

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 196 of 2019

STATE

V

MALELI NAIBE

Counsel : Mr. A. Kumar and Ms. L. Latu for the State.
: Ms. A. Bivalu for the Accused.

Dates of Hearing : 25 and 26 January, 2021
Closing Speeches : 27 January, 2021
Date of Summing Up : 27 January, 2021

SUMMING UP

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

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 person is 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. 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.
6. 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

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused person. There is no obligation on the accused to prove his innocence. Under our system of criminal justice,

an accused person is presumed to be innocent until he or she is proven guilty.

8. 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 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.
9. 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 court room.
10. 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.
11. 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

The accused is charged with the following offence: (a copy of the information is with you).

Statement of Offence

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

Particulars of Offence

MALELI NAIBE on the 26th day of October, 2019 at Ba, in the Western Division, inserted one of his fingers, into the vagina of “S.T”, without her consent.

13. To prove the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant “S.T” with his finger;
 - (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.
14. In this trial the 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 finger 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.
15. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
16. The second element is the act of penetration of the complainant’s vagina by the finger.
17. 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.

18. If you are satisfied that the accused had penetrated the vagina of the complainant with his finger 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.
19. 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.
20. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his finger into the complainant's vagina without her consent then you must find the accused guilty as charged.
21. 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.
22. The slightest of penetration of the complainant's vagina by the accused finger is sufficient to satisfy the act of penetration.
23. If you are not satisfied that the accused had penetrated the vagina of the complainant with his finger then as a matter of law I direct you to consider the lesser offence of sexual assault.
24. You are to consider the following elements of the offence of sexual assault beyond reasonable doubt:
 - a) The accused;
 - b) Unlawfully and indecently;

- c) Assaulted the complainant "S.T" by touching her vagina.
25. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offence.
26. The words "unlawfully" and "indecently" in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
27. The final element of assault is the unlawful use of force on the complainant by touching her vagina. You should ask yourself:
- a) whether you consider the force which was used in touching her vagina was sexual in nature; and
 - b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
28. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then you must find the accused person guilty of the lesser offence of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused person not guilty.
29. In this trial the accused person has denied committing the offence of sexual assault as alleged. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently touched the vagina of the complainant.

30. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offence of sexual assault, then you must find the accused person guilty of the offence of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused person not guilty.
31. 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.

ADMITTED FACTS

32. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
33. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
34. 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. This 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

35. The prosecution called five witnesses to prove the charge against the accused.
36. The complainant informed the court that in the year 2019 she was 16 years of age and a Form 5 student residing in Suva whereas her parents and siblings were residing in Rarawai, Ba. The house in Rarawai did not have any partitioned rooms, so they all slept in the open room.
37. On Friday 25th October, 2019 the complainant went home to spend her weekend and this was the first time she had seen the accused who was staying with her family. At around 11pm the complainant and her family were getting ready to sleep by this time the accused had not come to the house.
38. At around 4 am the complainant was sleeping when she felt someone was touching her vagina in a rough manner, she woke up when she felt pain. At this time the complainant screamed by saying “oye”.
39. After the complainant screamed she turned and looked up and saw the accused it was at this time she was able to recognize the accused from the light outside the house. The complainant was shocked the accused continued to have his hand inside the complainant’s undergarments. According to the complainant the accused may have put his two middle fingers inside her vagina.
40. The sleeping arrangement was that the complainant’s mother was sleeping in the corner, next to her was her brother then her sister then her father followed by the complainant and finally beside the complainant was the accused.

41. As a result of what had happened the complainant jumped on her sleeping mother, her mother woke up and asked her what had happened. The complainant told her mother about what the accused had done, that is he had touched her private part. The complainant's mother hugged her and for them to talk about it in the morning when the complainant was talking to her mother the accused stood up and went outside.
42. In the morning the complainant went with her father to the police station and reported the matter, thereafter she was taken to the hospital for a medical examination. The complainant did not consent to what the accused had done to her since she would never allow anyone to touch her body.
43. In cross examination the complainant agreed that she was sleeping between the accused and her father and when she jumped to where her mother was sleeping her $\frac{3}{4}$ pants and panty were intact and she was wearing them and at no time these clothes were removed.
44. When it was suggested to the complainant that the accused could not have touched her vagina without removing her pants and her panty the complainant disagreed and maintained that the accused had touched inside her vagina.
45. The complainant stated that the accused had put his left index finger inside her vagina. The accused was sleeping on the complainant's left side facing her and with his left hand he was touching her vagina. She disagreed that it was not possible for the accused to put his hand inside her vagina when she was still wearing her panty and her $\frac{3}{4}$ pants. The complainant stated that she did not know how the accused did what he did but he had done it, she only knows that she felt pain and she saw his hand inside her vagina.
46. The complainant agreed that when she went to sleep the lights inside the house was switched off but the lights outside were on so the inside of the

room was not that dark. When the complainant woke up she saw the accused lying beside her. The complainant agreed that she did not wake her father who was sleeping beside her because she knew how her father was.

47. The complainant disagreed with the suggestion that she had jumped to go and sleep next to her mother because she disliked the fact that the accused was sitting beside her and smoking. The complainant maintained that she jumped to her mother because she had felt pain, so she screamed and jumped towards her mother.
48. In re-examination the complainant clarified that she did not tell her father about what had happened to her because her father was short tempered who might have done something to the accused.
49. The second witness was Dr. Makelesi Kautoga who graduated with an MBBS degree from the Fiji School of Medicine this is her 5th year of practice as a Medical Practitioner. On 26th October, 2019, the witness was based at the Ba Mission Hospital where she had examined the complainant. The Fiji Police Medical Examination Form of the complainant dated 26th October, 2019 was marked and tendered as prosecution exhibit no. 1.
50. The specific medical findings of the doctor were:
 - (a) The hymen was not intact, there was an area of redness noted on the vaginal opening. The doctor explained that this area of the vagina was painful to the patient which was most likely caused due to trauma but in some other cases it could be due to infection.
 - (b) In respect of the hymen not being intact the doctor stated a hymen is a membrane covering the vaginal opening it not being intact could possibly be caused by an injury or by some form of penetration.

51. In the professional opinion of the doctor the area of redness noted at the os meaning the vaginal opening was painful to the patient, likely secondary to trauma and the hymen was not intact. According to the doctor the redness of the vaginal opening was not normal.
52. In cross examination the doctor stated that the area of redness could have been as recent as the same day.

Ladies and Gentleman Assessors

53. You have heard the evidence of Dr. Kautoga who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.
54. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
55. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.

56. The third witness Meresiana Nataci the mother of the complainant informed the court that in 2019 she was residing at Rarawai, Ba with her husband and children. The accused was also living with them, in the early hours of 26th October, the witness got a shock when her daughter "S.T" jumped on her whilst she was fast asleep.
57. When Meresiana woke up she saw her daughter shivering and looking scared. According to the witness "S.T" was talking and crying at the same time. She hugged her daughter and tried to calm her down after a while the witness asked her daughter about what had happened to her.
58. The witness was told by her daughter that when she was sleeping she felt the accused touch her private part with his hand when she felt pain she jumped over to the place where her mother was sleeping. Meresiana also saw the accused stand up and go outside the house.
59. When the witness came to know about what had happened to her daughter she felt sorry for her. After the incident the witness noticed that her daughter was ashamed, did not want to go to her friends and did not wish to finish her studies. After much persuasion the witness was able to get the complainant to come home from Suva and now she is going to school.
60. In cross examination the witness stated that there was light in the room when the accused went outside the house and also when she was talking to the complainant she had switched on the light in the house. The witness further stated that after the incident she saw the accused standing at the door and going out of the house.
61. The witness did not wake her husband because she was worried her husband would hurt the accused if he came to know about what the accused had done. The witness and her family members had no issues with the accused they all had a good relationship.

62. When it was put to her that “S.T” did not tell her that the accused had touched her and that this was something the witness and her daughter had made up against the accused because she did not like the accused staying with them. The witness disagreed and maintained that they had a good relationship with the accused.

Ladies and Gentleman Assessors

63. Complainant’s 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 complainant’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.
64. 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 told her mother that the accused had touched her vagina with his hand.
65. This is commonly known as recent complaint evidence. The evidence given by Meresiana is not evidence of what actually happened between the complainant and the accused since Meresiana did not see what had happened between the complainant and the accused.
66. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says that the complainant told her mother about what the accused had done to her was enough to raise an alarm that something

wrong had been done to the complainant by the accused. Furthermore, the complainant was asleep and had been abruptly awoken after her vagina was touched in a rough manner and the left index finger of the accused was inserted inside her vagina. The complainant as a result of pain screamed and jumped onto her mother. The prosecution is asking you to consider the circumstances that were prevailing at the time hence the complainant cannot be expected to tell every detail of what had happened to her mother who had also been disturbed from her sleep.

67. Furthermore, the prosecution says the complainant was of such an age (16 years) that she would not be comfortable in talking openly about sexual matters to her mother at that point in time. The prosecution is asking you to consider that the complainant did relay relevant and important information to her mother about what the accused had done to her and therefore she is more likely to be truthful.
68. On the other hand, defence says the complainant and her mother had made up a story against the accused. If what the complainant told the court was the truth she would have woken her father who was sleeping beside her and informed her mother in detail about what had happened and in particular the fact that the accused had inserted his finger inside her vagina and not that he was touching her vagina. The complainant did not volunteer the information but only after she was asked by her mother that the complainant said the accused had touched her vagina when nothing had happened. The defence says the complainant should not be believed.
69. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.

70. The fourth witness PC 5623 Josefa was the interviewing officer who had conducted the caution interview of the accused in the iTaukei language at the request of the accused. The interview was hand written by the witness in iTaukei language. The record of interview was signed by the witness, the accused and the witnessing officer on all the pages.
71. The caution interview of the accused in the iTaukei language was marked and tendered as prosecution exhibit no. 2A. The witness had also translated the interview in the English language which was marked and tendered as prosecution exhibit no. 2B.
72. According to the witness the accused was not forced to be interviewed by anyone or forced to sign the interview. The accused was cooperative, he gave the answers noted in the interview willingly and the accused did not raise any complaints. The accused was also informed of the allegation which he had understood was cautioned and given his rights as well.
73. In cross examination the witness was referred to Q & A 62 of the caution interview which was read as follows:

“Q. 62 Do you want to read your statement of interview?”

Ans: No, I don't know how to read.”

74. When it was put to the witness that after the interview the document was not read to the accused the witness disagreed. When further questioned the witness agreed that he did not read the caution interview to the accused. When asked since the interview had not been read to the accused so how would the accused have known the answers in the interview were his, the witness stated that he wrote everything the accused had said in his interview.

75. The witness denied that he had fabricated the answers in the caution interview.
76. In re-examination the witness clarified that the reason why he said there was no fabrication of the accused's answers were because he wrote everything the accused had said and that there was no complaints from the accused that the interview was not read to him.
77. The final witness PC 5934 Apimeleki Vunaki was the charging officer. He had charged the accused in the ITaukei language on 28th October, 2019. The witness had signed the charge statement with the accused and the witnessing officer. The accused was not forced to sign the charge statement. The charge statement of the accused in the ITaukei language was marked and tendered as prosecution exhibit no. 3A. The witness had translated the charge statement in the English language which was marked and tendered as prosecution exhibit no. 3B.
78. The witness stated that before the charging the accused was calm and cooperative who made no complaints before the charging and was giving all the answers. The accused was not forced to give his answers and he had not made up the answers.
79. In cross examination the witness agreed that the signing was done after the charge statement was printed out. The witness had asked the accused whether he was able to read the charge statement which was not in the charge statement, the answer he had received from the accused was that he could not read.
80. The witness was referred to Q. 15 paragraph 3 which was read as follows:

“I have read my statement and I wish to say that this is my true statement and I have given it on my own free will I was told that I can add, alter or correct anything in my statement”.

81. When it was put to the witness that the accused could not have read the charge statement as mentioned, the witness replied that he had showed the accused the document who had looked at it so the witness knew the accused was reading. The witness took the document back and explained the contents to the accused. When questioned where he had noted this in the charge statement the witness said he did not. The witness again stated that he did not ask the accused whether he knew how to read but he had explained the document to the accused.
82. Finally, the witness agreed that he had pre-typed the questions and answers and told the accused to sign it.
83. In re-examination the witness stated that he had not understood the final question that the questions and answers were pre-typed by him and he had told the accused to sign it. The witness denied he had pre-typed the charge statement and got the accused to sign it.

Ladies and Gentleman Assessors

84. The caution interview and the charge statement of the accused are before you, the answers in these documents are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in these two documents.
85. During the cross examination of the interviewing police officer Josefa the counsel for the accused had asked questions of this officer suggesting that he had made up the admissions in the caution interview and that he had

acted unfairly when he did not read the caution interview to the accused when he knew the accused could not read. This means the counsel was putting to this witness that the admissions made by the accused in the caution interview was not given by the accused. Further counsel stated in the beginning of the interview the accused had denied everything about the allegation and then as the interview progressed the admissions came about which was not given by the accused but written by the police officer therefore you should disregard those admissions.

86. In respect of the charge statement during the cross examination of the charging officer Vunaki the counsel for the accused had asked questions of this officer that it was incorrect to record in the charge statement that the accused had read the charge statement and that the contents of the charging were the accused true statement when the accused could not read what was written in the document. This aspect was known to the charging officer yet at question 15 paragraph 3 of the charge statement he had stated that the accused had read the statement which was incorrect. Defence counsel submits that the admissions were obtained unfairly the charging officer also had admitted in cross examination that he had pre-typed the questions and answers and had asked the accused to sign. The defence is asking you to disregard the admissions in this document as well.
87. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his caution interview and the charge statement then you should disregard them. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.
88. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

89. At the end of the prosecution case you heard me explain options to the accused he has those options because he does not have to prove anything. The burden of proving the accused guilt beyond reasonable doubt remains on the prosecution at all times.
90. The 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 accused decided to remain silent and not call any witness.
91. From the line of cross examination the defence takes the position that the accused did not commit the offence as alleged. The accused did not rape the complainant by inserting his finger into the vagina of the complainant on 26th October, 2019.
92. The defence says that the evidence of the complainant is not probable in the circumstances as narrated by her and therefore she should not be believed. The complainant and her mother had made up a story to implicate the accused since the complainant's mother did not like the accused staying with them. If the complainant was indeed raped by the accused in the manner described by her she would have told her mother straight away about what the accused had done to her in detail since the facts were fresh in her mind. She did not because nothing had happened. There is also no way the accused could have touched the vagina of the complainant without removing the complainant's ¾ pant and panty and then leaving his hand inside whilst the complainant had awoken.
93. The defence also says that the medical report of the complainant whilst mentioning there was redness at the vaginal opening does not conclusively

suggest that there was penetration when there are other causes for such redness such as infection. In respect of the caution interview and the charge statement the defence is asking you to disregard the admissions in both these documents which was unfairly obtained and the answers were made up by the police officers. The accused could not read the documents so the police officers took advantage of this and wrote the admissions and then got the accused to sign.

94. This was the defence case.

ANALYSIS

95. The prosecution alleges that during the early morning of the 26th of October, 2019 the accused who was sleeping beside the complainant had put his left hand inside the pant and panty of the complainant and inserted his left index finger into the vagina of the complainant.
96. As a result of what the accused had done the complainant felt pain so she screamed and jumped over to where her mother was sleeping. Before the complainant had jumped over to her mother the complainant saw the hand of the accused was still inside her panty. When the complainant's mother woke up she noticed the complainant was shivering and looked scared. The complainant was talking and crying at the same time that the mother of the complainant had to hug the complainant and calm her down. After a while the complainant told her mother that the accused had touched her vagina.
97. When it became daylight the matter was reported to the police and the complainant was medically examined at the hospital the same day. The doctor found redness on the vaginal opening likely to be caused by trauma and the hymen was not intact. According to the prosecution the redness was due to a recent injury which is consistent with what the complainant had told the court.

98. The accused was also caution interviewed and charged he had admitted to what he had done which is mentioned in these documents the police officers had acted fairly and respectfully towards the accused who had cooperated with the police. The admissions were made by the accused and they were the truth.
99. On the other hand, the defence states the allegation is not probable as narrated by the complainant. The accused did not do anything as alleged. The complainant did not like the accused sleeping beside her and smoking so she went to sleep beside her mother and then made up a story to implicate the accused so that he leaves the house.
100. The complainant was not sleeping alone her father was sleeping next to her the least the complainant could have done was to wake her father rather than jump from one end to the other. The complainant did not tell her mother the most crucial aspect of the incident that was the penetration of the finger into her vagina in effect she did not even tell her mother about the touching of her vagina. It was both the complainant and her mother who had raised this false allegation against the accused since the mother of the complainant did not want the accused to be with them.
101. The defence is further saying that the medical report whilst mentioning there was redness at the vaginal opening does not conclusively suggest that there was penetration when there are other causes for such redness such as infection. In respect of the caution interview and the charge statement the defence is saying that the admissions in both these documents were unfairly obtained and made up by the police officers. The admissions attributed to the accused in these documents should be disregarded.

Ladies and Gentleman Assessors

102. 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 whether the prosecution witnesses were reliable or not. You observed the witnesses give evidence in court. You decide if the witnesses were forthright and truthful or not. You may use your common sense when deciding on the facts. Assess the evidence of the witnesses and their demeanour in arriving at your opinions.
103. 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 the witnesses said, 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 the witnesses told the truth and were correctly recalling the facts about which he or she has testified. You can accept part of a witness evidence and reject other parts. A witness may tell the truth about one matter and lie about another or be accurate in saying one thing and not be accurate in another.
104. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused person 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 the other witnesses.
105. 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.
106. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to

prove the accused guilty beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.

107. The accused person is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

108. Your possible opinions are:-

COUNT OF **RAPE**: Accused - GUILTY OR NOT GUILTY.

If you find the accused not guilty then you are to consider whether the accused is guilty or not guilty of the lesser offence of SEXUAL ASSAULT.

Ladies and Gentleman Assessors

109. 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.

110. 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

27 January, 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.