

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 295 of 2016

[CRIMINAL JURISDICTION]

STATE

V

WAQA NAITINI

**Counsel** : Ms. K. Semisi for State  
Mr. S. Valenitabua & Ms. B. Malimali for Accused  
**Hearing on** : 26<sup>th</sup> – 29<sup>th</sup> June 2017  
**Summing up on** : 03<sup>rd</sup> July 2017

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "AV".)

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room, the exhibits tendered and the admitted facts. Your opinion should be based only on the evidence presented inside this court room. If you have

heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of his/her the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

7. When the complainant gave evidence she said she is 17 years old. She gave evidence of events that had taken place when she was 12 years, 13 years and 16 years old. You may have come across children of these ages. You will have an idea of the way a child of a particular age behave, think, talk and the way they describe things.
8. Children can be confused about what has happened to them; sometimes children blame themselves for what has happened. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time that what they were doing was wrong. They may be embarrassed because they found that some aspects of the attention they were getting from the individual concerned were enjoyable.
9. I mention these possibilities because experience shows that victims of sexual offences may react in different ways to what they went through and children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.
10. You may have your own views about the social media. You may be an individual who is in favour or against it. Please remember that any adverse view of yours on social media should not influence your judgment on whether the complainant is a credible witness or not. You should not be quick to jump into conclusions due to the fact that the complainant had made the postings in the social media as highlighted by the defence. As I have pointed out, it is not



possible to draw out rules as to the exact manner in which a victim of a sexual offence should behave, even when it comes to social media.

11. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.
12. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
13. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by him/her is for you to decide.
14. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his/her evidence is inaccurate; or you may accept the reason he/she provided for the inconsistency and consider him/her to be reliable as a witness.

15. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what he/she said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
16. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
17. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
18. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
19. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of an offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.

20. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not those charges have been proved.
21. I must explain to you as to the reason for the use of the screen when the complainant gave evidence. It was a normal procedure adopted in courts on the request of the prosecution to make a particular witness relatively more comfortable when giving his/her evidence. You must not infer that such a protection to the witness was warranted due to the accused's behaviour and should not draw any adverse inference against him on that account.
22. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
23. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

#### **FIRST COUNT**

##### **Representative Count**

##### *Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

##### *Particulars of Offence*

**WAQA NAITINI** between the 1<sup>st</sup> day of February 2012 and the 28<sup>th</sup> day of February 2012 at Makoi, Nasinu in the Central Division unlawfully and indecently assaulted AV, a child under the age of 13 years by touching her buttocks.

#### **SECOND COUNT**

##### *Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

##### *Particulars of Offence*

**WAQA NAITINI** between the 1<sup>st</sup> day of January 2012 and the 31<sup>st</sup> day of December 2012 at Makoi, Nasinu in the Central Division unlawfully and indecently assaulted AV, a child under the age of 13 years by touching her vagina.

#### **THIRD COUNT**



*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**WAQA NAITINI** between the 1<sup>st</sup> day of January 2012 and the 31<sup>st</sup> day of December 2012 at Makoi, Nasinu in the Central Division on an occasion other than that mentioned in Count 2, unlawfully and indecently assaulted AV, a child under the age of 13 years by pressing his penis against her buttocks.

**FOURTH COUNT**

**Representative Count**

*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**WAQA NAITINI** between the 1<sup>st</sup> day of January 2013 and the 31<sup>st</sup> day of December 2013 at Makoi, Nasinu in the Central Division unlawfully and indecently assaulted AV by touching her thighs and back.

**FIFTH COUNT**

*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**WAQA NAITINI** on the 3<sup>rd</sup> day of July 2016 at Makoi, Nasinu in the Central Division unlawfully and indecently assaulted AV by sucking her breasts.

**SIXTH COUNT**

*Statement of Offence*

**RAPE:** contrary to section 207 (1) and (2)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**WAQA NAITINI** on the 3<sup>rd</sup> day of July 2016 at Makoi, Nasinu in the Central Division had carnal knowledge of AV without her consent.

24. Though the accused is charged with six counts you should remember to consider each count separately. You must not assume that the accused is guilty of the other count just because you find him guilty of one count.

25. You would note that the 1<sup>st</sup> count and the 4<sup>th</sup> count are representative counts. When it comes to a representative count, the law says that it shall be sufficient for the prosecution to prove that between the dates specified in the charge at least one offence described in the particulars was committed. In count one the prosecution alleges that during the period between 1<sup>st</sup> day of February 2012 and the 28<sup>th</sup> day of February 2012 several acts of sexual assault took place. However, if you are satisfied that the prosecution has proved beyond reasonable doubt at least one incident where the offence of sexual assault was committed by the accused against the complainant between the specified period, you should find the accused guilty of the first count. The same applies in relation to the 4<sup>th</sup> count.
26. On 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> counts the accused is charged for sexual assault. To prove the offence of sexual assault, the prosecution should prove the following elements beyond reasonable doubt;
- a) the accused;
  - b) unlawfully assaulted the complainant; and
  - c) the said assault is indecent and sexual.
27. The first element involves the identity of the offender who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed each offence.
28. When you consider the evidence on the identification of the accused in respect of each offence, please bear in mind that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate the evidence given by the complainant on identification of the accused in relation to each offence;
- a) Duration of observation;
  - b) The distance within which the observation was made;
  - c) The lighting condition at the time the observation was made;



- d) Whether there were any impediments to the observation or was something obstructing the view; and
  - e) Whether the complainant knew the accused and for how long.
29. Assault is the use of unlawful force. A touch constitutes an assault if it is done without a lawful excuse.
30. The word "unlawfully" simply means without lawful excuse.
31. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. You should also ask yourself, firstly, whether you consider that indecent assault could also have been sexual because of its nature; and if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.
32. To prove the sixth count where the accused is charged with the offence of rape, the prosecution must prove the following elements beyond reasonable doubt;
- a) the accused;
  - b) penetrated the vagina of the complainant with his penis;
  - c) without the consent of the complainant; and
  - d) the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not she was consenting.
33. The first element is concerned with the identity of the person who committed the offence. As I have mentioned before the prosecution should prove beyond reasonable doubt that it was the accused who committed the offences.
34. The second element involves the penetration of the complainant's vagina with the penis. The law states that this element is complete on penetration to any extent. Therefore, it is not necessary to have evidence of full penetration or ejaculation. A slightest penetration is sufficient to satisfy this element.

35. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent.
36. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
- a) by force; or
  - b) by threat or intimidation; or
  - c) by fear of bodily harm; or
  - d) by exercise of authority.
37. Apart from proving that the complainant did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
38. What is meant by 'reckless as to whether or not she was consenting'? If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
39. Please remember that knowledge and intention of the accused can only be inferred based on the other proven facts because you will not find direct evidence regarding same.



### *Prosecution case*

40. The complainant said in her evidence that;

- a) *In 2012 she lived with her extended family at Lot 27 Poorva road, Makoi. There were 21 people living at that house including her and her parents. In 2012 she was in class 7 and was 12 years old. She came back from Levuka in January 2012;*
- b) *Before she started to go to school in 2012, she had to babysit the accused's baby as the accused's wife was doing night shifts. One day when she was lying down with the baby, the accused entered the room and started touching her buttocks. This happened in the night. After the accused touched her, he left the room;*
- c) *On another day when she was babysitting in the night and after she put the baby on the cot, the accused entered the room. The accused hugged her from behind and she felt that the accused was trying to insert his penis which was hard, in her buttocks. She tried to move but the accused hugged her too tight. Then he made her sit on top of him and he told her "this is only us two's, nobody has to know". Then he left the room.*
- d) *Thereafter, one night when she was sleeping in her room she suddenly woke up because someone was trying to open her thighs. That day she was sleeping alone in that room because her brother went somewhere. She was sleeping on the top bunk. When she opened her eyes, she saw the accused from the light from the TV. The accused then touched her vagina. She pretended to be sleeping because she was scared. The accused was there for less than 5 minutes and he left. She said she was confused, uncomfortable and scared. She could clearly see the accused from the light that came from the TV as her bunk was just next to the door facing the TV that was in the living room. Nothing was blocking her view at that time. The other people in the house were sleeping when this happened. After the accused left, she just lay there crying. She wanted to tell her parents but she thought they won't believe her. That is because the accused was always generous to her parents where he was a helping hand and was always kind.*
- e) *Thereafter, she stayed at Sakoca from mid-2012 to mid-2013. After she came back to Makoi in 2013 the accused kept on harassing her. When she was washing the dishes the accused would stand behind her and touch her buttocks.*
- f) *One night when she was sleeping in the sitting room with her grandmother she felt that her buttocks are being rubbed by someone's leg. Then she saw that it was the accused. Her grandmother was fast asleep. Her cousins who were there in the living room were also fast asleep. She was able to see the accused from the light in the kitchen. The accused was standing where her legs were and he was there for less than one minute. Then he went to his room.*
- g) *She said there were 4 bedrooms in the house. The first room in front was occupied by her grandmother and her cousins. The next room was occupied by her, two cousins and her sister. The third room was occupied by the accused and his wife. The fourth room was occupied by her parents. She did not tell her grandmother and her cousins because they were always against her. All her cousins were younger than her and therefore she did not tell them. She said the reason she say*



that they were always against her is because they did not make her feel that she is part of their family. She said the accused was very generous and respected everyone including her parents, her grandmother and her aunts and uncles.

- h) In 2014 she attended a school in Levuka. When she came back from Levuka she lived with her parents in a different house. They moved back to the same house at Lot 27, Makoi in 2016. She was 16 years old in 2016. On 3<sup>rd</sup> July 2016 she returned home around 2pm after attending the Saturday class. There was a church function at home. She went straight to sleep because she was a bit sick. She suddenly woke up because of the breeze. When she woke up, she saw that the window and the door were opened though she could remember that she closed them before she went to sleep. When she stood up to close the window, she saw a figure in front of her. Then from the light from the neighbour's house she recognized that it was the accused.
- i) When she was about to move, the accused blocked her face with a pillow. Then he pushed her and made her lie on the bed. He blocked her face with the pillow and she thought that he is going to kill her. The accused also held her hands. She tried to move but she was helpless. Then she could feel that the accused was removing her skirt, her shorts and her top. Then the accused started to suck her breast. She was crying and was helpless because she was sick. She said she was asthmatic. Then she could feel the accused's penis entering her vagina. The accused pushed it too hard inside her vagina and then took it out. He leaned on the pillow and said that it is bleeding. Then again he inserted his penis inside her vagina and was going up and down. After sometime he took his penis out and said "I have leaked inside". Thereafter the accused went to his room. She said this took about 30 minutes. When the accused was doing that to her she was crying and she felt really weak. She said she didn't call out on her family because the pillow was blocking her face. After the accused left, she did not tell anyone because she was so weak. She did not go to school the next week because she was sick.
- j) She did not tell her parents what the accused did to her but she wrote a suicide letter. The reason that she wrote the suicide note was because she had enough of the ill-treatment, the harassment and the sadness. For what her family had done to her and what the accused had done to her. She was forced to do the house chores and was always being growled at. She said though she and her cousins had turns to do the chores, she had to do the work for the cousins when the cousins complained. She had to do the laundry, babysit, clean the house and cook. She felt that it was unfair. When she told her mother about this the mother told her that she should do it because she is the eldest.
- k) She went to school with the letter inside her school bag. She took the pills she brought from home and she slept during the last two periods because she felt dizzy. After she got up, she came to know that her best friend had read the letter and the best friend said she wants to help her. So she went to the best friend's house that day. The best friend told her aunt and then they went to the police station to file a complaint. She was medically examined by a doctor at the Medical Services Pacific.



- l) *She did not consent at any time for the accused to do what he did to her on the 3<sup>rd</sup> July. She also did not consent to what the accused did to her in 2012 and 2013.*
- m) *She said she did not tell anyone at home because they would not believe her. Once she told her mother that the accused used to touch her physically. She said she told her mother only that. She thought that her mother would help her. The mother told her that she should understand that the accused is from Raiwaqa. Having confronted the accused the mother told her that the accused had said he was just playing around. When her mother told her this she felt sad because she thought the mother will help her. She told this to the mother before the incident on 3<sup>rd</sup> July. She identified the accused in court.*
- n) *During cross examination she agreed that the house at Lot 27 is an old wooden house. She agreed that her grandmother normally wake up around 3 o'clock in the morning for prayers. She also agreed that her grandmother prepares breakfast for everyone. She agreed that there was a church gathering on 2<sup>nd</sup> July 2016 and then on 3<sup>rd</sup> July there was a family meeting.*
- o) *She said that she lodged her complaint on 31/07/16. The medical examination was conducted on 3<sup>rd</sup> August and her statement was recorded by the police on the 4<sup>th</sup> of August. She agreed that her grandmother did the babysitting for all children and she just helped.*
- p) *She said the touching of her buttocks as alleged in Count 1 happened inside the 3<sup>rd</sup> room. Touching of her vagina as per the Second Count happened in the 2<sup>nd</sup> room. The incident in the Third Count happened inside the 3<sup>rd</sup> room. She agreed that she posted a happy picture of herself as her profile picture on Facebook on the 3<sup>rd</sup> July 2016.*
- q) *She said when the accused was blocking her face she did struggle but she was helpless. She did not scream because the accused blocked her face with the pillow. She did not scream after the pillow was eventually removed because she was still trying to catch her breath. When the accused sucked her breast one hand was on the pillow which was on her face and from the other hand the accused was holding her hands. When it was suggested to her that she never close her legs she said the accused was parting her thighs with his knees.*
- r) *It was suggested to her that she expects the court to believe that the accused raped her for 30 minutes in an old squeaky house. She said "yes".*
- s) *She agreed that she took three packets of 'no more pain' after her mother and sister beat her up and she broke up with her boyfriend. She agreed that she was admitted in hospital because of that. She admitted that she was unhappy because her parents did not allow her to go to her friend's place and for her to hangout in town. She denied that she snuck out of the house. She agreed that one Saturday night she came home late. She said that day she came after a holiday job and then she went out.*
- t) *She agreed that she moved from place to place because troubles kept coming up in the places she was staying. She agreed that the accused was always kind to her and to her family.*



- u) *During re-examination she said she burnt the bed-sheet with the blood stains because she thought she won't be living and she attempted to commit suicide. She said that she did not complain to her family, neighbors and school mates because she was scared and she was also shy as the accused is part of the family. That is why she just ended up writing a suicide letter.*

41. The 2<sup>nd</sup> witness was the complainant's mother. She said that;

- a) *In 2012 she was living with her in-laws including the accused. She moved to a house in upper Poorva in 2014 and went back to the same in-laws house in mid-2015. The complainant also lived with her at upper Poorva at that time. In 2016, most of the time she and her daughters were doing the house chores. The complainant was doing the chores everyday which included cooking, washing clothes, sweeping and babysitting. The complainant would normally babysit the accused's daughter.*
- b) *In 2016 the complainant told her that the accused used to touch her breast, her back and her butt. She confronted the accused. The accused tapped her shoulder and said he is not stupid to do such things. She said the complainant was scared.*
- c) *The complainant used to sleep in the second bedroom. She said the house was half concrete and half wooden. The wooden floor makes a lot of noise when you walk depending on the way you walk.*
- d) *She said in 2016, the complainant was afraid to stay home with them because no one listened to whatever she said.*
- e) *During cross examination she agreed with the suggestions that she is sad about what had been happening to her daughter and that she wished she may have listened to the complainant more.*
- f) *She said the complainant went to Sakoca during the 3<sup>rd</sup> Term school break. She said that the accused was there with them in the same house in 2012. She said the accused was going to Muanivatu settlement in Vatuwaqa only during weekends.*
- g) *She agreed that her sister-in-law Anastasia worked at Kingdom Closet in 2012. She agreed that sometimes her mother in law would get up at 3am for her prayers. She said the kitchen light is kept switched on during nighttime and it brightens the living room partly. She agreed that there was a family meeting on the 3<sup>rd</sup> July 2016, and there was a church meeting at home on the 2<sup>nd</sup> July. She said the complainant was part of that church meeting and she was there till the meeting ended between 10pm and 11pm. She went to bed around 11.30pm and she woke up the next morning at 5am. By the time she got up her mother in law was already awake.*
- h) *She said the complainant complained about the accused few days before the incident in 2016. She agreed that the accused denied doing anything to the complainant when she confronted him. She said she believed the accused because of the way he acts, the way he talks and the way he treats them.*



- i) *During re-examination she said that Anastasia went to Pacific Foods Limited from Kingdom Closet and then to Eagle Closet.*
42. Next prosecution witness was Repeka Waqalala. She said that;
- a) *She is a Social Welfare officer. She went with the complainant for the complainant's medical examination. She placed the complainant at the complainant's aunt's place at Nakasi. She said the complainant seemed traumatised in the sense that she was shivering and her eyes were teary and she kept crying when her statement was recorded.*
- b) *During cross-examination she said she gave her consent for the complainant's medical examination on behalf of the parents. She was called by the police to act on behalf of the complainant's parents. She said what she said in her evidence about the complainant's appearance was what she noted when she first saw the complainant and spoke to her inside the vehicle on their way to Medical Services Pacific. She said she placed the complainant with her maternal aunt.*
43. The fourth prosecution witness was Dr. Elvira Ongbit. She said that;
- a) *She examined the complainant on 03/08/2016. She tendered the medical report as PE 1. She said she observed a healed total hymenal laceration at the 6 o'clock position during the vaginal examination. According to her, anything that had gone through the vaginal opening could have caused that injury. The normal healing time of a mild injury is 7 days and a marked injury can go up to 15 days. She said that type of an injury will be visible even after one month and it will present as a healed hymenal laceration.*
- b) *During cross examination she agreed that any foreign object could have caused the injury she noted. When it was suggested to her that the injury she noted was no older than 15 days, she said 'yes'. She said what she wrote in D14 of the medical report was based on what the patient told her.*
- c) *During re-examination, she said a marked injury can be visible after 15 days.*
44. The fifth prosecution witness was W/DC Vularua Calati. She said that;
- a) *She is a police officer based at the Nasinu Police station. She was the investigating officer in this case. She recorded the statement of the victim, visited the scene and she arrested and interviewed the accused. She tendered the rough sketch plan she prepared as PE 2. She requested a Social Welfare officer to be present during the investigation due to the information she received from the complainant that the complainant's mother had not done anything though the complainant had informed the mother about what was happening to her.*

45. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give sworn evidence and to call witnesses.

*Defence case*

46. The accused said in his evidence that;
- a) *He lives at Lot 27 Poorva Road. Before moving to Lot 27 he lived at the Muanivatu settlement in Vatuwaqa. He said he moved to Lot 27 Poorva Road in March 2013. He is having a relationship with Anastasia Aditukana. They are not married and they have 3 children. He said the date of birth of his eldest child is 19/02/10 and the second child was born on 13/02/11. He could not remember the date of birth of the third child but he said the year is 2015. In 2012 he was working at the Kingdom Closet and Anastasia was also working there. During that time he did not see his family that often. They would come to him at Muanivatu only during his pay days.*
  - b) *He couldn't recall all the people who lived in the house when he moved to Makoi. He could not recall whether Anastasia's siblings were living there.*
  - c) *He did not know the complainant in 2012. He knew the complainant in 2013. His relationship with the complainant was just like a normal family. He had a good relationship with the complainant and her parents.*
  - d) *He said Lot 27 was a wooden house. The floor inside the house and the walls were made of wood and was old. The old lady and her grandchildren occupied the first room. Mitieli who is the complainant's brother occupied the second room. He occupied the third room. The fourth room was occupied by his wife's brother. He said he does not know the room the complainant occupied.*
  - e) *He denied the allegations made against him by the complainant. He said the relationship between the complainant and her parents last year was good. He used to respect the complainant's parents. He does not know why the complainant had made the allegations against him.*
  - f) *His mother in law used to pray at 3am in the morning. He said his mother in law used to prepare breakfast. The work in the house including cooking and cleaning was done by the mother in law. He used to help her in washing the clothes.*
  - g) *During cross examination he denied that he moved to Lot 27 Poorva Road Makoi in 2012. When it was suggested to him that the second bedroom in the house was occupied by the complainant and her brother he said it was only Mitieli. He agreed that he was present in the house at Makoi on 3<sup>rd</sup> July 2016. He said he used to respect all the people who lived in the house.*



47. Second defence witness was Anastasia Aditukana Snr. She said that;
- a) *She is 71 years old. She has been living at Lot 27, Poorva Road, Makoi since 1983. The accused is her son-in-law. She usually wakes up at 3am to say her prayers. Thereafter she would prepare breakfast for the children and lunch for school. She used to do this every day. On Sundays she would be awake from 3am till she goes for Mass at 7 o'clock.*
  - b) *She said the accused was not living with them in 2012. She said the accused came to Makoi in March 2013. She couldn't recall all the people or the number of people living in the house in 2012 and in 2016. The first bedroom was occupied by her and three grandchildren. When she was asked about the second bedroom, she said it was also occupied by some of her grandchildren. She could not recall whether there was any function at home on 2<sup>nd</sup> July 2016.*
  - c) *She said the accused is her best son-in-law because she like the way he talks to her. The accused would wash the dishes and would help her clean the house. He is the son-in-law who is always beside her.*
  - d) *She always sleeps in the sitting room and she says her prayers at 3am in the sitting room. She said if someone is making noise in the second bedroom she will be able to hear it and she will be able to see into that bedroom.*
  - e) *During cross examination she said 'yes' when it was suggested that she will have to get up in order to look into the bedroom. Then again she said she can clearly see because she was closer to the second bedroom. She denied the suggestion that she won't be able to see inside the room when the curtain was down. She agreed that she won't be able to hear any noise if she was fast asleep.*
  - f) *She agreed with the suggestion that she can't recall a lot of things. When it was suggested that she can't recall the exact time the accused came to live in the house, she said she can recall. She agreed with the suggestion that she came to testify on behalf of the accused because the accused is her best son-in-law. She agreed that she was told to inform the court that the accused came to live in Makoi in March 2013. Thereafter when she was asked who told her to come and say that, she said she knows that because that was the time the accused came home.*

48. Third defence witness was Anastasia Aditukana Naivaluvou. She said that;

- a) *She is in a relationship with the accused. They are not married. They have three children. She has been living at Lot 27, Poorva road, Makoi since birth. She started seeing the accused in 2008. Her eldest daughter's date of birth is 02/02/10, second child was born on 02/02/11 and the third child on 01/06/15. She said the accused came to live at Lot 27 in March 2013. Before March 2013 the accused lived in Muanivatu settlement. She said she took the photographs that were marked for identification by the defence and she tendered the said photographs as DE 1 to DE 8.*
- b) *She could recall the 3<sup>rd</sup> July 2016. On 2<sup>nd</sup> July 2016 she was at home with the accused. Nothing happened at home on that day. There was no church meeting on*



2<sup>nd</sup> July 2016. On that day the accused was helping her to do the house work and they had the three meals together. They had dinner at 7pm. After dinner they had their night prayers from 8pm to 9pm and then they went to sleep. They slept in the third bedroom and the door was locked when they were sleeping inside. It was an old door and would make a loud noise when you open the door. She said the accused never left the room that night. She woke up at 6am the next morning and the accused was with her when she woke up. She did not notice anything odd about the accused's behavior that morning. She could recall that the complainant was sleeping in the second bedroom.

- c) During cross examination she denied that the complainant used to babysit her second child. She maintained that there was no church meeting at home on 2<sup>nd</sup> July 2016. She further said that all what she can recall is that she spent time with her husband and the children on that day. She denied the suggestion that she would not know if the accused left the room when she was asleep. She agreed that she does not like the complainant. She agreed that she was asleep from 9pm to 6am next morning.

49. Fourth defence witness was Seini Lalanawiwi. She said that;

- a) The complainant lived with her from mid-2012 till December 2012 at her house in Sakoca. The complainant left after the death of her sister-in-law in December 2012. She said the complainant is a lovely girl who is very open.
- b) During cross-examination she agreed that the complainant returned to Lot 27, Makoi in 2013.

50. That is a summary of the evidence adduced by the prosecution and the defence. Please note that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I have not referred to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

### *Analysis*

51. The defence totally denies each allegation. The defence says that the complainant is not a credible and a reliable witness and what she said in her evidence is implausible.

52. With regard to the first count, the prosecution relies on the evidence where the complainant said that the accused touched her buttocks inside the third bedroom while she was lying down on the bed with the accused's child. The

complainant said this incident took place in 2012 after she came from Levuka in January and before she started going to school that year.

53. With regard to the second count, the prosecution relies on the complainant's evidence that the accused touched her vagina whilst she was sleeping on the top bunk in the second bedroom. According to the complainant this incident took place in 2012.
54. With regard to the third count, the prosecution relies on the complainant's evidence that the accused hugged her from behind inside the third bedroom and she felt that the accused was trying to insert his penis in her buttocks. According to the complainant this incident also took place in 2012.
55. With regard to the fourth count, the complainant said in her evidence that the accused would stand behind her and touch her buttocks when she washed the dishes. This was after she came back to live in the house in Makoi in 2013. The complainant also said that one night in 2013 the accused rubbed her buttocks with his leg while she was sleeping in the sitting room.
56. The accused totally denies these allegations and says that the complainant is lying. The defence says that the accused moved into the house where the alleged incidents according to the complainant had taken place, only in March 2013. The defence points out that the complainant had not made any complaint regarding the alleged incidents in 2012 and 2013 until 2016. The defence points out that there were quite a number of people living in that house. It was the position taken up by the defence that the accused's *de facto* wife who was the third defence witness did not do night shifts. The third defence witness in her evidence did not say that she did not do night shifts during the time in question. However, she said that the complainant did not babysit her child during that period.



57. On counts 1 to 4, the accused is charged with the offence of sexual assault. Therefore you should consider whether the elements of the offence of sexual assault as I have explained to you have been proved beyond reasonable doubt in respect of each count. In the event you are satisfied beyond reasonable doubt that there was an unlawful assault with regard to a particular count but that unlawful assault was only indecent and not sexual, then you should find the accused not guilty of the offence of sexual assault on that count, but should find him guilty of the lesser offence of indecent assault.
58. With regard to the fifth count, the prosecution relies on the complainant's evidence that the accused sucked her breast in the second bed room after he removed her cloths.
59. With regard to the sixth count, the prosecution relies on the complainant's evidence that the accused inserted his penis inside the complainant's vagina on 03<sup>rd</sup> July 2013. According to the complainant, these two incidents took place in the night on 03<sup>rd</sup> July 2013 while the others in the house were sleeping.
60. The accused denies the above allegations and says that the complainant is lying. The defence points out that the house at Lot 27, Poorva road had an old wooden floor that was noisy when someone walks and there were lot of people living in that house. Defence submits that, if the complainant struggled the way she said on the night in question, someone in the house would have heard. Defence says that the second defence witness is usually awake from 3.00am in the morning. The defence points out that the complainant did not promptly complain to anyone about these incidents though she had the opportunity. It is the position of the defence that the complainant did not make such complaint because the incidents never happened.
61. The defence pointed out that, because the complainant destroyed the bed sheet, an opportunity to do a forensic study on that was lost. The complainant said in

her evidence that she did not intend to live and that is why she burnt the bed sheet. According to the complainant, what was there in that bed sheet was only her blood. You should also remember that there is no requirement according to our law for the evidence of a complainant in a case where the accused is tried for a sexual offence to be corroborated. As I have mentioned before, you should not speculate about what evidence there may have been. If you believe the complainant's evidence and you are satisfied that her evidence has proved the elements of a particular offence beyond reasonable doubt, that evidence is sufficient for you to find the accused guilty of that particular offence.

62. You heard evidence that the complainant had complained to her mother about the accused in 2016. This is regarding the alleged incidents on the first four counts. The prosecution says that they are relying on what is known as recent complaint evidence. In this regard, you should consider whether the complainant made a prompt complaint to someone regarding the incident and whether she sufficiently complained of the offences the accused is charged with.
63. Such complaint need not specifically disclose all the ingredients of the offence and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. However, please remember that this evidence of recent complaint is not evidence as to what actually happened between the complainant and the accused. It may only assist you to decide whether the complainant is consistent and whether or not the complainant has told you the truth. In the end you are deciding whether the complainant has given a truthful account of her encounter with the accused.
64. According to the evidence in this case, the matter was reported to the police about one month after the alleged incidents relevant to the 5<sup>th</sup> and 6<sup>th</sup> counts had taken place. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all.



However, if there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.

65. You heard the evidence of the fourth witness, the doctor who examined the complainant. She gave her opinion based on what she observed when she examined the complainant. You are not bound to accept that evidence. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the doctor. Briefly, the medical evidence in this case was that the injury that was observed on the complainant's hymen could have been caused by any object that would have gone through the vaginal opening. With regard to the age of the injury, what the doctor could say was that the injury was older than 15 days and such injury would present as a healed hymenal laceration even after one month.
66. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
67. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
68. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each offence;
  - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.

- (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
- (iii) The third possibility is that you reject his evidence. But if you disbelieve him, or his witnesses, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

69. Any re-directions?

70. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. You may peruse the exhibits if you wish to do so. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

71. Your possible opinion should be as follows;

1<sup>st</sup> count (sexual assault) - guilty or not guilty

If not guilty

Indecent assault - guilty or not guilty

2<sup>nd</sup> count (sexual assault) - guilty or not guilty

If not guilty

Indecent assault - guilty or not guilty

3<sup>rd</sup> count (sexual assault) - guilty or not guilty

If not guilty

Indecent assault - guilty or not guilty

4<sup>th</sup> count (sexual assault) - guilty or not guilty

If not guilty

Indecent assault - guilty or not guilty



5<sup>th</sup> count (sexual assault) - guilty or not guilty

6<sup>th</sup> count (rape) - guilty or not guilty



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitor for the Accused : Toganivalu & Valenitabua, Barristers & Solicitors, Suva.