

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 328 of 2019

[CRIMINAL JURISDICTION]

STATE

V

- 1. ALIPATE DURU**
- 2. TUATE TUVUNI**
- 3. LEMEKI KOROI**

Counsel : Ms. S. Shameem for the State
Ms. L. David and Mr. P. Varinava for 1st Accused
Ms. N. Mishra for the 2nd Accused
Ms. A. Singh for the 3rd Accused

Hearing on : 27 - 28 October 2020

Summing up on : 29 October 2020

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should 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 you agree with that opinion. You are the judges of facts.

2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room and the admitted facts. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. 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 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 the complainant. No such emotion should influence your decision.
5. 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 behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience 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 all, part or none of any witness' evidence.

6. 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 you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.
7. 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. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
8. 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 proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
9. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
10. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means

that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.

11. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you have a reasonable doubt in respect of even one of those elements, as to whether the prosecution has proved that element beyond reasonable doubt, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.
12. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not those charges have been proved.
13. Please remember that 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 necessary.
14. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

FIRST COUNT

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ALIPATE DURU on the 8th day of September, 2019 at Cunningham in the Central Division, had carnal knowledge of **KARALAINI TUBUNA**, without the consent

of the said **KARALAINI TUBUNA**.

SECOND COUNT

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

TUATE TUVUNI, on the 8th day of September, 2019 at Cunningham in the Central Division, had carnal knowledge of **KARALAINI TUBUNA**, without the consent of the said **KARALAINI TUBUNA**.

THIRD COUNT

Statement of Offence

Aiding And Abetting: contrary to Section 45 and 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ALIPATE DURI, on the 8th day of September, 2019 at Cunningham in the Central Division, aided and abetted **TUATE TUVUNI**, to have carnal knowledge of **KARALAINI TUBUNA**, without the consent of the said **KARALAINI TUBUNA**.

FOURTH COUNT

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

LEMEKI KOROI, on the 8th day of September, 2019 at Cunningham in the Central Division, had carnal knowledge of **KARALAINI TUBUNA**, without the consent of the said **KARALAINI TUBUNA**.

FIFTH COUNT

Statement of Offence

Aiding And Abetting: contrary to Section 45 and 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ALIPATE DURI, on the 8th day of September, 2019 at Cunningham in the Central Division, aided and abetted **LEMEKI KOROI**, to have carnal knowledge of **KARALAINI TUBUNA**, without the consent of the said **KARALAINI TUBUNA**.

15. As I have already informed you, after the prosecution case was concluded, it was decided not to proceed further in relation to the second accused and the third accused. Accordingly, you need not deliberate on the second and the fourth counts above.
16. The three remaining charges are against the first accused. That is, the first count, the third count and the fifth count. You should bear in mind to consider those three charges separately. You should not find the first accused guilty of the other counts simply because you may find him guilty of one particular count. It is necessary that you consider whether the prosecution has proved each count beyond reasonable doubt against the relevant accused separately.
17. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
18. The first prosecution witness ("PW1") said in her evidence that;
 - a) *She is 20 years old. She resides at Vunidawa Settlement, Cunningham. On 08/09/19, around 7.00pm, while she was returning home after she went with one of her cousins to look for that cousin's sister, a person called her. She was walking on the main road. She did not know this person as he was new to the settlement. He called her "sis". She thought that this person needed help and went to him. It is not disputed that this person is the first accused. She said that the first accused told her that he is looking for someone to be in a relationship with.*
 - b) *She told him that she is still schooling and the first accused told her that he is also schooling and he is a form 6 student and that his name is 'Saula'. Then he told her that*

- they should go to the 'ghetto'. She said that she did not give her consent. She said that they were talking on a footpath and there were three houses nearby. One house was at the top of a small hill and the other two houses were not on the hill and they were situated opposite to each other. Those two houses were about 2 meters away from where they were standing. One of those was a blue house and there were some people outside that blue house, burning something.*
- c) When she did not give her consent to go to the ghetto, the first accused pulled her from her t-shirt and took her to the ghetto. This ghetto was the area under the white house which was opposite the blue house. She shouted asking for help, but no one came to help her. She said the ghetto was totally dark and she could not see anything. There was a settee with a loose handle in that ghetto. When the accused pulled her inside the ghetto there was no one else there.*
 - d) Then the first accused forced her to sit down on the settee by pushing her shoulder and she fell. Then she was lying on the settee and he closed her mouth to stop her from shouting. Then he took her clothes off. She said that she continued to shout when the first accused took his hands off her. She was wearing a t-shirt, a vest, pants and a panty. She said the accused removed all those. She said that he un-buttoned and unzipped her pants before removing them.*
 - e) There after the first accused laid on top of her and put his penis inside her vagina. She said that the first accused did not ask her for her permission before doing that. She said that she did not want the first accused to put his penis inside her vagina and he knew that. While the first accused was inserting his penis inside her vagina, she shouted but no one came to help her. She wanted to stand up and leave, but she couldn't.*
 - f) She said that she heard some other people calling the first accused's name from outside while he was inserting his penis inside her vagina. Then the first accused told them to wait for a while for their turn for him to finish.*
 - g) Thereafter, the accused called out for them to come and he sat on her stomach. He blocked her mouth with one hand and with the other hand, held her neck tightly so that she could not move. She struggled to escape from there, but then the loose handle of the settee caused injuries to her left shoulder. There were no other injuries on her body.*
 - h) While the accused was blocking her mouth and holding her neck in this manner, she saw someone lighting a gas lighter beside her leg and this person told her not to tell anyone about what happened there. Then the accused took his hand off her mouth and she started shouting. Then the women staying in that house heard her. Then she was asked whether anyone apart from the first accused penetrate her vagina and she said that more than five others inserted their penises inside her vagina. She said that she does not know the names of the others.*
 - i) She said that these other persons asked the first accused if they also can do what he was doing and he gave his consent. She did not give her consent. At the time these persons*

- had sexual intercourse with her the first accused was sitting on her stomach as she explained. She said that the other persons did not know that she did not agree.*
- j) When this lady heard her, she came down to the ghetto using the light in her phone. Then all those who were there ran away except one person who was asking for a second round. Then she punched him. After the lady came down, she stood up and started looking for her clothes. Because she could not find her clothes, she covered herself from the bed sheet which was there to cover the settee. The lady then questioned her and took her to the house and thereafter to her uncle's house. There the lady called the police and reported the matter.*
 - k) During cross-examination she denied that she followed the first accused to go up to the white house after talking to him at the footpath. She agreed that they had to go down a slope to go to the ghetto. She denied having consensual sexual intercourse with the first accused. She said "yes" when it was suggested to her that she cried rape because she was embarrassed to be dressed in a bed sheet when the lady questioned her.*
 - l) During re-examination, she said that she agreed to the said final suggestion because she was taken to the ghetto and her clothes were removed forcefully. She said that they hid her clothes and they had caused her to feel weak.*
19. That was the evidence for the prosecution. The accused opted to give evidence on oath and called two witnesses.
20. The accused when he gave his evidence said that;
- a) He asked PW1 whether she is still available or not and PW1 said "yes". They then continued chatting for a while and he asked her if they could go up to the ghetto. He said that PW1 agreed. He said that he took the lead and she followed him. He said that on their way there were some people standing near the blue house and they were burning something. After they went inside the ghetto they sat on the settee and they continued chatting. Later he asked whether they could 'be together' and PW1 said "yes". They started kissing each other. He asked her if she could remove her clothes and then she removed her clothes. He removed his. Thereafter they had sexual intercourse.*
 - b) After they had sex, he heard people talking and they were coming down. He told her to get dressed and for them to leave. He got dressed up and left, but PW1 got late to get dressed. Then PW1 met the woman that came there.*
 - c) During cross-examination he agreed that his name is not Saula. He said that if he had pulled PW1 at the place where they were chatting, people who were there would have run after him and would have punched him. He denied the allegations.*

- d) *He said that while the second accused and the third accused were having sexual intercourse with her, he was outside the ghetto. He said that the two asked permission from PW1 to have sexual intercourse.*
21. The second witness for the defence was the second accused (“DW2”). He said that;
- a) *On 08/09/19, he saw the first accused and PW1 walking on the drive way when he returned from the shop after buying cigarettes. He said that PW1 was following the first accused. He saw them going down to the ghetto. Then he started smoking. When he finished smoking he went to check on the first accused and PW1 inside the ghetto and he saw them having sexual intercourse.*
- b) *Then he asked permission from PW1 for him to have sexual intercourse with her and she said “yes”. When she agreed, the first accused went outside and then he had sexual intercourse with her. He said that the first accused did not assist him in anyway to have sexual intercourse with PW1.*
- c) *During cross-examination he agreed that him and the first accused are best friends.*
22. The third witness for the defence was the third accused (“DW3”). He said that;
- a) *On 08/09/19, he met the second accused at the drive way to the second accused’s house. While they were smoking there, the second accused told him that the first accused is inside the ghetto with a girl. He went inside the ghetto and spoke to the first accused. Then he asked permission from PW1 and she said “yes”. When she said “yes”, the first accused stood up and went outside. He said that throughout the time he was with PW1, the first accused was outside.*
23. To prove the offence of rape in this case, the offence relevant to the first count, the prosecution should prove the following elements beyond reasonable doubt.
- a) the accused;
- b) penetrated the vagina of PW1 with his penis;
- c) without the consent of PW1; and
- d) the accused;
- (i) knew or believed that PW1 was not consenting; or
- (ii) was reckless as to whether or not she was consenting.

24. With regard to the first count, the first and the second elements are not disputed by the first accused. He admits having sexual intercourse with PW1 by inserting his penis inside her vagina. Therefore you should consider that the first two elements have been established beyond reasonable doubt.
25. However, the other two elements are in dispute. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated PW1's vagina without her consent.
26. 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;
 - a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
27. Apart from proving that PW1 did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that PW1 was not consenting; or the accused was reckless as to whether or not PW1 was consenting. This is the fourth element of the offence of rape.
28. It is not difficult to understand what is meant by "the accused knew or believed that PW1 was not consenting". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that PW1 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 PW1's vagina, you may find that the accused was reckless as to whether or not PW1 was consenting. Simply put, you have to see whether the accused did not care whether PW1 was consenting or not.

29. You should also 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 on relevant proven facts and circumstances.
30. On the third and the fifth counts the first accused is charged with aiding and abetting the second accused and the third accused respectively to commit the offence of rape.
31. A person who aids or abets the commission of an offence by another person is taken to have committed that offence. A person may be found guilty of aiding or abetting the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
32. For an accused to be guilty of an offence on this basis;
 - (a) the person's conduct must have in fact aided or abetted the commission of the offence by the other person; and
 - (b) the offence must have been committed by the other person.
33. In this case, according to PW1, all the others who had penetrated the vagina did that without her consent. Both the second accused and the third accused admitted that they had sexual intercourse with PW1 by penetrating her vagina with their penises. PW1 also said in her evidence that the others did not know that she was not

consenting. Because of this evidence, the second and the third accused needed to be found not guilty of the offence of rape as they had not had the knowledge that PW1 was not consenting. However, as far as PW1 is concerned (if you believe her evidence), she was raped by each of those individuals including the second accused and the third accused; the offence of rape was committed by the second accused and the third accused individually. Therefore, if you accept the relevant evidence of PW1 to be credible and reliable, you may consider whether the first accused aided and abetted the second accused and the third accused to commit the offence of rape as per the third count and the fifth count respectively.

34. To establish aiding or abetting, the prosecution should prove that the first accused must have intended that;
 - (a) his conduct would aid or abet the commission of any offence of the type the other person committed; or
 - (b) his conduct would aid or abet the commission of an offence and have been reckless about the commission of the offence that the other person in fact committed.

35. However, a person cannot be found guilty of aiding or abetting, the commission of an offence if, before the offence was committed, the person –
 - (a) terminated his or her involvement; and
 - (b) took all reasonable steps to prevent the commission of the offence.

36. In this case, the first accused says that PW1 was lying. He pointed out that he could not have dragged her to the ghetto because there were other people around that place. He said that he did not strangle PW1 and if he did there would have been marks on her neck given her complexion. It is the position of the defence that PW1 had consensual sexual intercourse with the first accused and also with the second accused and the third accused, but PW1 was embarrassed when the lady who owns

that house questioned her when she was only wearing a bed sheet, and that is why she made the allegations that she was raped.

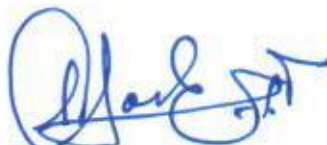
37. You have to remember that you are not here to judge whether the accused is right or wrong morally. You are here to decide whether the accused had committed the offence of rape as stipulated by the law.
38. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
39. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
40. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in relation to each count;
 - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is a reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, or his witnesses, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You

should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

41. Any re-directions?
42. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
43. Your opinion should be whether the accused is guilty or not guilty on the first, the third and the fifth counts.




Vinsent S. Perera
JUDGE

Solicitors;
Office of the Director of Public Prosecutions for the State
Legal Aid Commission for all the Accused