

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 435 OF 2012

STATE

VS

MOSESE NATUWAWA SAUKITAKALI

Counsel : **Mr M. Vosawale & Mr S. Seruvatu** for the **State**
: **Mr N. Bulisea of Vakaloloma & Associates** for the **Accused**
Summing Up : **29th September 2016**

(Name of complainant is permanently suppressed and will be referred to as A.B.)

SUMMING UP

Ladies and Gentleman 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 and the accused have addressed you on the evidence. After their addresses, 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 is to ensure that the trial is conducted fairly and according to law. As a 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 all questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of fact, 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 three 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 to them. 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, the things received as prosecution or defence exhibits and any admissions made by the parties.
- [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 are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening and closing submissions made by Counsel are not evidence. They were their 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 how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? 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. Consider also the likelihood or probability of the witness's account.
- [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 victim has 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 her 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 consistency of the complaint in her allegation, its genuineness and what weight you attach to it. I shall give more directions on this aspect in the part of the summing up titled "*analysis of all evidence*".
- [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.
- [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] Ladies and gentleman, 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. 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 offences charged.
- [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] It does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.

- [28] 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.
- [29] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [30] 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?
- [31] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond reasonable doubt. This means that in order to convict, you must be sure that the prosecution has satisfied beyond reasonable doubt of every element that goes to make up the offences charged. I will explain these elements later.
- [32] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the three offences 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.
- [33] 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.
- [34] Let us now look at the charges contained in the information.
- [35] There are three charges preferred by DPP, against the accused:

FIRSTCOUNT
(Representative Count)

Statement of offence

INDECENT ASSAULT : Contrary to Section **154(1)** of the Penal Code, Cap 17.

Particulars of the Offence

MOSESE NATUWAWA SAUKITAKALI, from the 1st day of January 2004 to 31st December 2004 at Navua in the Central Division, unlawfully and indecently assaulted **A.B.**

SECOND COUNT

Statement of Offence

RAPE : Contrary to Section **149** and **150** of the Penal Code, Cap 17.

Particulars of Offence

MOSESE NATUWAWA SAUKITAKALI, between the 1st day of January 2006 to the 31st of December 2006 at Navua in the Central Division, had unlawful carnal knowledge of **A.B.**, without her consent.

THIRD COUNT

(Representative Count)

Statement of Offence

INDECENT ASSAULT : Contrary to Section **212 (1)** of the Crimes Decree 44 of 2009.

Particulars of Offence

MOSESE NATUWAWA SAUKITAKALI from the 1st day of January 2012 to the 31st day of May 2012 at Navua in Central Division, unlawfully and indecently assaulted **A.B.**

- [36] I shall first deal with the elements of the offence of Rape. In order to prove a charge of Rape, the prosecution must prove beyond reasonable doubt that the accused penetrated A.B. or the complainant's vagina, by his penis. The slightest penetration is sufficient to satisfy this element.

- [37] A woman 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 over 13 years of age and therefore, she had the capacity to consent.
- [38] If you are satisfied beyond reasonable doubt that the accused penetrated the complainant's vagina with his penis then you may find him guilty of rape.
- [39] The accused is also charged with two counts of Indecent Assault as the 1st and 3rd Counts on the Information. In proving an allegation of Indecent Assault, the prosecution must prove beyond a reasonable doubt that the accused unlawfully and indecently assaulted the complainant. The word "*unlawfully*" simply means without lawful excuse. An act is indecent if right minded persons would consider the act indecent. As to whether the act of touching the breast of the complainant after touching her body 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?
- [40] 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 touching the breast of the complainant by the accused as to be indecent on the two occasions, then you may find the accused guilty to these offences. If you are not satisfied, then you must find the accused not guilty to these charges.
- [41] Apart from the elements of these offences, the identity of the person who is alleged to have committed the offences must also be proved by the prosecution. What it means is that it was this accused and none other had penetrated the complainant's vagina on that date and time. There must be positive evidence as to the identification of the accused.
- [42] If you find that the prosecution failed to establish any of these elements then you must find the accused not guilty.
- [43] In our law, no corroboration is needed to prove an allegation of Sexual Offence and Rape and Indecent Assault are obviously considered as Sexual Offences.
- [44] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

Case for the Prosecution

[45] Evidence of the complainant, A.B.

- (i) *It is her evidence that she is currently 21 years old and was born on 1st August 1995. She is living with her mother and younger brother. They live in a house belonging to her step father, the accused, at Lapanoni village. In 2004 her relationship with the accused was good, but it changed when he thought about her "badly". In explaining the nature of their relationship, the complainant said that the accused was jealous and would not allow her to speak to boys or go out of the house.*
- (ii) *Describing the incident in relation to the 1st Count, the complainant said that during that time she was sleeping alongside of her younger brother on a bed while the accused and her mother slept on the floor close to the bed. Then she felt the accused started to touch her on her back and was moving his hand towards her breast. When he touched her breast, she threw his hand away. He kept on touching her. Then she got up and looked at him.*
- (iii) *He told her to keep quiet and not to move around so that she would not wake up her mother. She was scared and did not scream. This has happened in 2004 but she is unable to recall how many times it happened. She did not complain about the accused as he threatened her that he would kill her. After this incident the complainant hated the accused.*
- (iv) *In relation to the incident of the 2nd count, the complainant said in evidence that in 2006, she was 12 years and attended the same school at Lapanoni village, but was in class 6. At that time also the accused lived with them. One day she returned from school and she was to attend a birthday party with her brother the same evening. The accused said not to go. When their mother called and was told that the accused told them not to go. Then her mother spoke to the accused. Then the accused asked them to have a shower. She was the first to have the shower and then came to the bed room looking for her clothes. Then the accused also came into the room.*
- (v) *He then held her by strongly wrapping his hands around her from back and had then put her on the bed. He covered her mouth and inserted his fingers and then his penis into her vagina. She did not agree with*

it, hated it and was crying. At that time her brother came out of the bathroom. Hearing this, the accused stood up. After that she also went in to the bathroom to wash herself and she felt blood coming from her vagina.

- (vi) She did not tell this incident to her brother and had then gone to attend the party. She was scared to tell as the accused had threatened to kill her with a cane knife if she reveals it to anyone. She took the threat seriously. After this incident she continued to stay in that house for another two years. Then she moved to her aunt's house at Cautata and stayed with her for the next four years.*
- (vii) In relation to the incident described in the 3rd count, the complainant said that in 2012 she was schooling at L.D.S. in Form 4 and was 14 years old. At that time her mother was living in the Lapanoni village and the complainant was not there due to previous incidents. She was regularly in contact with her mother but not with the accused. During holidays she returned to Lapanoni upon her mother's request.*
- (viii) On one afternoon, during her mother's absence, she slept on the floor. She was lying face down. Then the accused lay on top of her and asked her "if we can". She said "I can't". The accused started touching her back and then was also touching her breast. She then stood up and went to the bath room. She did not consent for this act by the accused.*
- (ix) Then she ran to where her mother was. She called her mother home and then wrote in a piece of paper what the accused did to her. Then she gave it to her mother to read. Why she did not tell her mother was due to the fact that the accused stayed in the house. Then her mother confronted the accused with the allegation and the accused said that the complainant is lying. Her mother was very upset about what happened and fought with the accused. She then threw away his travel bag full of clothes. The complainant had to abandon her studies due to her pregnancy.*

[46] Evidence of Litia Suguta

- (i) This witness said that she lived with the complainant, son Inoke and grandson Alma in Lapanoni village. The complainant is her eldest child and was born on 1st August 1995 and her son was born three years later. The house they lived in, belong to the accused, her de facto partner. She started her relationship with the accused in 2004 but had*

no children from him. At that time the accused had good relations with her children and this situation continued until 2006.

- (ii) On one evening in 2006, they slept and the witness got up at about 5.00 a.m. when she felt movement of her mattress. She then saw the accused touching the complainant's breast and then continued down to her stomach. Then the witness slapped him and asked him as to what he is doing. He said he did nothing. They fought over this and then the accused apologised to her.*
- (iii) At that time she was unemployed and had nowhere else to go and they were under the responsibility of the accused. The complainant stayed with them until 2012. During this time, the accused used to beat the complainant with an extension cord. Then the witness told the complainant to move to Cautata where her younger sister lived. The complainant continued her studies while schooling at L.D.S. but the accused was very upset about it. He broke utensils and swore at the witness. She was in contact with the complainant and visited her regularly. The accused said he would go to church, if the complainant returned.*
- (iv) Sometime in 2012, the complainant returned to Lapanoni. At that time the witness was employed but only had work for few days of the week. She was offered a job at a nearby boutique. The witness asked the accused if he could pay the complainant's school fees as she could not support her. By then the complainant did not attend school as her fees were not paid. She stayed at home.*
- (v) One evening, after dinner, the witness had gone to a nearby house and was talking to a person. It was raining. Then she saw the complainant running and then she came up to her crying. She wanted the witness to return home. When she reached home, she saw the accused waiting with a bamboo stick in his hand. He scolded the complainant.*
- (vi) When asked what happened, the complainant told her that when she was on the mattress the accused lay on top of her and asked "if we can". The witness was angry but could not do anything as he had a bamboo stick. They fought and she then threw his clothes out and that night the accused did not sleep with them.*

[47] That was the case for the prosecution. You then heard me explaining several options to the accused. I explained to him that he could remain silent or give sworn

evidence and call witnesses on his behalf. He could also address Court. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests on prosecution at all times. But he opted to offer evidence under oath.

Case for the Accused

[48] Evidence of the Accused

- (i) *The accused said in his evidence that he lived in Lapanoni village for the past 30 years and currently employed in a Hotel. He met complainant's mother in 2003 and accepted her as his partner but they are not legally married. He accepted her children as well. The complainant and her brother were schooling at that time. They had a good relationship with the accused and lived in his house. He treated them well. The accused was the only one employed.*

- (ii) *In May 2012, Navua Police took him to the station upon a report alleging of an incident that took place in 2006. The allegation was about Rape and pregnancy by the complainant. He denied the allegation. What had happened was that the complainant went missing and returned home only on the following morning at about 7.00 a.m. She was with a boy called Pita. He brought her home and with her mother's permission, beat her.*

- (iii) *Except for this incident the accused never scolded the complainant or "touched" her. The accused got to know about the allegation of sexual assault was when he was taken to Police. He was then remanded. He denied the two allegations of "sexual assault" and also the allegation of Rape.*

Analysis of all evidence

[49] The prosecution relied on the evidence of the complainant and her mother to prove its case, while the accused offered evidence under oath in support of his denial.

[50] Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses is truthful and, in addition, reliable. The only evidence placed before you in respect of 2nd and 3rd counts by the prosecution is that of the complainant. Her mother's evidence reveals that her evidence is relevant in relation to the 1st count in addition to the complainant. If you

find their evidence is not truthful and or unreliable, then you must find the accused not guilty to the charge of Rape and also to the charges of Indecent Assault, since the prosecution has failed to prove its case.

- [51] If you find the evidence placed before you by the complainant and her mother both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence of Rape and also of the offences of Indecent Assault, and identity of the accused beyond a reasonable doubt. It might also be relevant to remind yourselves that no corroboration is needed for the complainant's evidence.
- [52] 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 the consistency of the evidence.
- [53] In relation to considering the consistency of the prosecution evidence, I shall first direct you with the evaluation of evidence on the aspect known as recent complaint. What this consideration is whether the complainant consistently made the allegation of sexual aggression to the person to whom she disclosed it for the first time since the alleged incident.
- [54] The prosecution lead evidence from the complainant that she did describe the alleged act of sexual aggression that took place in 2012, in relation to the 3rd count, to her mother soon after it happened and implicated the accused as the person who did it. Evidence of her mother reveals that she in fact complained to her, when she returned to their house that evening.
- [55] You could consider this item of evidence, in order to decide whether the allegation of sexual aggression in respect of the 3rd count was consistently made and also in what detail. However, I must caution you that this item of evidence should not be utilised by you to decide that they support the complainant's evidence led before this Court. You could only consider this item of evidence at this stage to consider whether the allegation is consistently made and was made without undue delay, without leaving room for afterthought and fabrication.
- [56] In relation to the incidents relevant to the 1st and 2nd counts, it was elicited during cross examination that she complained about it for the first time on 22nd October 2012 while making a report to Navua Police. It is clear that the incidents allegedly took place in 2004 and 2006 were reported only in 2012 and therefore, the complainant was describing events which took place a long time ago.

- [57] The complainant did not disclose the 1st incident to her mother. She also did not disclose the 2nd incident to her brother who was with her at the time, to her mother or later at school, to her teachers.
- [58] In explaining her failure to complain soon after the alleged acts, the complainant said that she was threatened by the accused with death by showing her a cane knife. She took his threat seriously. She was 9 years in 2004 and 11 years in 2006. Prosecution evidence is that her family was dependent on the accused for support. Even after these incidents the complainant continued to live in his house as they had no other place. It is for you to consider these factors and decide whether her conduct under such circumstances is probable and therefore acceptable as an explanation for the delay.
- [59] If you do conclude that she has given a satisfactory explanation why no complaint was made to the police until 2012, there remain some consequences of the delay which you need to bear in mind.
- [60] First, memories fade. You would not expect a witness' memory of detail to survive intact after this length of time. For example, the complainant told you that she could not recall how many time the accused touched her breast over this period of time, in relation to the 1st count.
- [61] But, if a witness does claim to have a memory of detail there may be a risk that its accuracy has been affected by the passage of time. We all have experience of distant memory playing tricks with us. Although the complainant told you that she had a vague recollection about the number of time he repeated his conduct, she said that she had no difficulty recalling the details of his acts in 2004 and 2006.
- [62] You must decide whether the complainant's recollection of the essential events is reliable. If, therefore, you are concerned, either about the absence of a circumstantial detail which would have assisted you to judge the reliability of her evidence, or by her claim to remember detail which you regard as unlikely after this length of time, then that is a legitimate concern, because it is relevant to the question whether the prosecution has proved its case. But, it is for you to decide whether your concern affects only a small part of the complainant's evidence or undermines her evidence as a whole.
- [63] If, of course, there is other evidence which tends to support the complainant's recollection of detail about a particular incident you would be able to give effect to it if you thought it right to do so. The complainant's mother has given evidence that she saw the accused touching the complainant's breast and she had slapped the accused when she saw it. He later apologised to her. Provided you are sure that her mother was recalling accurately something she saw at the time and has not been

influenced by anything she has heard since, her evidence is capable of supporting the complainant's evidence recalling this particular incident itself.

- [64]** I say it is capable of providing support. You must decide whether it does or not. The mother's evidence was independent of the complainant because she saw the incident herself. However, the complainant does not make any reference that her mother slapped the accused since discovery of it and that fact is relevant to the question whether the complainant's present claim to recall the incident is reliable. You may have to consider whether the complainant and her mother describe the same incident or two different ones.
- [65]** Second, you should consider the effect which the passage of time has had upon the accused's ability to respond. He did not know, until his arrest in 2012, that he would have to meet the case now brought against him. He is in no better position than anyone else to remember the details of his family life 8 to 6 years ago. To give an example, had the allegation been made at the time, the accused might have been able to recall details of his movements which assisted his defence. That kind of inquiry is no longer available to him. However, he claims total denial.
- [66]** If, having considered the accused's position, you accept that he has, as a result of the delay, been placed at a material disadvantage, you should consider carefully to what extent that concern might influence your conclusion.
- [67]** You should bear all these factors in mind when you are deciding whether the evidence makes you sure of the accused's guilt. You should make your own assessment and decide what weight you should attach to them.
- [68]** In addition, it is your duty to consider the evidence led before this Court for its consistency. I shall first deal with the inconsistencies highlighted in the prosecution's case. Before I venture to refer to the inconsistencies, let me assist you by directing the manner in which you should consider these inconsistencies in determining truthfulness and reliability of a particular witness.
- [69]** 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.
- [70]** You may have observed that when the complainant gave evidence, there were some inconsistencies between her evidence before this Court and the statement given to police. In respect of her pregnancy the complainant admitted that she falsely implicated the accused as the father of her unborn child, when in fact she got

pregnant after having intercourse with one Pita. She says what she said in evidence is true.

[71] What you have to take into consideration is only the evidence given by the complainant in Court and not any other previous statement given by the witness. The reason is what she said to Police is not evidence. The portion of the statement to Police could only be used to consider whether she said something different to what she said in Court. These portions only assist to decide whether she was consistent in that particular issue.

[72] In addition, the accused highlighted some other inconsistencies of the evidence of the complainant.

[73] As I have already directed you earlier on in this summing up, 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.

[74] The inconsistencies of the prosecution evidence as highlighted by the accused were in relation to the following:

i. *the complainant said in her evidence that she was not in Lapanoni during January to May 2012 where as her mother stated that she stayed with them for months as the complainant did not attend school due to non-payment of school fees,*

ii. *the complainant admitted in her cross examination that she stated that the accused was the only person to forcefully have sex with her whereas she also admitted that it was Pita who made her pregnant. However, the complainant said in evidence she had consensual intercourse with Pita and she told Police that the accused had "forceful" sex with her. You have to consider this alleged inconsistency in the context of these relevant items of evidence on forceful and consensual sex.*

[75] The prosecution says that the inconsistencies that are highlighted by the accused were on ancillary matters and therefore should not affect the basic version of her evidence. The accused wants you to consider the complainant's evidence as unreliable as she was inconsistent with these details and falsely implicated the accused as her child's father. The accused poses the question that if she has lied on this issue how could one rely on her evidence on the important items of evidence?

- [76] It is for you to decide whether these inconsistencies, affects the credibility of the basic version of the prosecution. Having considered the above, you have to decide whether these inconsistencies, makes its evidence false and unreliable.
- [77] Similarly, you also have to consider the inconsistencies of the accused's evidence. It was pointed out by the prosecution that the accused made different statement in respect of the incident concerning the 1st count, in his caution interview by answering to questions Nos. 17, 18, 19 and 20 by answering that he could not remember the part he had touched on the body of the complainant, whereas admitting that he did it to Police.
- [78] You will have to consider these inconsistencies in the light of the above cited evidence and decide the effect of it on the truthfulness and reliability of the accused's evidence.
- [79] I also mentioned to you that the manner of giving evidence is also an applicable consideration in evaluating witnesses for their truthfulness and reliability. You would have observed how the complainant and her mother have given evidence and faced cross examination. Similarly you should also consider the demeanor of the accused in evaluation of truthfulness and reliability of his evidence.
- [80] In addition to the above mentioned considerations on evaluation of evidence; there is another factor in considering whether the evidence of the prosecution and accused are truthful and reliable. That is the relative probability of the versions of events as presented by the parties.
- [81] The position of the prosecution is that the accused, having had the complainant and her family under his control, used the opportunity to his advantage to have the complainant to satisfy his sexual desires. The prosecution wants you to consider that both the complainant and her mother had no way to report the incident to Police as they had to rely on the accused for financial support and also for lodging. It is in these circumstances there was no report to Police was made and the complainant continued to live under the same roof.
- [82] The prosecution case is, in relation to the 1st count, that the accused touched her body and breast when they slept in close proximity. Then in 2006, the accused used the opportunity of the absence of the complainant's brother to commit the act of rape on her. Then again in 2012, in the absence of her mother, he touched her breast while lying on top of her.
- [83] In challenging the prosecution version of events on relative probability, the accused wants you to consider the following:

- i. the complainant made this allegation only in 2012 after the accused beat her with her mother's permission for spending a night with the boy called Pita and for this she hated him,*
- ii. she complaint of rape only when she realised that she was pregnant with Pita's child,*
- iii. it is not possible to penetrate vagina of a girl of 11 years without causing significant injury to her vagina and there was no such evidence in support of this,*
- iv. there would have been significant bleeding as a result of penetration and the complainant claimed she only felt but not seen blood, although she was a virgin at that time,*
- v. she could not tell an exact date or time of these alleged incident,*

[84] In examining the accused's evidence for its truthfulness and reliability, if you find the evidence of the accused as truthful and reliable, then you must find the accused not guilty to the counts of Indecent Assault and also to the count of Rape, since the prosecution has failed to prove its case. If you reject the evidence of the accused as not truthful and also unreliable, that does not mean the prosecution case is automatically proved. They have to prove their case independently of the accused and that too on the evidence they presented before you.

[85] With this caution in mind, we could proceed to consider the evidence of the accused for its truthfulness and reliability on the consideration of probability of the version. The claim of the accused is the complainant decided to complain of the incident only with the detection of her pregnancy and she falsely implicated his name as the father of the child and similarly she implicated him for other allegations as she hated him for the beating she received by him. He treated the complainant and her brother well, since they moved in to live with him.

[86] The accused denies the three allegations leveled against him by the complainant. It is your duty to consider the relative probability of the accused's version of events as presented before by the accused.

[87] I must caution you over one important matter. When I present the accused's version, alongside the version of the prosecution, you might get an impression that the accused must prove that the complainant has fabricated this allegation by implicating him of sexual aggression and of Rape and that is why he has given evidence. That is wrong. He is under no duty to disprove the case for the prosecution. He is not under a legal duty even to offer evidence. He could have

remained silent. When he does give evidence, then, as already directed, it must first be evaluated for its credibility and reliability. We are dealing only with this aspect of his evidence at this moment.

[88] So far, I have directed you on the assessment of credibility of the witnesses for the prosecution and of the accused. If you reject the evidence of the accused as false and or unreliable and preferred to accept the prosecution evidence as truthful and reliable then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of Rape and also of the two counts of Indecent Assault, beyond a reasonable doubt.

[89] I will first deal with the allegation of Rape. As already noted the complainant had clearly stated that the accused penetrated her vagina with two fingers and then with his penis. If you accept it as sufficient proof of penetration of the complainant's vagina, then in addition, the prosecution must prove that it was this accused who penetrated without her consent. It is up to you to decide whether the complainant had the mental capacity and maturity to consent at the time of the alleged Rape. This applies to the 1st count as well.

[90] You would have noted that in the information two statutes are mentioned. The 1st and 2nd counts were under the Penal Code provisions while the 3rd count was under the Crimes Decree. The elements of the offence of Indecent Assault are the same in both these instances. The only difference is in relation to the 3rd count, and unlike in the 1st and 2nd counts, the complainant was over 13 years of age by this time and therefore, the consent of the complainant is relevant for this charge. However, she clearly stated that she did not consent.


[91] I shall now direct you on another important issue of the case. You will recall that I have already directed you on this topic by referring to the identity of the accused. It is a vital component of the prosecution case and if it had failed to prove the fact that it was this accused and no other had penetrated the complainant's vagina and touched her breast in 2004 and 2012, then you must find the accused not guilty of Rape and Indecent Assault. The prosecution primarily relied upon the evidence of the complainant to prove identity of the accused and she claims she clearly identified the accused on the three instances.

[92] There are three charges in the information.

[93] I think I must mention another relevant legal requirement concerning the charges against the accused. The three charges leveled against the accused are presented as representative counts. Representative counts are based on act or series of acts done during a specified time period by the accused. Such a charge is described generally as a representative count in legal terminology. The prosecution is expected to prove

just one incident which falls within this period in respect of such count. They need not prove a continuous or a series of incidents in support of a representative count.

- [94] With that legal direction in mind, you must first decide whether the accused is guilty or not guilty to the charge of Indecent Assault, described in the 1st count. Then you must proceed to consider whether the prosecution proved the count of Rape. Then, you must consider whether the prosecution has proved the 3rd count of Indecent Assault. Finding the accused guilty of one count does not necessarily mean that you should find him guilty to the other two counts as well. You must consider these three counts separately and independently of each other.
- [95] In summary and before I conclude my summing up let me repeat some important points. If the prosecution has proved all the elements beyond reasonable doubt of Rape and Indecent Assault then you must find the accused guilty of those charges. If not, then you must find the accused not guilty.
- [96] If you have any reasonable doubt about the prosecution case as a whole or an element of any of the three offences, including identity of the accused, then you must find the accused not guilty of that particular charge or charges.
- [97] Any re directions the parties may request?
- [98] Ladies and Gentleman assessors, this concludes my summing up of law and evidence. Now you may retire and deliberate together and may form your individual opinions on the count of Rape and also on the two counts of Indecent Assault against the accused. When you have reached your separate opinions you will come back to Court, and you will be asked to state your opinion.
- [99] I thank you for your patient hearing.



ACHALA WENGAPPULI
JUDGE



At Suva

This 29th Day of September 2016

Solicitor for the State : ***Office of the Director of Public Prosecution, Suva***
Solicitor for the Accused : ***Vakaloloma & Associates***