

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

**Crim. Case No: HAC 304 of 2019**

STATE

vs.

NEUMI RAWAVATU

**Counsel:** Mr. S.Komaibaba for the State  
Ms. S.Prakash for Accused

**Date of Hearing:** 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup> September 2020

**Date of Closing Submission:** 01<sup>st</sup> October 2020

**Date of Summing Up:** 02<sup>nd</sup> October 2020

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**SUMMING UP**

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1. The hearing of this case has now reached its conclusion. I have to sum up the case for you. As I explained to you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies to this action. You must accept the law from me and apply all directions I give you on matters of law.
2. Your function is to determine the facts of the case based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I explain it to you, to the facts as you find them to be, and in that way, arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. However, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts unless it coincides with your own independent opinion.
4. You must reach your opinion on evidence and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the exhibits tendered as evidence. This summing up, statements, arguments, questions, and comments made by the parties' counsel are not evidence. The purpose of the opening address by the learned counsel for the Prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the Prosecution is not evidence. The closing addresses of the counsel of the Prosecution and the Defence are not evidence either. They are their arguments, which you may properly consider when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss, and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that your opinion does not bind me, but I assure you that I will give the greatest possible weight to your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether sympathy for or prejudice against the accused, the Complainant, or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. It would be best if you approached your duty dispassionately, deciding the facts solely upon the whole of the evidence. You have to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

### **Burden and Standard of Proof**

7. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused guilty of the offence.
8. The burden of proof of the charge against the accused is on the Prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words, there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
9. The standard of proof in a criminal trial is "proof beyond a reasonable doubt." It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle in your mind about the accused's guilt, that means the Prosecution has failed to satisfy you the guilt of the accused beyond a reasonable doubt. If you find any reasonable doubt about the commission of the offence as charged or any other offence by the accused, such doubt should always favor the accused.

### **Information and elements of the offences**

10. The accused is being charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act and one count of Indecent Assault contrary to Section 212 of the Crimes Act. The particulars of the offences are in the information. Hence, I do not wish to reproduce them in the summing up.
11. The main elements of the offence of Rape are that:
  - i) The Accused,
  - ii) Penetrated the vagina of the Complainant with his finger,
  - iii) The Complainant did not consent to the accused to penetrate her vagina with his finger.

iv) The accused knew or believed or reckless that the Complainant was not consenting for him to insert his finger in that manner.

12. The main elements of the offence of Indecent Assault are that:

- i) The accused,
- ii) Unlawfully and Indecently,
- iii) Assault the Complainant.

13. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. It is your duty as Assessors to consider and decide whether the act of fondling of the breast of the Complainant is indecent.

#### **Admitted Fact**

14. I now request you to draw your attention to the Agreed Facts, which are before you. They are the facts that the Prosecution and the Defence have agreed without dispute. Hence, you are allowed to consider them as proven facts by the Prosecution beyond a reasonable doubt.

#### **Separate Consideration**

15. The accused is charged with one count of Rape and one count of Indecent Assault. You have to consider each of these two counts separately. If you find the accused guilty of one count, that does not automatically make him guilty of the remaining count. Likewise, if you find the accused not guilty of one count, that does not automatically make him not guilty of the remaining of the counts.

#### **Accused**

16. It is the onus of the Prosecution to prove beyond a reasonable doubt that it was the accused who committed these offences to the Complainant.

## Penetration

17. Evidence of the slightest penetration of the finger into the vagina of the Complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

## Consent

18. Consent is a state of mind that can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely voluntarily. A consent obtained through fear, by threat, by the exercise of authority, by use of force, or by intimidation, could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
19. The Complainant must have the freedom to make a choice. It means that she must not be pressured or forced to make that choice. Moreover, the Complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
20. If you are satisfied that the accused had inserted his finger into the vagina of the Complainant and she had not given her consent, you are then required to consider the last element of the offence. That is whether the accused honestly believed or knew or reckless that the Complainant was freely consenting for this alleged sexual act. I must advise you that belief in consent is not the same thing as hope or expectation that the Complainant was consenting. You must consider whether the accused knew either that the Complainant was not in a condition or a position to make a choice freely and voluntarily, or the Complainant had made no choice to agree to the sexual act. Suppose you conclude that the accused believed or knew that the Complainant was consenting. In that case, you must then consider whether such a

belief of the accused was reasonable under the circumstances that were prevailed at the time of the alleged incident.

### **Evidence of Corroboration**

21. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the Complainant and accept it as reliable, credible, and truthful, you are not required to look for any other evidence to support the account given by the Complainant.
22. One or more of you may have assumptions as to what constitutes Rape, what kind of person may be the victim of Rape, what kind of person may be the rapist, or what a person is being raped will do or say. Though such assumptions are natural in ordinary life, you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist, or a victim of Rape.
23. Offences of this nature can occur in any circumstance between any person who acts in various ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses during the hearing.
24. It is your duty to assess the evidence to determine whether the accused has committed this crime to the Complainant. In doing that, you must be mindful not to bring in to the assessment of the evidence any preconceived views as to how a victim of Rape in a trial such as this should react to the victim's experience. Every person has his or her way of coping with such an incident. Some may display apparent signs of distress, and others may not. Demeanours of the Complainant in the court while giving evidence is not necessarily a clue to the truth of the Complainant's account.

### Evidence of the Prosecution

25. Let me now remind you of the evidence presented by the Prosecution and the Defence during the hearing. This is a very short hearing, where the Prosecution adduced the evidence of two witnesses, including the Complainant. The Defence presented the evidence of two witnesses. I trust that you have heard those evidence and still could recall them.
26. The Complainant was a 13 years old girl, attending to CMF Primary School in 2018. She has gone to Waicoka village to attend a function on the 27th of October 2018. You may recall that she explained in her evidence that she met one Neumi at the beach. It was in the afternoon. She had gone to the beach after the function, where she met Neumi. She then explained that they have gone to a vacant house. Inside the house, Neumi had kissed her lips and touched her breast, and then placed his hand inside her vagina. The Complainant was scared as someone might find this incident, and she will be punished. When she heard someone was calling for her, she had pushed Neumi and ran out of the vacant house.
27. In contrast to what she had explained in her evidence in chief, the Complainant said during the cross-examination that she saw Neumi while he was still in the sea and never spoke to him in the afternoon 27th of October 2018. She further said that she did not meet Neumi on the 27th of October 2018. She left the beach while Neumi was still in the water. The Complainant said further that Neumi did not take her to a vacant house, did not kiss her, or fondled her breast or placed his hand inside her vagina.
28. In the afternoon of the 30th of October 2018, she had gone to her grandmother's place to pick the dinner. On her way, she had met one Kikica. Kikica had asked her if she knows Neumi. The Complainant then met three girls on her way to grandmother's place. Upon reaching her grandmother's house, she had picked the dinner and took it back to her home. The Complainant had then gone back to her grandmother's house. On her way, she met Kikica again. Kikica had asked her to come over to her place in the afternoon. The Complainant had spent sometimes at her grandmother's home and then went to Kikica's place. She found that no one was at Kikica's place. She then saw Neumi was standing in

front of the house on the road. He asked her to go for a stroll, which she agreed. They have walked together for about 20 minutes and reached a vacant house. He asked her to sit on a wooden log, which she did as he asked. She was dressed in pants, wrapped around 'sulu', and a singlet. Neumi was standing in front of her while she was seated on the wooden log. He then forced himself to kiss her lips and then touched her breast. After touching her breast, his hands went down to touch her vagina. He had poked her vagina. The Complainant said she was angry and scared but did not explain why she was angry and for what she was scared of. The Complainant then pushed Neumi away and ran towards the roadside. Neumi was running after her and pulled her 'sulu'. She had told him that she was going up as they were looking for her. Neumi pulled her 'sulu' and asked her money for a cigarette. She had given him one dollar and got her 'sulu' back. She then went home.

29. You heard the Complainant then said that Neumi made her lie down and then laid on her. He then touched her breast and poked his hand into her vagina. She did not specify in her evidence whether she was wearing long pants or short pants. Moreover, the Complainant did not explain how did Neumi poke his hand into her vagina, whether removing her pants or with her pants.
30. On her way home, she met one Salome. Salome told her that her mother was looking for her, and someone had told her mother that the Complainant was with Neumi. The Complainant had run straight home. When her mother asked her where she was, the Complainant had lied to her, saying that she was at Kikica's house. The Complainant had lied to her mother because she thought her mother would get angry and beat her if she tells the truth. The Complainant had then gone to sleep. She was awakened up at around 8 p.m. by her grandmother. Her grandfather questioned her about Neumi, and then grabbed her to Neumi's house. He was outraged at what he had heard. You may recall that the Complainant did not explain what the grandfather had heard of getting angry as such. He then took her to Neumi's house, where they found he had gone somewhere. On the following day, the mother of the Complainant had told her to go to the police and report about the rumours that her mother had heard.



31. During the cross-examination, the Complainant said that she did not meet Kikica twice on her way to her grandmother on the 30th of October 2018. It has not recorded in the statement the Complainant made to the police as well. The Complainant met Kikica on the 29th of October 2018. Moreover, the Complainant had not stated that she met three girls on her way to her grandmother's place on the 30th of October 2018. Furthermore, it has not been recorded in her statement that Neumi made her lie down and then laid on top of her on the 30th of October 2018.
32. You may recall that the Complainant had informed the Doctor who had performed the medical examination of her on the 3rd of November 2018 that Neumi had taken off her panty and tried to insert his penis into her vagina on the 30th of October 2018. Answering the cross examination's final question, the Complainant said she made a false allegation against Neumi.
33. The second witness of the Prosecution is Dr. Bakani. He explained the contents of the Medical Examination Report prepared by Doctor Elvira Ongbit on the 3rd of November 2018.

#### **Evidence of the Defence**

34. At the conclusion of the Prosecution's case, the accused was explained about his rights in defence. The accused opted not to give evidence but called two witnesses for his defence. I will now proceed to summarize the evidence presented by the Defence briefly.
35. The first witness of the Defence is Mr. Apakuki Soweta. He is a childhood friend of the accused. According to his evidence, the accused had gone to play touch rugby at CMF ground with Apakuki in the afternoon of the 30th of October 2018. They have left to play touch rugby at around 4 to 4.30 p.m. It was nearly 7 p.m, when they returned home. The accused went home first, and then Apakuki left to his house.

36. The second witness of the Defence is Ms. Rosalini Tatatau. She is the mother of the accused. The accused came home around 7 p.m. after playing rugby on the 30th of October 2018. He was at home till 9.30 p.m. He had his dinner and then watched TV. He then left home, informing that he was going to a friend's place. Five minutes after the accused left home, the Complainant's family came, looking for the accused. Ms. Rosalini had informed them the accused had just left home. During the cross-examination, Ms. Rosalini said that the police came to get her statement, but she wanted to tell them what happened.
37. I have summarized the evidence presented during this hearing. However, I might have missed some. It is not because they are not important. You have heard every item of evidence. I only wanted to draw your attention to the main items of evidence and help you recall yourselves of the evidence.

### **Analysis and Directions**

38. The Prosecution alleges the accused had taken the Complainant near to a vacant house and then touched her breast and penetrated her vagina with his finger. In contrast, the Defence claims that the accused played touch rugby with his friends during the time material to this alleged incident.
39. Accordingly, you have first to decide whether this alleged incident took place. You have to decide then whether it was the accused who committed the two alleged offences. To do that, you have to determine the reliability and credibility of the Prosecution and the Defence's evidence.

### **Evaluation of the Evidence**

40. I now take your attention to the direction of evaluation of the evidence. The evolution of evidence consists of two main steps, the determination of the reliability and the credibility of the evidence.

### Reliability of Evidence

41. You must be satisfied that you can rely on the evidence as reliable evidence. To do that, you have to be satisfied that evidence is free from mistakes, errors, and inaccuracies. If you find the evidence is free from such mistakes, errors, and inaccuracies, you can consider the evidence as reliable evidence.

### Credibility of Evidence

42. The assessment of the credibility of evidence does not concern the unintended inaccuracy, mistakes, or errors. It focuses on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, their motivations, their relationship to, and the reaction to the particular situation.
43. Evaluation of the reliability and credibility of evidence will help you determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to decide whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
44. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear, and or feel what the witness is talking in the evidence. It would be best if you then considered whether the witness's evidence is probable or improbable, considering the circumstances of the case. Apart from that, you are required to consider the witness's consistency not only with his or her evidence but also with other evidence presented in the case.
45. It is your duty to consider the witnesses' demeanour, how they react to being cross-examined, and re-examined and were they evasive to decide the witness's credibility.

46. Moreover, you must bear in mind that 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 accurate in another thing.

### **Defence of Alibi**

47. Let me now take your attention to the accused's defence, where he claims that he was not present at the scene of the crime, as the accused was playing touch rugby with his friends at CMF ground. The accused's defence is an alibi.
48. The accused is not obliged to prove his innocence and also not required to give evidence. However, in this hearing, the accused elected to present evidence of two witnesses. Therefore, you have to consider the evidence adduced by the Defence when you determine the issues of this case.
49. Even though the accused has put forward the defence of alibi, the burden of proving the case against the accused remains on the Prosecution. The Prosecution must prove so that you are sure that the accused was present at the scene of the crime and allegedly committed the two offences as charged. In doing that, the Prosecution has to disprove the alibi defence put forward by the Defence. That does not mean the Prosecution is required to provide specific evidence to disprove that the accused was not at the CMF ground playing touch rugby with his friends. If you believe and accept the Prosecution witnesses' evidence as credible, reliable, and truthful beyond a reasonable doubt, then the Prosecution has discharged its duty of disproving the alibi defence of the accused person.
50. If you conclude that the accused's alibi is true or may be true, then the accused cannot participate in this alleged crime, and you must find the accused not guilty. If, on the other hand, you are sure, having considered the evidence carefully, that the accused's alibi is false, that is a finding of fact that you are entitled to consider when judging whether he is guilty. But do not jump to the conclusion that because the alibi put forward is false, the accused must be guilty. You should bear in mind that sometimes an alibi is invented because the

accused thinks it is easier than telling the truth. The main question for you to answer is: are we sure that this alleged incident involving the accused took place as claimed by the Prosecution.

51. In respect of alibi defence, the accused is not required to prove beyond a reasonable doubt his alibi defence. The burden of the accused to prove his alibi is an evidential burden. It means that the accused has to adduce or point to evidence that suggests a reasonable possibility that he was somewhere else when this alleged offence took place.
52. If you believe or maybe believe that there is evidence that suggests a reasonable possibility that the accused was not present at the scene of the crime and he was playing touch rugby with his friends at CMF ground, you can find the accused not guilty.

### **Evidence of the Prosecution**

53. The accused claims that he was not present at the crime scene, and therefore, the Complainant may have mistakenly identified the alleged perpetrator as the accused. Consequently, you must determine whether the Complainant had clearly and adequately identified the accused as the perpetrator. To do that, you have to decide whether or not you can accept the Complainant's evidence as reliable, credible, and truthful evidence. If you are satisfied, you must then determine whether what she said in her evidence is probable or improbable according to the circumstances they were explaining.
54. When you are considering the evidence of identification given by the Complainant, you need to exercise special caution. The reason for this is that experience tells us that honest and impressive witnesses, genuinely convinced of the correctness of their identification, have in the past made mistakes, even a number of witnesses making the same identification. You cannot convict the accused unless you are sure that the Complainant's identification of the accused was accurate and, in making that judgment, you need to look carefully at the circumstances in which it was made and at any other evidence in the case which may support it. Especially you have to take into consideration the followings:

- i) How long was the suspect under observation?
- ii) At what distance?
- iii) In what light?
- iv) Was the observation impeded in any and, if so, what way?
- v) Had the witness seen the suspect before and, if so, how often and in what circumstances?
- vi) Was there any material difference between the description given by the witness at the time and the suspect's actual appearance?
- vii) Any other circumstances emerging in the evidence which might have affected the reliability of the identification.

55. Let us consider the circumstances in which the identification took place. The Complainant had seen Neumi at the beach on the 27th of October 2018 while he was swimming in the sea. She had not spoken to him. Neither he came and talked to her. She then met Neumi on the 30th of October 2018 near Kikica's house. They went for a stroll for about 20 minutes. It was getting dark. When she was sitting on the wooden log, he was standing in front of her.

### **Inconsistencies and omissions**

56. Madam and Gentlemen, you have heard that the Complainant said during the evidence in chief that she met Kikica twice on her way to the grandmother's house on the 30th of October 2018. In contrast, she said she did not meet Kikica on the 30th of October 2018 during the cross-examination. Moreover, she said during the cross-examination that she made a false allegation against Neumi. (Last question of the cross-examination).
57. You are allowed to consider the inconsistencies in the evidence of witnesses when you consider whether the witness's evidence is reliable and credible.
58. Additionally, you have heard that the learned counsel for the Defence cross-examined the Complainant about the inconsistent nature of the statement that she made to the police and the evidence given in court. Moreover, the learned counsel for the Defence in her closing address suggested you consider the inconsistent nature of the Complainant's evidence.

59. You are allowed to consider the inconsistencies and the omissions when you consider whether the witness is believable and credible as a witness. However, the statement made to the police is not evidence of the truth of its contents. The evidence is what the witness testified in court on oath.
60. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible, and you might not expect every detail to be the same from one account to the next.
61. If there is any inconsistency, it is necessary to decide whether it is significant and whether it affects the reliability and credibility of the issue you are considering. If it is substantial, you will next need to consider whether there is an acceptable explanation for it. If there is a satisfactory explanation for the change, you may conclude that the evidence's underlying reliability is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent influences your judgment of the reliability of such witness.

### **Final Directions**

62. Ladies and Gentleman, I now take your attention to the final directions of the summing up.

### **First Count**

63. Upon consideration of the whole of the evidence adduced during the hearing, if you are satisfied that the Prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Rape as charged under count one, you can find the accused guilty of the said offence of Rape.
64. If you are not satisfied or have doubt whether the Prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Rape as charged under count one, you must find the accused not guilty of the said count of Rape.

### Second Count

65. If you are satisfied that the Prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Indecent Assault as charged under count two, you can find the accused guilty of the said offence of Indecent Assault.
66. If you are not satisfied or have doubt whether the Prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Indecent Assault as charged under count two, you must find the accused not guilty of the said count of Indecent Assault.

### Conclusion

67. Madam and Gentleman Assessors, I now conclude my summing up. It is time for you to retire and deliberate your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached your opinion, you may please inform the clerks so that the court could reconvene.
68. Learned counsel of the Prosecution and the accused, do you have any redirections to the assessors?



At Suva

02<sup>nd</sup> October 2020

Solicitors

Office of the Director of Public Prosecutions for the State.  
Officer of the Legal Aid Commission for the Defence..

  
R.D.R.T. Rajasinghe  
Judge