

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO. HAC 378 OF 2013**

**STATE**

**VS**

**WAISAKE VUETI**

**Counsel** : **Ms. S. Serukai for the State**  
: **Trial in Absentia. No Appearance**  
**Summing Up** : **22<sup>nd</sup> September 2016**

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**SUMMING UP**

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Madam and Gentlemen Assessors,

- [1] We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear more. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State has addressed you on the evidence. After her address, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2] As the presiding judge, it is my task to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give you on matters of law. It is also important to note that, if I give you a caution, you have to take it also into consideration, in coming to your opinion.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful and reliable. You will then apply relevant law, to the facts as revealed by such credible evidence. In that way you arrive at your opinion.
- [4] During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent view.
- [5] In forming your opinion, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] It is also important to note that, in forming your opinion on the charges against the accused, it is desirable that you reach a unanimous opinion; that is, an opinion on which you all agree, whether he is guilty or not guilty. However, the final decision on questions of fact rests with me. I am not bound to conform to your opinion. However, in arriving at my judgment, I shall place much reliance upon your opinion.
- [7] I have already told you that you must reach your opinion on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] The evidence is what the witnesses said from the witness box, the documents and the things received as prosecution exhibits.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom also are not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel is not evidence either. The opening and closing submissions made by the State Counsel are not evidence. They were her arguments, which you may properly take

into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, another matter which will be of concern to you is the determination of truthfulness of 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 correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.
- [14] The experience of the Courts is that those who have been victims of Rape react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every such victim has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanor in Court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15] The experience of the Courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report the incident could be also due to shame, coupled with the cultural taboos existing in their society, in relation to an open and frank discussion of matters relating to sex, with elders. There is, in other words, no classic or typical response by victims of Rape.
- [16] A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in this matter before us, the lateness of the complaint and what weight you attach to it. It is also for you to decide when she did eventually complain as to its genuineness.

- [17] Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question. I shall offer more directions when I deal with the evidence of the case in more detail.
- [18] In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Credibility concerns honesty. Reliability may be different. A witness may be honest enough, but have a poor memory or otherwise be mistaken.
- [19] Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.
- [20] Madam and gentlemen, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [21] Having placed considerations that could be used in assessing credibility of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [22] When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the two charges of Rape. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as assessors, in determining a question of

fact, should utilise your commonsense and wide experience which you have acquired living in this society.

- [23] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence.
- [24] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of Primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [25] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [26] In order to illustrate this direction, I will give you an example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [27] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove. That burden rests on the prosecution to prove the guilt of the accused.
- [28] This is because the accused are presumed to be innocent. They may be convicted only if the prosecution establishes that he is guilty of the offences he is charged with. Whether the accused has given evidence or not is immaterial in this regard and it does not imply any burden upon him to prove their innocence. It is not for him to prove his innocence.

- [29] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or level of proof, as expected by law?
- [30] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond a reasonable doubt. This means that in order to convict, you must be sure that the prosecution has satisfied beyond a reasonable doubt of every element that goes to make up the offence charged. I will explain these elements later.
- [31] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence and the other matters of which you must be satisfied, such as identity, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such doubt, then your duty is to find the accused guilty.
- [32] You should dismiss all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion has any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinion.
- [33] Let us now look at the charges contained in the information.
- [34] There are two charges preferred by DPP, against the accused:

#### **FIRST COUNT**

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

**RAPE** : Contrary to Section 207(1) and (2)(a) and (3) of the Crimes Decree No. 44 of 2009.

##### ***Particulars of the Offence***

**WAISAKE VUETI** on the 28<sup>th</sup> day of August 2013, at Navoka Road, Levuka, in the Eastern Division, had carnal knowledge of **VASEMACA VAKACIVO**, a child under the age of 13 years.

#### **SECOND COUNT**

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

**RAPE** : Contrary to Section 207(1) and (2)(a) and (3) of the Crimes Decree No. 44 of 2009

### ***Particulars of the Offence***

**WAISAKE VUETI** on the 29<sup>th</sup> day of August 2013, at Navoka Road, Levuka, in the Eastern Division, had carnal knowledge of **VASEMACA VAKACIVO**, a child under the age of 13 years.

- [35] As you would have noted there are two counts of Rape. I shall now deal with the elements of the offence of Rape. In order to prove the count of Rape, the prosecution must prove beyond reasonable doubt that the accused penetrated the complainant's vagina by his penis. The slightest penetration is sufficient to satisfy this element of the charge of Rape.
- [36] A person of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was less than 13 years of age at the time of the alleged offending and therefore, whether she consented or not is immaterial.
- [37] If you are satisfied beyond reasonable doubt that the accused penetrated the complainant's vagina with his penis in the two instances as the information revealed, then you must find the accused guilty to those counts of Rape.
- [38] Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence must also be proved by the prosecution. What it means is that it was the accused named in the information and none other had penetrated the complainant's vagina on those two dates and times. There must be positive evidence as to the identification of the accused.
- [39] If you find that the prosecution failed to establish any of these elements in relation to any count of Rape, then you must find the accused not guilty of that Count.
- [40] In our law, no corroboration is needed to prove an allegation of Sexual Offence; and Rape and, if relevant, Indecent Assault are obviously considered as a Sexual Offences.
- [41] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [42] The prosecution, in support of their case, called the complainant, and three Police Officers.

## Case for the Prosecution

### **[43] Evidence of the complainant Vasemaca Vakacivo**

- (i) *It is her evidence that in August 2013, she was schooling at Delana Methodist Primary School at Levuka in Class 4. She was 9 years old at that time. She was living with her uncle, aunt, aunt's son "Dodo" and her brother Epeli. The accused, Waisake Vueti was also known to her as "Yanu". At that time he too was staying with them but not related to the complainant.*
- (ii) *On the 28<sup>th</sup> August 2013 in the morning her Aunt and Dodo have gone for work. Her uncle also went somewhere. Only the complainant, her brother and the accused were at home. They were watching a movie. The complainant was sitting on the sofa while her brother was on the settee. The accused was lying on the floor and had covered himself with a blanket up to his neck.*
- (iii) *Then the accused told Epeli to look for chewing gum in Dodo's room and as he was told he had to climb on to the bed in that room. The accused, then asked the complainant to come and hide beside him to hide themselves from Epeli. The complainant then got under the blanket with the accused. She felt his breath close to her hair and then she was told to come closer to him. At that time the accused was facing the kitchen and then the complainant was lying face up. She was told to turn and face the kitchen.*
- (iv) *Then he pulled his pants down and put his penis to her buttocks. At that time Epeli returned. The accused then told him to go in search of chewing gum in the room the complainant and others occupied. When Epeli entered that room, the accused stood up and closed the door to that room.*
- (v) *Then he went to Dodo's room and called the complainant in. While in the room she was told to put her pants down and to lie on the bed. Then he put his penis into her vagina and she felt pain. She also felt that the accused is moving "front and backwards very fast". She was afraid and did not scream as he was strong. Then the accused asked her to stand up. Then having rubbed her vagina, the accused had licked it.*



- (vi) *He then told her to pull her pants up and open the door to Epeli. The complainant was threatened by the accused if she said about this to her aunt, he would kill her.*
- (vii) *The following day, the 29<sup>th</sup> August 2013, both her aunt and Dodo left for work. Her uncle was sleeping with Epeli. The accused told the complainant to break breadfruit from an old man's house. Then both of them went there. The accused climbed up the tree while the complainant collected breadfruit.*
- (viii) *The accused then called her to a vacant house which belongs to FEA. When she went in to the bath room of that empty house, she was asked to pull her pants down. She was asked to step on a cement, which was about ½ meter in height. He then pulled her and put his penis into her vagina by putting it. She was facing him.*
- (ix) *Then they returned to the house. Before the accused went away for his training, he questioned the complainant whether she told her aunt and repeated his threat that he would kill her. She did not reveal this to anyone on that day.*
- (x) *When she was studying at Waidalice District School in Tailevu, her head teacher told in the assembly that if anyone has been harassed to raise a hand and then the complainant raised her hand. She has given her name to head teacher later. Then she gave her statement to Police and was medically examined at Levuka Hospital.*

**[44] Evidence of D/Inspector Sainimili**

- (i) *It is her evidence that she has completed her 18<sup>th</sup> year in the Fiji Police Force and on 27<sup>th</sup> August 2013 she was serving in Levuka Police Station. She is the Investigating Officer of this incident.*
- (ii) *The complainant came to Police to report about the Rape on 27<sup>th</sup> September 2013 and then the witness had taken her to the hospital to verify the allegation since it had happened a month ago. She was advised by Dr. Tiko to bring the complainant on the following day. After the medical examination, a complaint of Rape against Waisake Vueti was recorded on 28<sup>th</sup> September 2013 at Levuka Police. The complaint revealed that she was raped on 28<sup>th</sup> August 2013.*

- (iii) *On the same day the accused was arrested and later he was caution interviewed by Cpl. 2978 Jemesa while Cpl. 2869 Emosi acted as the witnessing officer. Medical Report was tendered as **P.E. No. 1.***
- (iv) *In conducting investigations, the witness visited the crime scene and examined the complainant's house and also the vacant quarters of FEA. She then prepared a rough sketch of the scene and tendered it as **P.E. No. 2.** She also took photographs of the two places where the alleged act of Rape was done. The photographs were printed as 3 sets containing 4 photographs in each set. These photographs were then printed by the witness and included in the docket. The three sets of photographs were marked as **P.E. Nos. 3(1) to (3).***

**[45] Evidence of Cpl 2978 Jemesa**

- (i) *This witness has served in the Police for the past 14 years. On 29<sup>th</sup> September 2013, he commenced the caution interview of the accused at the Levuka Police Station, where the witness was serving at the time. He commenced the interview of the accused at 10.53 a.m. in the presence of Cpl. 2869 Emosi as the witnessing officer. Each page of the interview statement the witness and the accused have placed their signatures and during the course of the interview, the accused was asked 74 questions. The accused answered all questions and the interview was conducted in iTaukei.*
- (ii) *The interview was suspended at 12.58 p.m. for the accused to have his lunch and also for scene reconstruction. The interview was recommend at 3.34 p.m. after a gap of 2 ½ hours. The accused appeared normal during the interview and did not make any complaint or request to the witness.*
- (iii) *His rights were given and the witness had not threatened, forced, or intimidated the accused to admit the allegation.*
- (iv) *The witness then tendered the caution interview statement of the accused and its English translations are marked as **P.E. Nos. 4 and 5.***

**[46] Evidence of Cpl 2869 Emosi**

- (i) *This witness has served in the Police for the last 20 years. On 29<sup>th</sup> September 2013 he was attached to Levuka Police Station. In this case, the witness was the witnessing officer to the caution interview of the accused.*

- (ii) *The interview was conducted at the Police Station by Cpl. 2978 Jemesa and he was present throughout the interview. The accused appeared normal. The witness did not force, assault, threatened or offered any inducement to the accused to make admissions during the interview. The accused was given food and did not complain.*

### **Analysis of all evidence**

- [47] The prosecution relied on the evidence of the complainant and three Police Officers to prove its case. As no medical witness is called, please disregard the medical report marked as **P.E. No. 1** as it is not evidence.
- [48] Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant and other witnesses are truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty to the two counts of Rape, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved all the elements of the offence of Rape, beyond a reasonable doubt.
- [49] Since the main witness for the prosecution, Vasemeca Vakacivo is a child, I thought it appropriate at this stage to familiarise you with some general considerations in evaluating evidence of a child witness for its truthfulness and reliability. It is for you to decide that issue and my references in this respect is not binding on you as they are not directions on law.
- [50] The prosecution has primarily relied on the evidence of the complainant in order to prove the charges they levelled at the accused. They also relied on the contents of the caution statement of the accused. I shall first deal with the evaluation of the evidence of the child witness and direct you as to how you should set about in assessing the caution interview statement of the accused at a later stage of this summing up.
- [51] A most important part of your task is to judge whether the child witness has told the truth, and has given a reliable account of the events she was describing. Some of you will have children and grandchildren who are of a similar age to the child who has given evidence.
- [52] If so, I think you will recognise the sense of the advice I am going to offer you about your judgement of their evidence, but remember that I am speaking of an approach to the evidence and it must be re-emphasised here that evaluation of her evidence is

your responsibility. You do not have to accept my advice and if you do not agree with it you should reject it.

- [53] Your task includes the assessment of the evidence of a child aged 12 years who described an event that allegedly took place when she was 9 years of age. At times during her evidence, it was apparent that she was having difficulty with some questions and with recall, particularly of detail and sequence. There is a danger that in formal situations we tend to judge children by the same standards as we would an adult. That would be a mistake.
- [54] Children do not have the same experience of life as adults do. They do not have the same standards of logic, understanding and consistency as adults do, and are therefore necessarily less sophisticated. Their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult.
- [55] Experience has shown a number of things. A child may not fully understand the significance of activity which is sexual in nature and that may be reflected in the way they remember it or describe it. A child's perception of the passage of time is very likely to be different from that of an adult. A child's memory can fade even in the short term. When recounting events later, even a fairly short time later, a child's recall of when and in what order events occurred may not be accurate. She may well not be able to speak of the context in which those events occurred. A child may have particular difficulty dealing with conceptual questions such as how she felt some time ago, or why she did or did not take a particular course of action. Those are not the sort of questions which are likely to encourage a meaningful or reliable response.
- [56] Your task is to judge whether the essential parts of the witness's evidence were truthfully given and, if so, whether they are reliable. Errors and inconsistencies in detail and in the sequence of events may not, in the case of a child, be any indication of untruthfulness or unreliability on the essential matters. Those decisions are, however, for you to make. Having made due allowance for the age and immaturity of the witness, you should act on her evidence only if you are sure it is right to do so.
- [57] All decisions about the evidence are for you to make. I only advise caution against judging children by the same standards as you would an adult.
- [58] I have just invited your attention to some considerations in evaluating evidence given by a child witness. When judging allegations of sexual or physical abuse involving children, experience has shown that it is necessary to keep a cool head. It is easy to feel indignant at the idea of this sort of thing happening, and easy to be

sympathetic to a witness who seems to be showing difficulty or distress at having to recall and recount an incident which was distressing and unpleasant for her. Those are perfectly proper and normal emotions but they do not assist in deciding whether these allegations are satisfactorily proved. As I said to you at the outset of this case you must judge this case on the evidence you have heard. You must put aside any feeling you have about cases such as these and review the evidence you have heard dispassionately.

- [59] Take into account, if you wish, the emotions and demeanour of the child witness, but do not allow your own emotions to take over.
- [60] You have to be sure that the complainant is telling you the truth and that her evidence is accurate and reliable. By doing that you are applying exactly the same standards as you would in any other criminal trial.
- [61] At the beginning of this summing up, I described some considerations you might want to apply to the evidence in order to satisfy yourselves as to the truthfulness and reliability of the evidence. One such consideration is whether the complainant complained about the acts of sexual aggression without a reasonable delay. If a prompt complaint is made, although not necessarily, it supports the proposition that opportunity to fabricate a false allegation is less, as there is little opportunity to the complainant to carefully think it over.
- [62] The evidence of the complainant is that after the alleged acts, she had not revealed about it, until her head teacher asked whether any of the children had been harassed. Then she volunteered this information. The complainant also said in her evidence that she was threatened by the accused that she would be killed if the incident was revealed to her aunt and on the 2<sup>nd</sup> day also the accused repeated his threat. This resulted in the delay in making the complaint, according to the prosecution.
- [63] It is for you to consider whether there is any delay in making the allegation. Promptness of her complaint could, of course, enhance credibility of the complainant as a truthful and reliable witness. Delay in complaint might support a proposition that her claim could be a fabricated story of Rape. However, if you consider that she made her allegation promptly having considered the circumstances, you must also remember that this is not an accurate indication of the truthfulness of the allegation.
- [64] Another consideration would be the consistency of her version of events. In dealing with the issue of consistency, I shall first refer to the evidence of the complainant since she is the main witness for the prosecution.

- [65] The Court, in ensuring a fair trial to the accused, clarified certain things from her. Upon examination by Court she said when the incident happened she was in class 4 and she complained about the incident after two years when she was in Class 6. She also said that she told Police about how the head teacher got to know of the incident, but in her statement it is not stated so.
- [66] The prosecution wants you to treat these instances of inconsistencies as insignificant ones. According to them, inconsistencies which are on peripheral matters and does not touch upon the core issues of the prosecution.
- [67] These are the inconsistencies of the complainant in the prosecution case. Considering these items of evidence, it is your responsibility to decide whether the complainant was consistent in her evidence and; whether and to what extent these inconsistencies affect her truthfulness and reliability as a witness. In addition, deciding her consistency you may also refer to the sketch and photographs tendered as **P.E. Nos. 2, 3(1) to (3)**.
- [68] In addition to above mentioned considerations on evaluation of evidence; there is another factor in considering whether the evidence of the prosecution is truthful and reliable. That is the relative probability of the versions of events as presented by the prosecution.
- [69] The evidence of the complainant is that the accused 1<sup>st</sup> tried to molest her when she was under the blanket with him. When Epeli returned to the hall, the accused got up and shut him in a room. He then took her to the other room and penetrated her on the bed. On the 2<sup>nd</sup> occasion, her uncle was at home, but was sleeping with Epeli. The accused then took her to a vacant house under the excuse of breaking breadfruit, and in its bathroom, he penetrated her.
- [70] In considering these two instances, it is your responsibility to decide whether her version of events is probable, in deciding her truthfulness and reliability.
- [71] There could be many other probabilities you would like to consider arising out of the evidence placed before us. You may consider all these probabilities and should decide it, based on your common-sense.
- [72] Another consideration in evaluating evidence for its truthfulness and reliability is the manner of each witness in giving evidence.
- [73] You will recall how the complainant gave answers when she was examined by the learned State Counsel. Please consider her demeanor in Court in deciding her credibility as a witness. You may have to employ this consideration on other witnesses as well.

- [74] I must caution you over one other important matter. When I present the prosecution version, you might get an impression that there is no evidence from the accused for you to consider and to compare with. That is wrong. The accused is under no legal duty to disprove the case for the prosecution. He is not even under a legal duty to offer evidence.
- [75] So far, I have directed you on the assessment of credibility of the evidence for the prosecution. If you prefer to accept the prosecution evidence as truthful and reliable account of the incident, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of Rape beyond a reasonable doubt.
- [76] As already noted the complainant had said, in relation to the 1<sup>st</sup> count of Rape that she felt pain when the accused penetrated. In relation to the 2<sup>nd</sup> count of Rape, the complainant said in evidence the accused penetrated her after she was put on the cement.
- [78] The prosecution says this is their proof of penetration of the complainant's vagina by the accused. If you consider these items of evidence as sufficient proof of penetration of the complainant's vagina by the accused on those two occasions, then you must find the accused guilty of Rape on both counts as the complainant's consent is irrelevant. If you are not satisfied that penetration had occurred in each of these two instances, then you must find the accused not guilty to the two charges of Rape.
- [79] If you find the accused not guilty of Rape on the basis penetration was not proved by the prosecution beyond a reasonable doubt, then and then only you should consider whether he is guilty of an alternate lesser offence.
- [80] You could consider whether the available evidence is sufficient to find the accused guilty to the offence of Indecent Assault, even though the accused is not charged with this offence in the information. The law provides for this type of situation.
- [81] In proof of Indecent Assault, there must be evidence to prove beyond a reasonable doubt that the accused unlawfully and indecently assaulted the complainant. The word "*unlawfully*" simply means without a lawful excuse. An act is "*indecent*" if right minded persons would consider the act indecent. As to whether the act of getting the complainant to put her pants down and to lick her vagina is indecent, you have to consider what right minded persons would think of this act. Was the act so offensive to current standards of modesty and privacy as to be indecent? The word "*assault*" means the use of force unlawfully. Accordingly, a physical contact may constitute an act of assault, if it is done without a lawful excuse.

- [82] In considering these questions you may consider the general nature of the relationship between the accused and the age gap between them. If you find that right minded persons would consider the act of licking private parts of a 9 year old girl to be an indecent act, then you may find the accused guilty to this offence. If you are not satisfied, then you must find the accused not guilty to this charge.
- [83] The identity of the accused too must be proved by the prosecution beyond a reasonable doubt. In order to prove that it is this accused who had penetrated the vagina of the complainant with his penis on both these instances, the prosecution relied on evidence of the complainant that the accused lived with them for three weeks prior to the incident and therefore the complainant knew him well.
- [84] At this stage, it is appropriate to deal with the evidence presented by the prosecution in relation to the voluntariness of the caution interview statement marked as **P.E. No. 4**.
- [85] Any admission made by an accused, in his caution statement is admissible and sufficient evidence to prove his guilt to a charge. However, there are some applicable principles of law in relation to this evidence. The prosecution must prove that the caution statement was made by the accused voluntarily. The prosecution must establish this fact beyond a reasonable doubt.
- [86] Whether the accused gave his statements voluntarily and whether the statements set out a version of events in relation to the Rape of the complainant, on which you can rely and accept, is a matter for you. Of course if you believe that the interview is false, that it was made up by the Police, you may think that you cannot put any weight on it. However, if you believe that the accused gave his statements without force or fabrication, intimidation or oppression you may think that they set out a version of the evidence which will assist you in deciding on his guilt or otherwise. However, the question of what weight you can put on these admissions contained in the caution interview statement is a matter of fact for you to decide.
- [87] The prosecution says that the interview was not obtained under pressure or inducement and that the accused told the police the truth in it. What weight you put on the accused's statement to the police is entirely a matter for you. However if you accept that the contents of the interview are reliable you may think that they contain a complete confession to all the elements of the offence.
- [88] You have heard from the police officers that there were no threats or any intimidation of any kind by anyone on the accused and his statement was freely and voluntarily given and Cpl. 2978 Jemesa has correctly recorded what the accused said.



- [89] Jemesa and Emosi said in their evidence that the accused was given his Constitutional rights and after a suspension for lunch and scene reconstruction, the interview of the accused recommenced and, on the same day it was concluded. Both of these officers stated that they have not threatened, induced or intimidated the accused to admit to the allegation. The accused did not complain to them or made any requests. Emosi said that in the statement he placed his signature as the witnessing officer. He maintained that he was there throughout the interview.
- [90] It is for you to assess the evidence. Remember that police officers are trained witnesses who are used to giving evidence. I do not say this because I express any opinion about their credibility, but where a confession is the primary evidence against an accused such direction is usually given.
- [91] Please disregard Q11 to Q15 with the answers in **P.E. No. 4** as these are not relevant to the case before us. Also note that in Q 56 the accused denied penetration in relation to the vacant house incident but on Q65 admitted that the two places visited were the places where he had sexual intercourse with the complainant.
- [92] You should take into account all the circumstances in which the statement was made in assessing its value. The State says the accused person has made some sort of confession to the police. As already directed, you can convict a person on his confession alone. It has been said that people don't admit committing an offence unless it is true. Of course people are known to make false confessions too. Before you can act on the confession of the accused you have to be satisfied beyond a reasonable doubt of three things:
- i. that the accused did make the confession,*
  - ii. that the confession is true,*
  - iii. whether the accused made the confession voluntarily in the sense that it was obtained without oppression, ill treatment or inducement.*
- [93] If you decide that the prosecution has failed to prove any of these or some of these factors beyond a reasonable doubt then you must disregard the caution interview statement of the accused altogether. But if you decide the prosecution has established these factors to the required level of proof in relation to the caution interview statement of the accused, then you could use its contents as items of evidence against the accused.
- [94] I wish to direct you about the accused who is not present before us during the trial.

- (a) *You have obviously heard no evidence from him. Even if he was here it would have been his right to remain silent and to require the prosecution to make you sure of his guilt; there is no burden on him to prove anything.*
- (b) *You must not assume that an absent accused is guilty because he is not here: his absence does not help the prosecution to prove its case against him in any way at all.*
- (c) *Equally you must not speculate or guess as to the reasons for his absence, and you must not hold his absence against him.*
- (d) *You try this case according to the evidence, and you will assess it just as carefully as you would have done if the accused was here.*
- (e) *But you will appreciate that there is no evidence from him at this trial to undermine, contradict or explain the evidence put before you by the prosecution.*

**[95]** In summary and before I conclude my summing up let me repeat some important points in the following form:

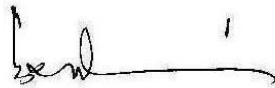
- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty.*
- ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider whether elements of the charge of Rape, namely penetration has been proved beyond a reasonable doubt in relation to the accused and also his identity. If it is so only you must find the accused guilty to the two counts of Rape.*
- iii. *If you find the prosecution failed to prove there was penetration, then only you proceed to consider whether the elements of Indecent Assault is proved beyond a reasonable doubt. If so, then you must find the accused guilty of Indecent Assault.*
- iv. *If you find that element of Indecent Assault also is not proved beyond reasonable doubt, then you must find the accused not guilty to Indecent Assault.*

[96] If you have any reasonable doubt about the prosecution case as a whole or an element of the offence and identity, then you must find the accused not guilty.

[97] Any re-directions, the prosecution may request?

[98] Madam and Gentlemen assessors, this concludes my summing up of law and evidence. Now you may retire and deliberate together and may form your individual opinions. When you have reached your individual opinions you will come back to Court, and then you will be asked to state your opinion.

[99] I thank you for your patient hearing.



**ACHALA WENGAPPULI**  
**JUDGE**



**At Suva**

**This 22<sup>nd</sup> Day of September 2016**

***Solicitor for the State*** : ***Office of the Director of Public Prosecution, Suva***  
***Solicitor for the Accused*** : ***Trial in Absentia. No Appearance***