

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

High Court Criminal Case No. HAC 417 of 2018

**BETWEEN** : STATE

**AND** : ILISAVANI CAVA

Counsel : Ms. U. Tamanikaiyaroi for the State  
Ms. R. Nabainivalu and S. Hazelman for the Accused

Date of Hearing : 18 & 19 February 2020

Closing Speeches : 19 February 2020

Date of Summing up: 20 February 2020

(The name of the complainant is suppressed and will be referred to as "SD")

**SUMMING UP**

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You are to decide the facts of the case, based on the evidence that has been led before this court. You will then apply those directions to the facts and give me your opinions as to whether the Accused person is guilty or not guilty.
2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going

through evidence. If you do not agree with that opinion you will ignore it and form your own opinions with that evidence.

3. You must base your opinions only and only on the evidence given by the witnesses. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, arguments and comments made by the counsel and this summing up are not evidence. A suggestion put to a witness is not evidence unless it is admitted by the witness. You may act only upon the evidence given by the witnesses in this case and nothing else. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so, is entirely a matter for you.
4. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinions. You will also not let any sympathy or prejudice sway your opinions. Emotions have no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of each element of the offence. You must not form your opinions based on the emotions, sympathies, prejudices, speculations or morality. As I said before you only have to consider the evidence given by the witnesses in this case and nothing else to form your opinions.
5. I will give you only a summary of the evidence given by the witnesses. I will not go through every word uttered by the witnesses, and if I leave out something that seems to be important, nothing stops you from taking that into account. Because you decide the facts.

6. After this summing up, you may give your individual opinions as the representatives of the community. You may reject or accept any evidence in forming your opinion. Your opinions need not be unanimous. And you need not give reasons for your opinions.
7. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Ladies and gentleman assessors,

8. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated them.
9. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail. Witnesses may most often forget chronology of events or they may not remember every detail of an incident after some time. You have to use your common sense in assessing the reliability and credibility of witnesses. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.
10. Generally, complainants of sexual offences react differently when they got to narrate the traumatic experience they have gone through. Some may display obvious signs of distress, anxiety and restlessness, but some may not. Every witness has their own way of expressions when they give evidence about an

experience, specially a traumatic one. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.

11. Subsequent conduct of complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may react instantly and report because of their maturity, education level, social status, and for other similar reasons. Some may not complain at once due to immaturity, lack of education, social stigma or for other similar reasons.
12. However, it must be noted that according to the law sexual offences do not require other evidence to corroborate the evidence of the complainant. Which means you can even solely rely on the evidence of the complainant only, without any other evidence to support it.
13. Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue.
14. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional

falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Memory is fallible, and you might not expect every detail to be the same from one account to the next. A witness may be honest enough but have a poor memory or otherwise be mistaken. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.

15. As a matter of law, I must direct you that what a witness said on oath is only considered as evidence. What a witness said in her or his statement to police, that is out of Court and therefore is not evidence. However, previous statements are often used to challenge a particular witness's credibility and reliability because a previous inconsistent statement may indicate that a witness said a different story then, and as a result her evidence might not be reliable. It is for you to decide the extent and importance of this inconsistency.
16. When you consider the evidence given by the witnesses, you have to see whether their evidence is reliable and credible. Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
17. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the prosecution must prove every element of the offence beyond reasonable doubt.

18. The Accused need not prove his innocence. The fact that the Accused gave evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence. The burden is on the prosecution to prove the guilt of the Accused. That means you must be satisfied that the state has proved every element of the offence beyond reasonable doubt. That doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of the offence, you must find him guilty.

Ladies and gentleman assessors,

19. We will now look at the offence that the Accused is indicted for. The Accused is charged for one count of rape in the Information filed by the Director of Public Prosecutions as follows;

*Statement of Offence*

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

*Particulars of Offence*

Iisavani Cava on the 31<sup>st</sup> day of October 2018, at Nasinu in the Central Division, penetrated the vagina of SD, with his fingers without her consent.

20. Now I will explain what matters you must take into consideration to determine whether the offence of rape is proved by the prosecution. The prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vagina of the complainant with his fingers;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complaint was not consenting; or the Accused was reckless as to whether or not she was consenting.

21. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the Accused and no one else committed the offence.
22. The second element involves the penetration of the complainant's vulva or vagina. The law states that even the slightest penetration of the vulva or vagina is sufficient to constitute the offence of rape. The vulva includes the rounded fleshy protuberance situated over the pubic bones that is covered with pubic hair, outer lips, inner lips, clitoris and the external openings of urethra and vagina. The vagina, also known as the birth canal is inside the body. Only the opening of the vagina can be seen from outside. Therefore, one has to necessarily enter the vulva before penetrating the vagina. Any kind of intrusive violation of the complainant's sexual organ, may it be vulva or vagina constitute the offence of rape.
23. As per the offence that the Accused is charged with in this case, the penetration is not by a penis. The offence is constituted by penetration of the vagina with a thing or a part of the body of the Accused that is not a penis. Therefore, the prosecution must prove beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his fingers to any extent.
24. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the Accused penetrated the complainant's vagina without her consent.
25. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. For the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. Consent obtained through force, threat, intimidation, fear of bodily harm, or by use of authority is not considered as consent given freely

and voluntarily. Submission without physical resistance by the complainant alone, to the act of the other person will not constitute consent.

26. Further, the consent given by the complainant may have been limited to a particular sexual activity and not for another sexual activity. Also, the consent can be withdrawn at any time. It is an ongoing state of mind and it is revocable once given. Consent of a person cannot be assumed.

27. In addition to proving that the complainant did not consent to the Accused to insert his finger into her vagina, 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.

28. The Accused was reckless, if the Accused realised there was a risk that she was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the vagina, you may find that the Accused was reckless as to whether or not the complainant was consenting. In other words, you have to see whether the Accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

29. If you believe that the prosecution proved all the elements of the offence you must find the Accused guilty. Likewise, if you believe that the prosecution failed to prove all the elements of the offence you must find the Accused not guilty to the offence of rape.

Ladies and gentleman assessors,

30. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions.



31. The complainant, SD gave evidence that in 2018 she was 15 years old. She said that on 30 November 2018 she came to Cunningham to visit her cousin brother and his wife. The complainant said that she left there at around 10 pm. She said that she was refused to board a bus as she did not have sufficient funds in her card. She had then started walking towards Valalevu, Nadera while listening to music on her phone. The complainant had then noticed someone following her. She said that she continued to walk and then she heard someone calling her from behind.
32. According to the complainant's evidence it was an iTaukei male and he had asked her where she is heading to. She had told him that she is going to Nadera, Valalevu and had continued walking. The complainant said that the iTaukei male suddenly touched her and showed his phone to her. She said that a sex video was playing on his phone and she had refused to watch that. The complainant had kept on walking and all of a sudden that person had touched her shoulder and had pushed her down. She said that after she was pulled down, he made her lean on to a fence.
33. The complainant said that he started kissing her neck and squeezing her breasts over her clothes. She said that she was pushing him away and was telling him to stop. The complainant was wearing shorts and that person had slid one of his hands inside her shorts. She said that she was wearing an underwear and he put his hand inside the underwear and inserted three fingers into her vagina. The complainant said that he was pushing his fingers in and out and he was holding her hands with his other hand. She further gave evidence that when he inserted his three fingers into her vagina, she felt pain.
34. The complainant further said that a lady, whom she referred to as 'aunty,' came out of a house close by. She said that she tried to shout, and she told him not to do what he was doing to her as she was like a younger sister to him. Then he had taken her a bit away from that house and had told her not to shout.

She said that he pulled a knife out of his canvass and threatened her to keep quiet. The complainant said that when he was trying to open his trousers, she kicked him and pushed him down. She had then run away from him, towards the main road. She had got into a taxi and had gone to Valalevu Police Station.

35. After she lodged the complaint the Police officers had escorted her towards FNU Valalevu. She said that the person who did the alleged acts was seen on the road and she showed him to the officers. She said that then the officers arrested that person. She also said that later she was medically examined by a doctor.

36. The complainant identified the accused as the person who did the alleged acts to her. She said that she saw his face when the lady who came out of the house switched on the lights when they were near the fence.

37. She further gave evidence that she did not give permission to the accused to insert his fingers into her vagina.

38. During the cross examination the complainant was asked as to why she did not shout when her mouth was not covered. The complainant said that it was when she was shouting a lady came out of the house. However, she agreed that the lady would have heard if she called out "aunty" since the house was near.

39. It was also highlighted during the cross examination that the complainant has told the Police in her statement that she came to get a bus with one Eramasi and his wife Aliti, although she said in court that she walked up to the bus stop alone. It was put to the complainant that she has not stated in her statement that she was taken to a bush. However, the complainant said that she told the Police about it although it is not recorded.

40. Under cross examination the complainant admitted that she had a shower before going for medical examination. She said that she used her fingers to wash her vagina and she felt pain when she used soap to wash herself.

41. It was also suggested that the accused only slid his hand into her shorts but over her underwear. The complainant denied the suggestion and said that he put his hand inside her underwear. She admitted that she told the accused to stop. However, she denied that the accused stopped what he was doing.
42. During the re-examination the complainant said that when the accused was holding her hands he was leaning onto her chest. She said that she struggled to stop him but was scared to scream as she was not sure what he will do to her. She also said that she felt pain in her private parts before she washed herself. That was the complainant's evidence.
43. The Prosecution tendered the medical report of the complainant as Prosecution Exhibit 1 through Dr. Nikotimo Naucusou Bakini. The witness stated that as per the medical report it has been observed that there were fresh lacerations or tears in the hymen at 6 o' clock and 8 o' clock positions. He said that fresh injuries mean the injuries caused immediately after the trauma or within 3 days of presentation. He also said that there had been superficial abrasion between the fourchette (where both sides of labia minora meets) and the hymen.
44. The witness explained that a blunt object like fingers or a penis need to pass through the hymenal opening to cause lacerations or tears in the hymen. He also said that superficial abrasions could be caused due to friction or rubbing by a penis or fingers.
45. During cross examination the medical witness said that vigorous insertion of three fingers would not cause more injuries as the hymen of a girl of that age has ability to stretch. Further he said that it is highly unlikely to cause similar injuries by scratching or washing of the vaginal area with the complainant's fingers.
46. That was the case for the prosecution.

47. After the closure of the prosecution case the Accused was explained his rights. The Accused decided to give evidence. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused and he need not prove his innocence.

48. The Accused gave evidence that on 30 October 2018 he was walking home after work. He said that the complainant came behind him and started talking to him. He said that he received a porn video on messenger and when he was watching that the complainant also wanted to watch the video. The accused further gave evidence that after watching the video he asked her whether he could touch her. He said that the complainant consented to his request. According to the accused then they had gone to a place behind a bus stop and had started kissing near a fence. The accused said that he put his hand inside her pants. But he said that he did not put his hand inside her underwear. The accused said that the complainant then told him to stop and he took his hand out. The accused denied that he inserted his fingers into the complainant's vagina. He also denied that he had a knife. The accused further said that when he was walking back, some Police officers came in a vehicle and took him to the Police Station.

49. That was the case for the defence.

Ladies and gentleman assessors,

50. It should be noted that in our law no corroboration is needed to prove a sexual offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, the prosecution can solely rely on the evidence of the complainant only, without any supporting evidence whatsoever in sexual offences. It is for you to decide how credible and consistent is the evidence of the complainant.

51. The prosecution case was that the Accused penetrated the vagina of the complainant with his fingers without her consent.
52. In this case the accused does not dispute his identity. He admits that on 30 October 2018 he put his hand inside the pants of the complainant. His only contention is that he did not insert his fingers into the complainant's vagina or touch the vagina.
53. As it was said before, it is the duty of the prosecution to prove the elements the offence against the Accused. The Accused need not prove his innocence.
54. You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the Accused not guilty of the charge. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence, beyond any reasonable doubt.
55. It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, when you are assessing the evidence given by the Accused. You must consider his evidence also for its consistency and also the probability of his version. If you find the evidence of the Accused is truthful and reliable, then you must find the Accused not guilty of the charge.
56. However, I must caution you that even if you reject the evidence of the Accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. You must still consider whether the evidence given by

the complainant proved all the elements of the offence of rape beyond reasonable doubt.

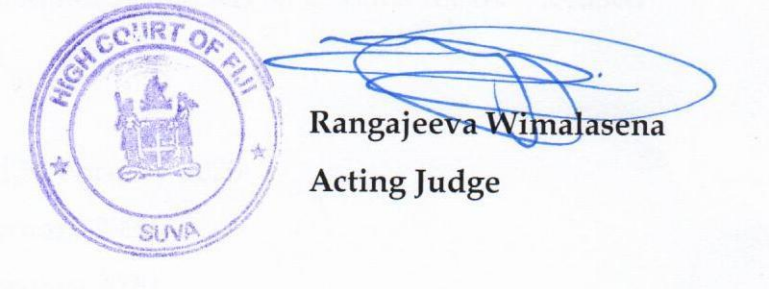
57. I have now given you the directions of law and summarized the evidence adduced in this case.

58. If you believe that the prosecution has proved the elements of rape beyond reasonable doubt, you must find the Accused guilty.

59. If not, you must find the Accused not guilty.

60. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

61. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



The image shows a blue ink signature of Rangajeeva Wimalasena over a circular official stamp. The stamp contains the text 'HIGH COURT OF FIJI' at the top, a central emblem, and 'SUVA' at the bottom. To the right of the signature, the name 'Rangajeeva Wimalasena' and the title 'Acting Judge' are printed in black text.

At Suva

20 February 2020

Solicitors for the State: Office of the Director of Public Prosecutions

Solicitors for the Accused: Office of the Legal Aid Commission