

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

**Criminal Case No.: HAC 113 of 2018**

**STATE**

**V**

- 1. SULUKA TUNAKA**
- 2. JOSEFA SEKOULA**

**Counsel** : Ms. S. Naibe for the State.  
: Ms. V. Narara for the First Accused.  
: Ms. E. Radrole for the Second Accused.

**Dates of Hearing** : 03 and 04 February, 2021  
**Closing Speeches** : 08 February, 2021  
**Date of Summing Up** : 08 February, 2021

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**SUMMING UP**

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*(The name of the complainant is suppressed she will be referred to as "LL").*

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

**ROLE OF JUDGE AND ASSESSORS**

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters

entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused persons are guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

### **BURDEN OF PROOF AND STANDARD OF PROOF**

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused persons. There is no obligation on the accused persons to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy for either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

### **INFORMATION**

13. The first accused is charged with one count of rape and the second accused is charged with two counts of rape (a copy of the information is with you).

### **FIRST COUNT**

#### ***Statement of Offence***

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

***Particulars of Offence***

**SULUKA TUNAKA**, between the 1<sup>st</sup> day of April, 2017 and the 31<sup>st</sup> day of May 2017 at Sigatoka in the Western Division had carnal knowledge of “LL” without her consent.

**SECOND COUNT**

***Statement of Offence***

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

***Particulars of Offence***

**JOSEFA SEKOULA**, between the 1<sup>st</sup> day of April, 2017 and the 31<sup>st</sup> day of May, 2017 at Sigatoka in the Western Division had carnal knowledge of “LL” without her consent.

**THIRD COUNT**

***Statement of Offence***

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

***Particulars of Offence***

**JOSEFA SEKOULA**, on the 26<sup>th</sup> day of October, 2017 at Sigatoka in the Western Division had carnal knowledge of “LL” without her consent.

14. As you are aware, after the prosecution closed its case, this court had ruled that the first accused had a case to answer in respect of the lesser offence of attempt to commit rape and not for the offence of rape as charged. You are to only concentrate on this lesser offence of attempt to commit rape for this accused.
  
15. To prove the offence of attempt to commit rape against the first accused the prosecution must prove the following elements of this offence beyond reasonable doubt:
  - (a) The first accused;

- (b) Attempted to penetrate the vagina of the complainant “LL” with his penis;
  - (c) Without her consent;
  - (d) The accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.
16. In this trial the first accused has denied committing the offence of attempt to commit rape. It is for the prosecution to prove beyond reasonable doubt that it was the first accused who had attempted to penetrate the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.
17. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
18. The second element is the attempt to penetrate the complainant’s vagina by the penis. This element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental.
19. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental. For the accused to be guilty of attempted rape, the accused’s conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.
20. This leaves you to consider the third element of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

21. If you are satisfied that the first accused had attempted to penetrate the vagina of the complainant with his penis and she had not consented, you are then required to consider whether the first accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
22. You will have to look at the conduct of both the complainant and the first accused at the time and the surrounding circumstances to decide this issue.
23. Before you can find the first accused guilty you must be satisfied beyond reasonable doubt of two things:-
  - (a) Firstly that the accused intended to penetrate the vagina of the complainant with his penis.
  - (b) Secondly with that intention the accused did something which was more than mere preparation for committing that offence.
24. In this case the prosecution is alleging that the accused intended to penetrate the vagina of the complainant with his penis without her consent.
25. Furthermore, intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. You decide intention by considering what the accused did, you should look at his actions before, at the time of, and after the act.
26. The accused has denied committing the offence of attempted rape. It is for the prosecution to prove beyond reasonable doubt that it was the first accused who had intended to penetrate the complainant's vagina with his

penis and with that intention he did something which was more than merely preparatory.

27. The prosecution says the first accused person forcefully pushed the complainant on the ground, removed her pants, even though she kept on pushing him away. After removing her pants the first accused tried to have sexual intercourse with the complainant. The complainant kept pushing the first accused away and was also closing her legs so that he could not succeed in penetrating her vagina with his penis.
28. If you accept the accused did this, then it is for you to decide whether what he did went beyond mere preparation. In other words, did he actually intend to commit the offence of rape, in which case he is guilty of attempting to commit rape, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.
29. If you are satisfied that the prosecution has proved all the above elements beyond reasonable doubt then you must find the accused guilty of attempt to commit rape.
30. If on the other hand, you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused not guilty of attempt to commit rape.
31. In respect of the second accused after the prosecution closed its case this court had ruled that he had a case to answer in respect of both counts of rape as charged.
32. To prove the above counts the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The second accused;
  - (b) Penetrated the vagina of the complainant "LL" with his penis;
  - (c) Without her consent;

- (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
33. In this trial the second accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
34. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
35. The second element is the act of penetration of the complainant's vagina by the penis.
36. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
37. If you are satisfied that the second accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
38. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.



39. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the second accused had penetrated his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
40. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty.
41. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
42. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
43. You must be satisfied that the prosecution has proved all the elements of all the offences beyond reasonable doubt in order for you to find the accused persons guilty of either or all the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or all the offences, then you must find the accused persons not guilty.
44. In this case, there are two accused persons you should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. You must not assume that because one accused is guilty on one count that he must be guilty of the other as well or if one accused is guilty of one count the other must be guilty as well.

#### **ADMITTED FACTS**

45. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.

46. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
47. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

### **PROSECUTION CASE**

48. The prosecution called one witness to prove the charges against both the accused persons.
49. The complainant informed the court that in the year 2017 she was 17 years of age and a Form 5 student. The complainant and both the accused persons belong to the same church and are members of the same youth group.
50. The complainant treated both the accused persons as her brothers, in April, 2017 there was a youth camp at the village church from Friday till Sunday. The complainant and both the accused persons were part of the youth camp. On Friday afternoon the complainant's aunt Va had sent the complainant and Kini to get some lemons. When they were on their way to get the lemons the first accused approached the complainant and told her that he wanted to talk to her but the complainant refused to talk to him.
51. When the complainant was returning after picking the lemons, the first accused again approached her to talk with him. At this time Kini was sitting beside the road, the second accused also joined the first accused and they wanted the complainant to stay with them by this time the complainant was beside her aunt Va's house.

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52. The accused persons forcefully pushed the complainant on the ground, after she fell the first accused removed her pants. The complainant started to push the accused away. After removing her pants the first accused tried to have sexual intercourse with her. The complainant continued pushing the first accused away and was also closing her legs so that the first accused could not penetrate her vagina with his penis.
53. At this time the second accused was standing beside the complainant and the first accused. The complainant could not shout because the accused persons were trying to cover her mouth she was also unable to push the first accused with her hand because he had held her hands tightly.
54. The first accused then told the second accused to have sex with her, the second accused went on top of the complainant and penetrated the complainant's vagina with his penis, this was the first time anyone had sexual intercourse with her. As a result of what the second accused had done the complainant felt pain in her vagina.
55. The complainant could not escape before the second accused had sex with her because both the accused persons were pushing her on the ground and the second accused kept covering her mouth. The complainant could not push the second accused away because he was too strong for her. During this time Kini was sitting beside the road with her boyfriend Simi about two meters away. The complainant did not call out for help to Kini since Kini was laughing at her.
56. After the accused persons left, the complainant felt pain in her vagina, wore her pants and went to see her aunt Va in the church. In the church she told her aunt that she was having her menstruation, the complainant was afraid to tell her aunt about what had happened to her because she didn't

know what would happen to her. The complainant also did not tell her parents because she was afraid they would either beat her or chase her away.

57. In October, 2017 the complainant with her family went for a fund raising in the village church. The complainant was sitting with her friends when the second accused came.
58. When the complainant was walking beside the church the second accused came and pushed her to the ground and removed her pants. The complainant tried to push the accused away but could not because he was strong and covering her mouth. At this time the accused was able to put his penis inside the complainant's vagina. The complainant felt afraid, hopeless and ashamed.
59. After the accused had finished he left, the complainant wore her panty and went to see her mother, she told mother if she could go home but she did not tell her mother about what had happened to her because she was afraid her mother would beat her up.
60. After the October incident the complainant got sick and was admitted to the hospital here she came to know that she was pregnant. The complainant told her parents that she was pregnant, upon hearing this, her parents got angry with her. The complainant told them to accept her pregnancy because she did not know that she was pregnant. As a result she did not complete her education, however, after the incidents the complainant's relationship with both the accused persons was normal.
61. In cross examination by the first accused counsel the complainant denied the first accused was her boyfriend. She also denied there was any vacant house in the village but changed her position to agree that there was an empty tin house where youths usually had their secret date. The complainant also agreed in April, 2017 she had met the first accused in the

vacant house on her own without any force and she had gone to meet the accused with one Savenaca.

62. The complainant had met the first accused only once and he did not try to have sex with her, they had a chat and then she left.
63. In cross examination by the second accused counsel the complainant agreed that she had developed a friendship with the second accused overtime. She had gone with the second accused to the vacant house in April, 2017 both had sex and after having sex the complainant wore her clothes when both left they met Kini and Simi at the roadside. Next day the complainant met the second accused in the church and they spoke to each other like normal friends and both continued to meet each other on other occasions.
64. The complainant agreed that in April, 2017 she had consensual sexual intercourse with the second accused. On 26<sup>th</sup> October, 2017 the complainant met the second accused for a “soli” gathering at the church she denied having consensual sexual intercourse with the second accused that day, however, she had gone with the accused to the main road and then back to the church.
65. The complainant agreed that after the April incident she had lied to her aunty Va about having her menstruation but denied that both the allegations she made against the second accused was a lie.
66. The complainant agreed the first allegation came to light after 9 to 10 months and about 4 months after the second allegation after it was discovered that she was pregnant.
67. The complainant denied that she was embarrassed about getting pregnant and that she was afraid of her parents so she had told them that the second accused had raped her.

68. The complainant agreed that after both the allegations in April and October she had continued to visit the second accused and his family. The complainant denied that the second accused never had forceful sexual intercourse with her in April and October, 2017.
69. In re-examination the complainant stated that the first accused had asked her to come for a talk so she went over and had a chat with him.
70. She also clarified that when she said “no” to the question that the second accused never had sexual intercourse with her in 2017 she meant she did not want to go out with him. The complainant also stated that when she said “no” to the question that the second accused did not have sexual intercourse with her in October, 2017 she meant that she did not want him.
71. This was the prosecution case.

## **DEFENCE CASE**

### Ladies and Gentleman Assessors

72. At the end of the prosecution case you heard me explain options to both the accused persons. They have those options because they do not have to prove anything. The burden of proving all the accused persons guilt beyond reasonable doubt remains on the prosecution at all times.
73. The first accused chose to remain silent and did not call any witness that is his right and you should not draw any adverse inference from the fact that the first accused decided to remain silent and not call any witness.
74. From the line of cross examination the first accused takes the position that he did not commit the offence of attempted rape as alleged. The allegation is not true when he met the complainant in April, 2017 at the vacant house they only had a chat and nothing else happened. It is incorrect of the

complainant to say that both the accused persons had pushed the complainant to the ground and he had attempted to rape her.

75. The chain of events narrated by the complainant is not probable by any means. The complainant could have informed her aunt and her parents about what the first accused had done to her but she did not because nothing had happened. The delay of 9 to 10 months to report the allegation is also worth considering why the complainant who was 17 years old would wait for that long to make such a serious allegation.

#### Ladies and Gentleman Assessors

76. Complainants of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
77. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant had reported against both the accused persons after 9 to 10 months of the alleged April incident and against the second accused after 4 months of the alleged October incident.
78. This was the first accused case.
79. Moving on, the second accused could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also called a witness. You must also consider their evidence and give such weight as you think fit.

80. The second accused informed the court that in April, 2017 there was a youth camp at the church, on his way to the church he met the complainant and Kini, while talking Simi, Kini's boyfriend came, at this time he requested the complainant if they could talk. The complainant asked him where she was supposed to go, the accused said to the blue house. The complainant agreed so both went towards the blue house sat under a tree and talked.
81. After a while the complainant started kissing the accused and then both kissed and touched each other, she removed her clothes and laid on the ground and then they had sexual intercourse. After this, both wore their clothes and sat down for a while and then both went to where Kini and Simi were.
82. According to the accused when they were talking the complainant was asking him whether he was being true to her and both were laughing. The next day the accused met the complainant in the church they spoke to each other, the complainant kept asking him if he was being true to her and their relationship.
83. On 26<sup>th</sup> October, 2017 there was a fund raising organized at the church, during this night whilst the fundraising was going on the accused met the complainant who was standing at the back of the church with Save and some other youth group members. The accused went to the complainant and called her, both went into the nearby bush while standing they started kissing each other, the complainant touched his penis and sucked it as well then they had sexual intercourse.
84. Thereafter the accused dropped the complainant to where Save and other youth group members were. The accused denied both the allegations made against him, he said that the allegations were not true and on both occasions the complainant had consented to have sexual intercourse with him.



85. In cross examination by the state counsel the second accused agreed that he had a good relationship with the complainant and that she would treat the accused like a brother.
86. Despite having feelings for the complainant the accused had never asked her to be in a relationship with him. When it was suggested that the reason why he did not ask the complainant to be in relationship with him was because she had refused to be in a relationship the accused denied this.
87. The accused agreed that in his evidence he had stated that the complainant had kept on asking him if he was true to her, however, during the cross examination of the complainant this proposition was not put to the complainant by his counsel. The accused denied lying or making up a story that the complainant had said to him to be true to her.
88. The accused agreed when he was questioned by the police he had told them everything that had happened. When it was put to the accused that he did not tell the police that he and the complainant had kissed in April, 2017 the accused maintained that he had told this to the police. He also agreed that he told the truth to the police.
89. The accused also maintained that he had asked the complainant to be in a relationship with him. In respect of the complainant touching the accused penis and sucking it the accused agreed that he did not mention this to the police and that what he told the court is different to what he told the police. The accused stated that the reason why he did not tell this to the police was because he was ashamed to tell this to the police.
90. The accused denied having forceful sexual intercourse with the complainant he maintained that he was in a relationship with the complainant in 2017.

91. The final witness for the second accused Savenaca Tikoisuva informed the court that on 26<sup>th</sup> October, 2017 there was a fundraising for the church in the night the witness was standing in the church compound talking with Kini and the complainant. After a while the second accused came and called the complainant for them to go and talk. The complainant left the witness and Kini and went to talk with the accused.
92. According to the witness the complainant and the accused were in a relationship after a little while both came back.
93. In cross examination by the state counsel the witness stated that the second accused was his cousin and they used to stay together in 2017 and they were very close as cousins. When the accused had called the complainant he was not forceful and that it was a lie to say that the complainant had refused to go with the accused. The witness maintained that the complainant and the accused were in a relationship.
94. The witness agreed because the accused is his cousin brother he would do anything for his family and he would believe anything the accused told him but the witness would not lie for the accused.
95. This was the second accused case.

### **ANALYSIS**

96. The prosecution alleges that in April, 2017 both the accused persons had pushed the complainant to the ground the first accused had removed her pants and forcefully tried to penetrate her vagina with his penis. The complainant tried to push the first accused away from her but she could not because he was too strong for her. The complainant did not tell anyone about what the first accused had done to her because she was afraid to tell her aunt or her parents due to the fear that she will be beaten or chased away from home.

97. The prosecution is asking you to take into account the totality of the complainant's evidence which shows that the first accused was intending to have forceful sexual intercourse with her but could not. The complainant was struggling with the accused and had closed her legs not allowing the accused the opportunity to succeed in what he wanted to do.
98. On the other hand, the first accused in his line of defence argues that the allegation is not true when he met the complainant in April, 2017 they only had a chat and nothing else happened. This fact was also agreed to by the complainant in cross examination therefore the complainant had not told the truth when she told the court the first accused had pushed the complainant to the ground, removed her pants and had attempted to rape her.
99. The defence further says that the chain of events narrated by the complainant is not probable by any means. If Kini was about two meters away from where the incident had allegedly happened as stated by the complainant then she would have most certainly told Kini about what had happened. The complainant had also gone back to the church immediately after and met her aunt but still she did not complain about anything is unbelievable from a person who had just moments ago undergone a struggle on the ground involving two boys where one had attempted to rape her.
100. In respect of the second accused the prosecution alleges that after the first accused had failed to have sexual intercourse with the complainant the second accused who was standing beside the complainant went on top of her and had forceful sexual intercourse.
101. During the October fund raising in the church the second accused had lured the complainant to leave the church so that he could talk to her. The accused took the complainant beside the church and had forceful sexual intercourse with her. The complainant did not tell anyone because she was

afraid that her aunt and her parents would beat her or chase her out of the house.

102. When the second accused was questioned by the police he did not mention anything to the police about being in a relationship with the complainant and also that the complainant had touched his penis and sucked it. The prosecution is asking you to disregard the accused evidence in this regard since he made this up in court.
103. Finally, the prosecution is saying that the complainant treated both the accused persons as her brothers so there was no reason for her to make any false allegations against the two.
104. On the other hand the second accused says he did not have forceful sexual intercourse as alleged, on both the occasions that is in April and October he had consensual sexual intercourse with the complainant. The complainant and the accused were in a relationship so when the opportunity came by they had consensual sexual intercourse.
105. According to the second accused the complainant did not tell the truth in court after the first encounter the complainant had met Kini but she did not make any complaint to Kini that she had been raped thereafter the complainant went to the church to her aunt again she did not say anything.
106. In a turn of events she lied to her aunt that she was having her menstruation, so to avoid shame because the complainant had become pregnant before marriage and she knew her parents would be angry with her the complainant made these allegations.
107. Furthermore, if the complainant had been raped once by the second accused then why did she leave the fund raising and walk with the

accused to an isolated spot for the second time. The complainant has now changed her story because she has to blame someone for her pregnancy.

108. Both the accused persons are asking you to look at the totality of the evidence that the narration given by the complainant is not probable. The first accused did not have sexual intercourse with the complainant at all.
109. The second accused says he had consensual sexual intercourse on two occasions the complainant did not complain to anyone because there was no need to do so. The complainant only implicated both the accused persons when it became known that she was pregnant.
110. The defence is asking you not to believe the complainant.

#### Ladies and Gentleman Assessors

111. You have seen all the witnesses give evidence keep in mind that some witnesses react differently when giving evidence.
112. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
113. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.

114. You can accept part of a witness's evidence and reject other parts. 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 be accurate in another.
115. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused persons have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
116. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
117. If you accept the version of the defence you must find the accused persons not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt for all the counts. Remember, the burden to prove the accused persons guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
118. The accused persons are not required to prove their innocence or prove anything at all. They are presumed innocent until proven guilty.
119. As mentioned earlier, there are two accused persons you should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. You must not assume that because one accused is guilty on one count that he must be guilty of the other as well or if one accused is guilty of one count the other must be guilty as well.

120. Your possible opinions are:-

Count one            **ATTEMPTED RAPE**: Accused one - GUILTY OR NOT GUILTY.

Count two:            **RAPE**: Accused two - GUILTY OR NOT GUILTY.

Count Three:        **RAPE**: Accused two - GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

121. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.

122. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.

  
  
**Sunil Sharma**  
**Judge**

**At Lautoka**  
08 February, 2021

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused persons.**