.***