

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO. HAC 300 OF 2011S**

**STATE**

**VS**

**RODNEY AUGUSTINE FONG**

**Counsels** : **Ms. M. Fong and Ms. S. Navia for State**  
**Mr. D. Sharma and Ms. N. Choo for Accused**  
**Hearings** : **12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> and 19<sup>th</sup> August, 2013**  
**Summing Up** : **20<sup>th</sup> August, 2013**

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**SUMMING UP**

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**A. ROLE OF JUDGE AND ASSESSORS**

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my 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 fact.
2. State and Defence Counsels 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 Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. 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 is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that 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.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

**C. THE INFORMATION**

7. You have a copy of the information with you, and I will now read the same to you:

*"... [read from the information]...."*

**D. THE MAIN ISSUES**

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:

- (i)** On count no. 1, did the accused, between 1<sup>st</sup> September 2009 and 31<sup>st</sup> January 2010, at Suva in the Central Division, indecently assault the complainant?
- (ii)** On count no. 2, did the accused, between 1<sup>st</sup> February 2010 and 31<sup>st</sup> December 2010, sexually assault the complainant?
- (iii)** On count no. 3, did the accused, between 1<sup>st</sup> January 2011 and 31<sup>st</sup> July 2011, sexually assault the complainant?

**E. THE OFFENCES AND THEIR ELEMENTS**

9. There were 3 counts in the information. The first count was “indecent assault”, while counts nos. 2 and 3 were “sexual assaults”. For the accused to be found guilty of “indecent assault”, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused;
  - (ii) unlawfully and
  - (iii) indecently
  - (iv) assaulted
  - (v) the female complainant
10. To “assault” someone is to apply unlawful force to the person of another, for example, to punch someone in the face, without any justifiable reason, is to apply unlawful force to the person of another. Likewise, to touch someone’s breast and/or vagina and/or insert a finger into a person’s vagina and/or anus, without that person’s consent, is to apply unlawful force to the person of another. At the material time in count no. 1, the complainant was aged 11 ½ years old. As a matter of law, a girl under 16 years cannot consent to an indecent assault. It wouldn’t amount to an “assault”, if a doctor examine a patient by touching a patient’s breast and/or vagina, with that person’s consent, in the course of conducting a medical examination. To constitute an “assault”, the application of force to the person of another, must be done with no legal justification whatsoever, that is, it was done unlawfully.
11. The “assault” must not only be “unlawful”, it must also be “indecent”. An “indecent assault” is one committed in circumstances of indecency. A circumstance of indecency is what right-minded people would consider indecent; for example, a step-father touching her step-daughter’s breast

and/or vagina or inserting his finger into her vagina or anus, without her consent. It is therefore essential for the prosecution to prove beyond reasonable doubt that the assault, was not only unlawful, it was also indecent, that is, right-minded people would consider the “assault” to be “indecent”.

12. Counts no. 2 and 3 involved “sexual assault”. “Sexual Assault” is in fact, an aggravated form of “indecent assault”. For the accused to be found guilty of “sexual assault”, the prosecution must prove beyond reasonable doubt, the following elements:
  - (i) the accused
  - (ii) unlawfully, and
  - (iii) indecently
  - (iv)** assaulted
  - (v)** the female complainant.
13. The definitions of the word “assault”, “unlawfulness” and “indecenty”, are exactly the same as that described for the offence of “indecent assault”, as described in paragraphs 10 to 11 hereof. You must use the same meaning for the offence of “sexual assault”.
14. Remember, there are three counts in the information. You must deal with each count separately, and consider the evidence separately, for each count.
15. Furthermore, each of the counts are “representative counts”. For example, in count no. 1, the alleged offence was said to occur “between 1<sup>st</sup> September 2009 to 31<sup>st</sup> January 2010” – a period of 5 months. The prosecution is required to prove only one incident of the alleged offence within that 5 months period to satisfy the element of the offence, although you may find more than one incident of the offence. This principle also applied to the representative counts in counts no. 2 and 3. You must apply the above principle to counts no. 2 and 3 also.

**F. THE PROSECUTION’S CASE**

16. The prosecution’s case were as follows. The female complainant (PW1) was born on 7<sup>th</sup> July 1998. Her birth certificate only recorded her mother (PW2), and not her father. She was virtually

brought up alone by her mother. Her mother worked hard to support her child, and prior to meeting the accused, they resided in Samabula, with a caregiver. The accused, on the other hand, was born on 24<sup>th</sup> May, 1963. In 1981, he got married when he was 18 years old, but the couple did not have a child until 2000, when they adopted a daughter. The couple were hardworking, and owned a construction company, which they used to purchase the couples' residence in Tamavua. Sometime in early or mid 2000, the couple separated.

17. On or about September 2006, the accused's path somehow crossed that of the female complainant's mother (PW2). They started texting and phoning each other, resulting in the birth of their relationship. PW2 was aged 32 years, at the time, while the accused was aged 43 years. In 2007, their relationship blossomed and they became a defacto-couple. They were very much in love with each other. Because of this relationship, the accused came to know the female complainant (PW1), then aged 9 years old. PW1, PW2 and PW1's caregiver moved to Ritova Street in 2007. They rented a 2 bedroom flat, which was paid for by the accused. PW2 left her job in March 2007, and she and her child, the complainant, were fully supported by the accused. In other words, the accused paid for all the complainant's (PW1) and her mother's (PW2) living expenses. The complainant began to treat the accused as her step-father, and called him "dad".
18. In November or December 2008, PW1 and PW2 moved in with the accused, at his residence in Tamavua. Although the relationship between the accused and PW2 was generally one of happiness between 2006 and 2008, cracks in the same began to appear in 2008. First, they went through the normal marital arguments. However, the same became volatile when the two began to argue on numerous occasions, on everything – for example, money and infidelity. In the midst of these fights and arguments, was the female complainant. In 2009, the relationship between the accused and PW2 appeared to be one of "I love you, I hate you" type. The accused, the female complainant and her mother lived as a family in Tamavua. Everything was paid for by the accused. In August 2009, PW2 told the accused she wanted to end their relationship. In January 2010, she left the accused's residence in Tamavua, and went to share flat in Kapadia Street, Raiwaqa.
19. However, she returned to the accused's residence as and when she preferred. PW1 lived with the accused at his house. He was her step-father. She was allowed to visit her mother as when she

pleases. In 2010 and 2011, the accused continued to support the complainant and her mother. Although, the accused and PW2 were living apart, they still saw each other as a family, until 13<sup>th</sup> August 2011. PW1, through a text message to her mother, complained that the accused had been sexually abusing her since September 2009, that is, had fondled her breasts, touched her vagina and inserted his finger into her anus on numerous occasions. PW2 referred the matter to St. Giles Hospital, who reported the matter to police. An investigation was carried out. PW1 was medically examined twice. The accused was caution interviewed by police on 18<sup>th</sup> September 2011. He was formally charged on the present offences. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

**G. THE ACCUSED'S CASE**

20. On 12<sup>th</sup> August, 2013, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the offences. In other words, he denied count no. 1 (indecent assault), count no. 2 (sexual assault) and count no. 3 (sexual assault). At the end of the prosecution's case, a prima facie case was found against the accused, wherein he was put to his defence, he choose to give sworn evidence in his defence, and called 3 witnesses. That was his right.
21. In his sworn evidence, the accused denied the allegations in the three counts. On count no. 1, he said, the allegation was false. He said, he did not carry the complainant to his bedroom, at the time. He said, he couldn't because of his right shoulder pain, at the time. He admitted the complainant was living with him at the time, including his mother. He said, he had never touched the complainant's vagina, nor her anus, as alleged. On count no. 2, the accused also denied the allegations against him, between the 1<sup>st</sup> February to 31<sup>st</sup> December 2010. He also denied the allegations against him in count no. 3. He said, he had never done such thing to the complainant.
22. He said, he wasn't aware of the allegations until caution interviewed by police on 18<sup>th</sup> September 2011, at Samabula Police Station. The police asked him a total of 60 questions and he gave 60 answers. The allegations that he touched the complainant's vagina and poked her anus 40 to 50 times between September 2009 and June 2011, was put to the accused, under caution. From

questions and answers 37 to 52 of his caution interview statements [Prosecution Exhibit No. 4 (B)], the accused denied the allegations.

23. Because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged, and acquit him accordingly. He is saying, the allegation against him is a complete fabrication, and he didn't commit the offences, as alleged. That was the case for the defence.

## H. **ANALYSIS OF THE EVIDENCE**

### **(i) The Agreed Facts:**

24. The parties have submitted an "Agreed Facts". A copy of the same is with you. You must read it carefully and understand the same. There are twelve paragraphs in the "Agreed Facts". Because the parties are not disputing the same, you may take it that those facts have been proven by the prosecution beyond reasonable doubt, and you may treat the same as established facts. Note that the admissibility of the complainant's medical reports dated 26<sup>th</sup> August 2011 and 14<sup>th</sup> September 2011 are not disputed by the parties. You must study and understand these reports, because they will have a crucial bearing on this case.

### **(ii) The Complainant's Mother's (PW2) relationship with the Accused (DW1):**

25. This case concerned three sexual abuse allegations against the accused. It does not concern the nature of the relationship between the complainant's mother and the accused. However, to understand the allegations, we need to understand the environment in which the complainant lived, before she made the allegations to her mother, on 13<sup>th</sup> August, 2011.
26. Financially speaking, the accused was a successful man. As agreed to in paragraph 6 of the "Agreed Facts", he was "a businessman and director of Construction Fiji Limited". In 2009, he had 60 people working under him. At the age of 18 years, he got married. His wife and him didn't have a child until 2000, when they adopted a daughter. His wife was a shareholder of the above company, and was also the company accountant. Through the company, they bought a house in Tamavua, as their residence. The accused and his wife separated before 2005, but remained as good friends.

27. The complainant's birth certificate [Prosecution Exhibit no. 5] recorded her mother (PW2) as her only legal guardian. Her biological father was not named therein. Prior to her mother meeting the accused in 2006, the complainant (PW1), her mother (PW2) and PW1's caregiver, lived in Samabula. In 2006, the accused and PW2 ran into each other and started a relationship. PW2 worked at Fiji Care to support her child. In 2007, the two's relationship became serious. PW2, PW1 and her caregiver moved into a 2 x bedroom house at Ritova Street. PW2 stopped working on March 2007. PW1 went to school at Saint Annes, then the Learning Centre, back to Saint Annes and then to Multiple Intelligence. The accused often visited PW2 and PW1 at Ritova Street. He paid for everything e.g. rentals, living expenses and PW1's school fees etc.
28. The accused, PW2 and PW1 saw each other as family. PW1 began to call the accused "daddy". The relationship between the accused and PW2 was one of happiness and love between 2006 and 2008. In November 2008, PW1 and PW2 moved to the accused's house in Tamavua. As soon as they settled in Tamavua, cracks began to appear in PW2 and accused's relationship. They began to argue about everything most time of the week. They accused each other of infidelity. The relationship reached a low point, when in January 2010, PW2 left the accused's house to share flat in Kapadia Place, Raiwaqa. However, PW2 left her child PW1 with the accused in Tamavua.
29. Although PW2 had left the accused's house, the accused continued to support her and PW1 financially. In June 2010, PW1 moved in with her mother at Kapadia Place, but was free to return to the accused's house in the weekends. Despite the physical separation, the accused, PW2 and PW1 still saw each other as family. PW1 still called the accused "dad". It would appear that, this was the first real dad PW1 had come to know. The arguments between the accused and PW2 never stopped. Verbal insults were often exchanged between PW2 and the accused. Unbeknown to the accused, PW2 was receiving additional financial support from a male friend in Australia. The above was the environment the complainant was exposed to, when she made the allegation on 13<sup>th</sup> August 2011.



**(iii) The Complainant's Evidence vs The Accused's Evidence:**

30. You have heard the sworn evidence of the complainant, as against the sworn evidence of the accused, on counts nos. 1, 2 and 3. I will not bore you with the details, but I will summarize to you the competing version of events of the parties, as far as the allegations were concerned.
  
31. As far as the complainant was concerned, the accused started to abuse her sexually after September 2009. She said, she would be asleep in her bedroom, next to the accused's bedroom. She said, the accused would lift her from her bedroom to his bedroom, and put her on his bed. Then, he would part her underwear, and touched her private part. He would then poke her anus for a while. She said, her anus was sore. She said, she was 11 years old at the time. She said, he repeated the above a week later. She said, he repeated the above so many times in 2009, 2010 and 2011. She said, sometimes he would squeeze her breast. She said, the accused poked her anus more than 40 times. She said, she could not remember a single date about the incidents. She said, she was shocked and confused. She said, she didn't tell anyone because she was afraid the accused might be angry at her, or her mum.
  
32. The accused, on the other hand, completely denied the above allegations. He said, he didn't carry the complainant to his bedroom, at any time. He said, at the time, he suffered from a chronic right shoulder injury, for which he had been treated by doctors. He referred to two medical reports [i.e. Defence Exhibit No. 8 and 9] as verification of the above. He also said, he had never touched the complainant's vagina or private part, at any time whatsoever. He said, he had never inserted his finger into the complainant's anus, as alleged by the complainant. He said, he denied all the allegations, made by the complainant.
  
33. So, you will see that the complainant's and accused's version of events on the allegations were completely at odds with one another. Your decision, on which version of events to accept and/or reject, will depend largely on your assessment on which of the two witnesses is the credible one. In other words, the State's case against the accused stands or falls, on whether or not, you find the complainant or the accused to be a credible witness. You have watched them give evidence in the courtroom. Who was the more credible of the two? Who was the more forthright of the two? Who

was the evasive witness of the two? Who was hiding something from you? Who, from your point of view, was telling the truth? Your answers to the above questions, will determine your answers to whether or not the accused is guilty as charged. If you find the complainant to be a credible witness, then you will find the accused guilty as charged. If you find the accused a credible witness, then you will find him not guilty as charged. It is entirely a matter for you.

**(iv) The Complainant's two Medical Reports [i.e. Prosecution Exhibit No. 1 (26.08.11 report) and Prosecution Exhibit No. 2 (14.09.11 report):**

34. Although, the complainant revealed her allegation to her mother on 13<sup>th</sup> August, 2011, the matter did not reach the police until 26<sup>th</sup> August 2011. As is often customary with the police, they immediately called for the medical examination of PW1, to find some medical evidence to confirm the allegations. On 26<sup>th</sup> August 2011, Doctor Viliame Nasila (PW5), medically examined the complainant at CWM Hospital. He submitted his medical report as Prosecution Exhibit No. 1. In D(10) of the report, PW5 recorded what the complainant told him, “...*The alleged on numerous occasions had fondled her breasts and genitalia. The alleged would also insert his fingers in her anus and not sure if he inserted in her vagina. All this happened in her sleep and she is aware of this thing happening, but pretend to be asleep. She is not sure whether (he) put his penis in her vagina...*” In D(12) (a) and (b) of the report, PW5 recorded his finding as follows, “...*No sign of trauma. Remnant of hymen seen...*”
35. It appeared the police were not happy about the medical report, and consequently called for a second medical examination. On 14<sup>th</sup> September 2011, at CWM Hospital, PW5 conducted a second medical examination of the complainant. In D(10) of his report, PW5 recorded the complainant's history as follows, “...*The alleged from September 2009 would fondle patient in her sleep. Patient pretended to be asleep during this times, but was aware of what was happening. He would touch her genital area and at times take off her undergarments, or slip his hand in. On every occasion he would insert his finger in her anus. Patient is not sure whether he put his finger in her vagina. During this occasions, he was naked in bed with her...*” PW5 recorded his medical findings in D(12) (a), (b) and (c) of the report, as follows, “...*Remnant of hymen seen. No sign of trauma to genital area. Anus – no sign of trauma...*”

36. On both reports, the doctor said, given the history of the complaint, he would not be in a position to conclude whether or not sexual assault occurred. He said, given that the allegations occurred between September 2009 and June 2011, he did not expect to find anything in his examination, because if there were any injuries, they would have healed in 2 to 3 months. He also said, the hymen could be perforated by various means – for example, sexual intercourse, finger, disease, injuries, medical examination, masturbation, physical exercise like dancing, tampon. The doctor even said, that if the girl is engaged in vigorous dancing, it could perforate the hymen.
37. So, in a nutshell, the medical report appear not to assist the prosecutions case. It provided no evidence to confirm the complainant's allegation on the accused inserting his finger into her anus, on numerous occasions, between September 2009 and June 2011. On the perforation of the complainant's hymen, the doctor pointed to various possible causes of the same, which has been mentioned above. It must be noted that, the complainant's main allegation is the accused poking her anus, **NOT** her vagina, on numerous occasions, at the material time. Both medical reports, appear not to support the complainant's allegations. If you accept the findings in the medical reports, it would strengthen the accused's denial, and his credibility, as a witness. It would also dent the complainant's credibility as a witness. However, what you make of the medical report, is entirely a matter for you.

**(v) The Complainant's Mother's (PW2) Evidence:**

38. The complainant reported her allegation to her mother on 13<sup>th</sup> August 2011. You cannot use the complainant's report to her mother on 13.08.11 to prove the truth of her allegations, because she was not present at the crime scene, at the material time, when the allegations were said to occur. However, you can use PW2's evidence, to show the consistency in PW1's conduct, in reporting the matter to her, when she was confident enough to do so. However, you must balance the above with the following questions. Why didn't PW1 report the matter soon after the first incident in September 2009? Why did she not report it in 2010? Why did she not report it in July 2011? In any event, PW2's evidence is mostly helpful in the type of relationship she had with the accused. What you make of her evidence is entirely a matter for you.

**(vi) Valea Reapi's (DW2) and Jim Farrell's (DW3) Evidence:**

- (39) DW2 was the accused's housegirl at the material time. She said, she was closed to the complainant. She said, in mid 2009, she saw the complainant naked in her bedroom and touching herself. She questioned her, and she said, she was doing nothing. DW3 was the accused's security guard, at the material time. He said, he came into the house one evening to close the window, as it was raining. He said, he saw the complainant in the house touching her private part. He questioned her on what she was doing. He said, she said nothing. What you make of DW2's and DW3's evidence, is entirely a matter for you.

**(vii) DC 3198 Atish Lal's (DW4) Evidence:**

- (40) DW4 was the first police investigation officer assigned to this case. He said, in the nature of his work as the police investigation officer, he met with the complainant's mother (PW2), at "Friends Cafe" in Suva. He said he discussed the case with PW2. He said, PW2 told him, "*she didn't want to proceed with the case. She only wanted to teach the accused a lesson.*" He said, PW2 said, "*accused was not supporting her and asked me to lock the accused in the police cell for 1 day only.*" He said, he told her he can't lock anyone in the cell anyhow. He said, this occurred in Suva after the police investigated the case after August 2011. He said, after 2 minutes, he left PW2 at the café. What you make of DC 3198's evidence is a matter entirely for you.

**(viii) Accused's Police Caution Interview Statements [Prosecution Exhibit No. 4 (A) and 4(B)]**

41. The accused was caution interviewed by police on 18<sup>th</sup> September 2011, at Samabula Police Station. This was also the first day he became aware of the complainant's allegations. In the caution interview statements, the accused denied the allegations against him. He repeated the denial when he gave evidence in court. In question and answer 52, the accused gave his reason of why this allegation occurred. What you make of the accused's statements in his caution interview statements, is a matter entirely for you.

**I. SUMMARY**

42. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.
43. Your possible opinions are as follows:
- (i) Count No. 1 : Indecent Assault : Accused : Guilty or Not Guilty
  - (ii) Count No. 2 : Sexual Assault : Accused : Guilty or Not Guilty
  - (iii) Count No. 3 : Sexual Assault : Accused : Guilty or Not Guilty
44. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions.

**Salesi Temo**  
**JUDGE**

**Solicitor for the State** : **Office of the Director of Public Prosecution, Suva**  
**Solicitor for the Accused** : **R. Patel Lawyers, Suva**