

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

CRIMINAL CASE NO. HAC 104 OF 2018

BETWEEN : **STATE**

AND : **UMESH CHAND**

Counsel : *Ms. S. Naibe for the State*
Ms. K. Vulimainadave for the Accused

Hearing on : *28th – 30th of October 2020*

Summing up on : *06th of November 2020*

SUMMING UP

Lady and gentlemen 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. Though the Director of Public Prosecutions has charged the accused of three counts initially, at the conclusion of the prosecution case the defence made an application that there is no case to answer in regards to the 2nd count and the prosecution too, conceded to it. The court being satisfied that the prosecution has failed to adduce sufficient evidence in regards to the 2nd count, acquitted the accused of it. Therefore, there remains two counts to be tried by you. They are;

COUNT 1

Statement of Offence

ABDUCTION OF YOUNG PERSONS: Contrary to section 285 of the Crimes Act 2009.

Particulars of Offence

Umesh Chand, on the 23rd of May 2018 at Lautoka, in the Western Division, unlawfully took Kesaia Bukabai Lewadrau, being under the age of 18 years, out of the possession and against the will of her mother.

COUNT 3

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

Umesh Chand, on the 23rd of May 2018 at Lautoka, in the Western Division, inserted his finger into the vagina of Kesaia Bukabai Lewadrau, a child under the age of 13 years.

18. Section 285 of the Crimes act describes the offence of Abduction of Young Persons. Accordingly;

285. Any person commits a summary offence if he or she unlawfully takes or causes to be taken any young person, being under the age of 18 years, out of the possession and against the will of his or her father or mother, or of any other person having the lawful care or charge of the young person.

19. Therefore the ingredients of the offence would be;

- i) The Accused
- ii) Unlawfully takes or causes to be taken out of the possession
- iii) A young person below the age of 18 years
- iv) Without the consent of the parent or the guardian.

20. These ingredients, when applied to this case, the prosecution has to prove that;

- i) Mr. Umesh Chand
- ii) unlawfully took Kesaia Bukabai Lewadrau out of the possession,
- iii) who was below the age of 18 years
- iv) Without the consent of her mother.

21. The defence concedes to above 1st, 3rd and the 4th ingredients. The sole contested element is the 2nd element. The word unlawfully means simply against the law. It would be important for me to point you that section 224 of the Crimes Act states that;

224. Except as otherwise expressly stated, it is immaterial in the case of any of the offences committed with respect to a person under a specified age, that the accused person did not know that the person was under that age, or believed that he or she was not under that age.

Therefore it should be noted that it is immaterial whether the accused was misled by her appearance or not. Even in case the accused honestly believed that she was married or over the age of 18 years, the law provides for the accused to be guilty of the alleged offence of Abduction of Young Persons. But the issue to be decided by you is whether the accused has taken the PW1 out of the possession of her parents. If she was taken by force as alleged by the prosecution, yes you should consider so. But if the defence version is accepted, that is, while roaming around the town, if she on her own goes on willingly with accused, on a journey of fun and frolic, pretending to be a married elder, should the accused be held liable for taking her out of the possession of her parents? It is up to you to decide.

22. Now I will deal with the essential elements of the offence of Rape alleged in the count. 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;

Section 207 (3) of the Crimes Act states that;

(3) For this section, a child under the age of 13 years is incapable of giving consent.

23. 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 Kesaia Bukabai Lewadrau with his finger,

(iii) At that time Kesaia Bukabai Lewadrau was below the age of 13 years.

24. 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.

25. The second element is penetration of the Kesaia Bukabai Lewadrau's vagina with the accused's finger. 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.

26. The third element is that Kesaia Bukabai Lewadrau was below the age of 13 years at the time of the alleged incident. That she was below the age of 13 years then is an admitted fact and this element is not contested in this case.

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 Kesaia Bukabai Lewadrau (hereinafter referred to as the 'Complainant') at the material time, was 12 years old as per the birth certificate.

ii) That Umesh Chand (hereinafter referred to as the 'Accused') at the material time was 38 years old, Carpenter residing at Saweni, Lautoka.

iii) That the Accused was with the Complainant on 23rd May 2018 at Saweni.

iv) That the complainant was born on 07th May 2006.

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, Kesaia Bukabai Lewadrau is the sole witness of the alleged incidents 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) Presently she is 14 years old, form 3 student at Ba Provincial School and lives with her parents.
 - ii) On the 23rd of May 2018, without going to school, she has gone to the Multipurpose Court in town for Netball practices. Then she was a class 7 student at Ahmadiya Muslim Primary School. She states that she has been at the netball court for nearly an hour. But again she states that she arrived at the court around 7.00am and was there till around 10.00am.
 - iii) Around 10.00am, after playing Netball, on her way to the bus stand, when she reached Home & Living two persons were following her, one of them called her and when she stood and looked that person came and closed her mouth with a face towel. She has got unconscious and they have carried her to the vehicle. They have left there and when reached the P. Meghji, **one** of them got down from the vehicle and went to buy alcohol. Again she states that 'They went to buy liquor and when they both got in then we went'. You should note the inconsistency here.
 - iv) On her way to the bus stand, when she looked back, she has seen a black Fielder car following her. She has thought it a normal vehicle. When she heard someone calling, she has stood still. When she looked back a person has closed her mouth with a face-towel. That person was a short, Indian man with a missing tooth in front. She has seen him about 2 meters away from her. When her mouth was closed with the face-towel, she fell unconscious and cannot recall anything. That incident happened on the

lane behind the Vinod Patel shop. She has taken that route because her mother has asked her to take that route and that is the route she always take.

- v) They having passed the McDonalds stopped at the P. Meghji. The Indian boy was sitting next to her. The driver got down from the vehicle and bought alcohol. On their way to Saweni, the Indian boy forced her to drink alcohol, one bottle till finished.
- vi) When asked when the Indian man went to buy alcohol, why didn't she try to escape, she states that she tried but the car was locked and she could not shout as she was not feeling herself. The drink made her weak as it was the first time she drank alcohol.
- vii) At Saweni, the driver and the short Indian man, both got down and went to buy things. She did not try to escape as she was weak and could not move. By that time, she has had three bottles of Bounty.
- viii) From there they have gone and stopped at a blue colour house. Once they got off the other two has carried her to the house. When entered, she has seen the toilet and the bathroom, the kitchen utensils, the food on the shelves and also a stove. She has seen the two bedrooms two TVs and a settee. In the second bedroom, there was only one bed. Then they have come and sat inside and the other two has made her drink and smoke. That was the first time she has smoked. At the same time she lied down and was knocked out.
- ix) When entering the house, the short Indian man opened the door and took her in and told her that it is his house. Inside the house she has had two bottles of Bounty.
- x) When she was knocked out, the short Indian man carried her to the room and put her on the bed. Then he took out her clothes and bit her neck. Thereafter he tried to insert his penis into her vagina, but he couldn't. Then he inserted his finger into her vagina. It has gone through and she was shocked. Then her head hit the bed and when she looked, she was

naked. She has looked for her clothes and found them under the bed. She has put them on and when looked for her Lee pants, found out that he was wearing them. When she came out, he has told her to go back to bed. She has told that she can't and that she has to go home. While they were walking the black Fielder was following them and behind that, a white Probox car was there. They stopped the Probox car and got into it and the Indian man dropped her at the Saweni, Uni Fiji Bus stop and said that he will come back for her. She then went to the store and stood there crying and a boy from the Uni Fiji came and asked her what happened. He has kept on asking and ultimately she has told him what the two Indian boys did to her.

- xi) Then he has called her mother and dropped her home at about 9.00pm. At home her mother has asked her what happened. But, without telling her she has gone and slept as she was feeling dizzy and weak. In the following morning, when she woke up her mother has asked her what happened and she has told that an Indian man grabbed her at home and Living. That day, she went to school and at around 12.00noon, her mother came to school and took her to Lautoka Police Station to make the complaint. At the police station she has seen the short Indian man who did the said things to her and identified him. She identifies the Accused as the short Indian man whom referred to in her evidence.
- xii) You saw the court asking a considerable number of questions from this witness. Many of her answers were inconsistent with her evidence given in examination in chief. I will not highlight each and every inconsistency in them.
- xiii) She was examined by a doctor at the hospital and was informed that she has not been raped.

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

- i) On that day she came to the Netball court at around 8.00am. She left home at 7.00am and took the bus to come there to the multipurpose court. Her parents were unaware of the training.
- ii) When she is suggested that she went in front of Vinod Patel towards the Shop and Save, she denied it. But later admitted that she went in front of Vinod Patel, Home and Living and sat between two boys Petro and Maile at a place between Fakirbhai and the Shop and Save Supermarket.
- iii) She admits stating that the incident happened on the Yasawa Street. She knows the Yasawa Street as the main road which goes in front of the Vinod Patel. However, as for her version, the alleged 1st incident has happened at a by lane behind the Vinod Patel shop and her explanation was that by lane is also called as Yasawa Street.
- iv) She admits seeing the Accused there. It should be noted that earlier she denied meeting the accused any time before the alleged incidents. She states that he thought she asked of an available flat. She further admits that the accused called a driver who has parked there right in front of them.
- v) Then he opened the door and pushed her into the car in front of her friends. She admits that this version of events are entirely different from what she said before in her examination in chief.
- vi) She states that at P. Meghji, the driver got down and went in and bought two bottles and a can of Bounty Rum. Later in cross examination, she admits that the accused went and bought the drinks from P.Meghji. She was sharing a bottle of bounty Rum with the accused. The accused forced her to drink. She has drunk the second bottle while being alone inside the car at Saweni.
- vii) Again her evidence become inconsistent when she state that the accused bought 4 cans of Bounty Rum and two bottles of Tribe from P. Meghji. She admits that her evidence in examination in chief were incorrect in that aspect.

- viii) The witness states that the driver dropped them at the road and drove away and two of them entered the blue house. Here too, her evidence is inconsistent with her version elicited in examination in chief. Furthermore she contradicts it further subsequently.
- ix) Whilst inside the blue house she drank 1 can of Bounty Rum and 3 bottles of Tribe. Then a cigarette was given to her and she took a puff of it and was knocked out. She has woke up when the accused inserted his finger into her vagina. This is inconsistent with her earlier evidence.
- x) She states that she was dropped at the Saweni Bus stand after 9.00pm and by the time she came home it was past 10.00pm. She admits that she asked the accused to drop her off at the Saweni Bus stop and when she realized that there are no buses, she started to cry.
- xi) She admits that the bus stand is right across the road from Shop and Save Supermarket. Instead of going to the bus stand she has gone away from it and accordingly has gone in a by lane behind the Vinod Patel shop. When asked of the reason for it, the witness states that it is her choice and her right and she wanted to follow that road. Therefore it is to be noted that she fails to give a clear answer and it creates a strong suspicion on the credibility of her version of events. Anyway, it is up to you to consider her evidence and attribute an appropriate weight to it.
- xii) The witness further admits that whatever she told that happened at the bedroom of the blue house at Saweni, has happened in her mind and she was half asleep then. On the very next day she has been examined by a nurse and informed that nothing has done to her.
- xiii) The injury on the side of her neck was only a single bruise. The witness states that it was a bite mark. It should be noted that the accused doesn't have a front upper tooth. Therefore, if he has bitten the neck, it is improbable to have left a single bruise. It is up to the prosecution to prove it removing all the doubt but they have refrained from calling any medical evidence.

31. The 2nd witness called by the prosecution was Ms. Losana Talili. She is the mother of the PW1. Her evidence is that;
- i) On the 23rd of May 2018, as usual she has prepared lunch for her children and left home at around 06.00am. After work, she reached home around 6.30pm. Then she was informed by her step-son Akuila that Kesaia did not go to school that day and went for training. As she was wandering of Kesaia, she received a call around 07.00pm from a Uni Fiji student that Kesaia is sitting at bus stop in Saweni. She has asked him to bring her. Kesaia was brought home around 08.00pm and the boy has left. Then she has questioned her. Kesaia has told her all that happened and she has asked her to lie down and examined her to see whether blood comes out or any sign of rape is there. She has not seen anything as such. Then Kesaia was asked to have a shower, have her dinner and go to sleep.
 - ii) The next morning too she has asked Kesaia to repeat what she told before. When repeated, she has gone to work asking Kesaia to go to school. She has come half day at around 12.00noon to Kesaia's school and taken her to the police station to lodge the complaint. Having lodged the complaint, they have come home and taken Kesaia to the hospital for medical examination on the following day. Thereafter they were called to the police station to identify the accused.
 - iii) She did not give permission to the accused to take Kesaia anywhere.
32. In answering the cross examination by the defence, the witness states that;
- i) She has never told Kesaia to take the road behind the Vinod Patel and if Kesaia has said so, that's a lie.
 - ii) She has come to know the Kesaia has gone for training that day, only when Kesaia gave her statement to the police.

- iii) On the night of the day of the incident, she asked Kesaia and was informed of the incidents. If Kesaia has stated that she did not tell me of the incident that night, it is incorrect.
- iv) When she examined Kesaia that night, she has seen a love bite on her neck. But she admits that she has not stated that in her statement to the police.
- v) She has gone to the police station to lodge the report on 24th and soon thereafter has gone to the hospital with Kesaia for her medical examination on the same day.

33. With leading the evidence of PW1 and PW2, the prosecution closed their case. The defence made an application under section 231 (1) of the Criminal Procedure Act and the prosecution conceding to it and the court being satisfied that there was no evidence to proceed with the 2nd count, acquitted the accused of the said 2nd count of Unlawful Confinement. The Court being satisfied that there is sufficient evidence adduced by the prosecution covering the elements of the 1st and 3rd alleged offences decided to call for defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and granting his due rights to the accused.

34. The accused having understood his rights elected to give evidence on his behalf. His evidence was that;

- i) In 2018 May, he was residing in Viseisei back road and worked as a carpenter.
- ii) On the 23rd of May 2018, he came to Lautoka town in morning and he was in between the Fakirbhai shop and the Shop & Save Supermarket at around 10.45am. He was waiting there for his brother to come.
- iii) A lady has come and talked to him. She was tall, wearing a vest and jeans and a canvass. She had a hanging bag on her. She asked him where he is residing and when told at Saweni, she has asked whether there are any vacant houses for rent there. He has told that there is a house and asked

that who else will be living with her there. She has replied that her husband works for Tropik Wood and she works at Nadi. They received notice and are looking for a house. He has said that rent is \$200.00 and she has to share it. Then she has requested to go and see the house.

- iv) He has seen a friend going across the area in his car and called him to take them to his house in Saweni. Then he has sat in the front passenger seat and the lady has sat at a rear seat. He denies holding a face towel to her face and forcing into the car and state that there were many people around there and nothing like that happened and she came and sat in the car willingly.
- v) The accused denies that this incident happened at the back of Vinod Patel and states that it happened on the main road in front of Fakirbhai shop.
- vi) When the car stopped at P. Meghji, he asked the lady whether she wants anything and she has asked for a can of Woodstock. Then he went to the P. Meghji and bought 3 cans of Rum & Cola as the Woodstock was not available then. When he came out of the shop, he has seen the driver outside the vehicle and speaking to a friend of his. The lady was sitting at a rear seat of the car. Then they headed to his mother's house at Saweni to get the keys of his house.
- vii) While on their way from P. Meghji to Saweni, he opened a can of Rum & Cola and offered to the lady. She has taken it. Having taken his house keys from his mother, he has come back and they have gone to the Shop & Save Supermarket in Saweni. He has bought a tray of Sausages to cook from the Shop & Save Supermarket and the driver has bought 6 bottles of Bourbon & Cola from the liquor shop. When he came back he has seen the lady having finished a can of Rum & Cola placing the empty can in the compartment between the driver and the passenger in front and taking another can of Rum & Cola from the brown packet and opening it.
- viii) Then they went to his house at Viseisei Back Road. From there he got off and paid the driver and lady also got down. He showed the compound and

the house to the lady. He removed his shoes and entered the house and the lady also removed her shoes and socks by herself and entered the house. He showed her around the house including the bedrooms, bathroom, wash room, kitchen and the backyard. She saw everything and commented that the house is good and it's separate. Then she went and sat on the rug and he went into his room and changed his clothes.

- ix) When he came out, he has seen her opening her bag and taking two bottle of Bourbon & Cola and when asked she has said that the driver gave them to her. Then he has asked whether she wants the house or not and she has told that she is interested and her husband will knock off between 5-5.30pm and she will go to him and collect there things and will come back there.
- x) Then he has gone out to cut the grass. She was sitting on the rug in the sitting room and drinking Bourbon & Cola. The door was open. At around 4.30pm he having had a wash and changing his clothes, he went and dropped her at the road.
- xi) The accused denies rape and doing anything to her on that day.

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

- i) In 2018, he was 40 years old. He admits being with the PW1 at Saweni on the 23rd of May 2018.
- ii) On that day he met Kesaia in front of the 'Shop & Save' area. He was with Maila at that time. He admits taking her to Saweni area.
- iii) When he was questioned by the police, they assaulted him and did not write some of the things told by him. Therefore, he refused to sign the statement.
- iv) When it is suggested that he did not discuss of a house with Kesaia, the witness denies it. It should be noted that PW1, in her cross examination

too admitted that he spoke of a house thinking that she was looking for a one.

- v) The accused denies forcing her to smoke and state that she smoked a cigarette by herself.
- vi) Though the learned State counsel suggests that certain events of the defence case was not suggested from the prosecution witness, it should be noted that there is no dispute of those events as the PW1's version is consistent with that of the defence in regards to those events.
- vi) The prosecution queries that the PW1 was a minor at the time of the incident. It should be noted that it an admitted fact. The witness states that he was not aware of that at the time of the incident. You should not consider it as a denial of an admitted fact. The fact is different from the knowledge of it of the accused at the time of the alleged incident. The accused states, she said that she is married, her husband works for Tropik and she works in Nadi. Her appearance was different on that day. She was with a big hair and looked like a big girl.
- vii) He denies that he took Kesaia away from the possession of her parents. His position is that she pretended to be a big, married girl and came on her own to see a house to rent with him. He denies raping her.

36. 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.

37. 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 proved 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.

38. The Accused has indicated his stance and it was that she went with him to see a house on rent willingly and he did not rape her. 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.
39. You should consider each of the counts separately and decide upon each of them. 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 counts.
40. Any re-directions? *None*

41. 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.

42. Your opinion should be;

- I) Whether the accused is guilty or not guilty of the alleged 1st count of Abduction of a Young Person?
- II) Whether the accused is guilty or not guilty of the offence 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.*