

IN THE HIGH COURT OF FIJI

AT LABASA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 57 of 2016

STATE

V

PITA COLASAWIRI

Counsel : Ms. Amelia Vavadakua for the State
Ms. Talei Kean for the Accused

Dates of Trial : 16-18 October 2017

Date Summing Up : 20 October 2017

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

SUMMING UP

Madam Assessor and Gentlemen Assessors,

- [1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. 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 duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. 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 reasoning.
- [5] In forming your opinions, 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] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, and the documents tendered as prosecution exhibits.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also 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 submission made by the State Counsel and closing submissions made by both State Counsel and Defence 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 the credibility of witnesses, basically the truthfulness and 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' demeanour 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 demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may 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, demeanour in Court alone 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] According to the evidence you heard in this case, the complainant was 8 years old at the time of the alleged incident, in October 2016, and was 9 years old when she testified in Court. Experience shows that 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.

- [16] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems 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.
- [17] Lady and Gentlemen Assessors, 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.
- [18] Having placed considerations that could be used in assessing credibility and reliability 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.
- [19] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the two charges he is charged. 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.
- [20] 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.
- [21] 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.
- [22] 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.

- [23] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this morning, 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 example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [24] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [25] 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. It is not his task to prove his innocence.
- [26] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [27] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [28] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, 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 reasonable doubt, then your duty is to find the accused guilty.
- [29] You should disregard 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 should have 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 opinions.

- [30] I must also explain to you as to the reason for the use of screen, when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when a screen is placed, the complainant is relieved of any mental pressure to describe the often unpleasant incidents. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [31] The same applies for permitting a closed court proceedings when the complainant gave evidence in this case and for allowing a support person (in this instance her mother) to sit beside her while she gave evidence.
- [32] Let us now look at the charges contained in the amended information.
- [33] There are two charges preferred by DPP, against the accused:

FIRST COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

PITA COLASAWIRI, on the 15th of October 2016, at Banikea Village, Lekutu, in Bua, in the Northern Division, unlawfully and indecently assaulted T.T.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

PITA COLASAWIRI, on the 15th of October 2016, at Banikea Village, Lekutu, in Bua, in the Northern Division, penetrated the vagina of T.T., a child under the age of 13 years, with his tongue.

[34] Section 210 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act) reads as follows:

(1) An person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person;

[35] Therefore, in order for the prosecution to prove the first count of Sexual Assault, they must establish beyond any reasonable doubt that;

(i) the accused;

(ii) on the specified day (in this case the 15 October 2016);

(iii) at Banikea Village, Lekutu, in Bua, in the Northern Division;

(iv) unlawfully and indecently assaulted T.T., the complainant.

[36] The first element is concerned with the identity of the person who committed the offence. The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[37] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of touching of the complainant's vagina by the accused is an indecent act and thereby amounts to Sexual Assault.

[38] Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

[39] Section 207(2) (b) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a); or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

[40] Therefore, when Section 207(1) is read with Section 207(2)(b) it would read as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if —

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

[41] Section 207(2)(b) refers to a person penetrating the vulva, vagina or anus of the other person, to any extent, with a thing or a part of the person's body that is not a penis.

[42] Section 207(3) of the Crimes Act provides that *"For this section, a child under the age of 13 years is incapable of giving consent."*

[43] Therefore, in order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 15 October 2016);
- (iii) at Banikea Village, Lekutu, in Bua, in the Northern Division;
- (iv) penetrated the complainant's vagina, with his tongue.

[44] The first element is concerned with the identity of the person who committed the offence. The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[45] The fourth element involves the penetration of the complainant's vagina, with his tongue. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration.

[46] As indicted earlier, the issue of consent will not arise in this case. 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 8 years of age at the time of the alleged incident, and therefore, she had no mental capacity to consent.

- [47] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Sexual Assault and Rape are obviously considered as Sexual Offences.
- [48] If you are satisfied beyond any reasonable doubt that the accused, on 15 October 2016, unlawfully and indecently assaulted the complainant by touching of the complainant's vagina, then you must find him guilty of the first count of Sexual Assault.
- [49] If you find that the prosecution has failed to establish any of these elements in relation to the first count, then you must find the accused not guilty of Sexual Assault.
- [50] If you are satisfied beyond any reasonable doubt that the accused, on 15 October 2016, penetrated the complainant's vagina with his tongue, then you must find him guilty of the second count of Rape.
- [51] If you find that the prosecution has failed to establish any of these elements in relation to the second count, then you must find the accused not guilty of Rape.
- [52] However, in relation to the second count, if you find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 15 October 2016, penetrated the complainant's vagina with his tongue, has satisfied beyond any reasonable doubt that the accused, on 15 October 2016, unlawfully and indecently assaulted the complainant by licking of the complainant's vagina; as an alternative, you are then allowed to look at the lesser offence of Sexual Assault, though the accused is not formally charged in the information for that offence in count two.
- [53] I wish to remind you once again that you need to go in this direction ONLY if you find that the prosecution has failed to establish any of elements constituting the offence of Rape beyond reasonable doubt in count two. If you are satisfied that the prosecution has established all the elements constituting the offence of Rape beyond reasonable doubt, then you must find the accused guilty of Rape as charged in count two.
- [54] 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

- [55] The prosecution, in support of their case, called the complainant, a medical officer and one police witness. The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit P1- Medical Examination Report of the complainant.

Prosecution Exhibit P2- The Birth Certificate of the complainant.

Prosecution Exhibit P3- The rough sketch plan of the alleged crime scene.

[56] Evidence of the complainant T.T.

- (i) *The complainant testified that she is currently residing with her mum and dad at Nagadoa Village. As per her birth certificate, her date of birth is 25 May 2008. Therefore, she is currently 9 years of age.*
- (ii) *She is the eldest in her family. She has 2 sisters and 2 brothers younger than her.*
- (iii) *She is currently attending Dama District School and is in Class 4.*
- (iv) *Last year (in 2016), she was staying at Banikea, Kavula. She was staying with her maternal grandparent and was attending Banikea, Kavula, Infant School. The accused was her grandfather. She refers to the accused as Bu Pita and her grandmother as Bu Peti. Her younger sister, Loraina, and another man named Bu Bobo were also residing in the same house.*
- (v) *She testified that one day when they were at home, Bu Pita wanted to go and pull out some cassava. So she had gone with him. She was climbing on an orange tree, while Bu Pita was cutting some leaves.*
- (vi) *The accused had then told her to lie down. He had warned her not to shout. He was touching her vagina with his hand (she referred to the vagina as bukuqu in Itaukei). Then the accused had licked her vagina with his tongue. When the accused was licking the vagina it had been paining. The accused was doing so (licking her vagina) for a long time.*
- (vii) *The complainant had been wearing a red dress at the time. She was wearing a panty and vest inside. She testified that Bu Pita had undressed her. He had taken out the dress and thrown it away and pulled out her panty. The witness said that she had felt frightened.*
- (viii) *There had been no houses around this area (the cassava patch or the cassava plantation). From the house where they live to the cassava plantation, they have to come by crossing a river.*
- (ix) *The complainant testified that after the incident she wore her dress again and also wore her panty. She had felt pain in her body. When asked which part of her body was paining, she said her vagina.*
- (x) *Thereafter, they had returned home. Her grandmother, Bu Peti and her sister, Loraina were at home. She did not inform her grandmother as to what happened, as Bu Pita had warned her that he will whack her if she told the story to anyone.*

- (xi) *The complainant testified that she remembers the date this incident happened as the 15 October 2016. She had not gone to school on the said day and the next day was a Sunday.*
- (xii) *On the next day (which was a Sunday), she had gone to church. Even at church she had not told anyone as to what happened.*
- (xiii) *Later that afternoon, she had gone with one Bu Sereima to the river to have a bath. At that time the witness had told the story (about what the accused did to her) to Bu Sereima.*
- (xiv) *She had told Bu Sereima that the accused was touching her vagina, and also licked her vagina, and that she was frightened when the accused was doing that to her.*
- (xv) *When asked by Court as to whether she remembers her date of birth (her birthday), or as to how many months are there in a year, the witness did not know the answer. Therefore, in cross examination it was put to the witness as to whether someone had told her to say the date of incident as 15 October 2016 in Court. The witness answered no.*
- (xv) *In cross examination it was put to the witness that sometimes when they go to the cassava plantation they go on horseback. The witness answered yes. She, her sister (Lorraine) and the accused would go on horseback, while her grandmother would walk.*
- (xv) *It was also put to the witness that whenever they go to the cassava plantation she never goes alone with the accused. She answered "sometimes we go alone myself and Bu Pita."*
- (xvi) *It was elicited in cross examination that the accused was wearing a short trouser and a singlet on the day of the incident. He had also carried a black sulu with him. The accused had spread the sulu on top of the leaves he had cut, and told the complainant to lie down there.*
- (xvii) *It was put to the complainant in cross examination that on the day of the alleged incident that the accused was having a stomach pain and a headache and as such he did not go to the cassava plantation. The witness answered that the accused was lying and that they went to the cassava plantation together.*
- (xviii) *The complainant confirmed in cross examination that when Bu Pita licked her vagina it was paining. However, she admitted that there was no blood on her panty.*
- (xix) *It was revealed in cross examination that the statement of the complainant was recorded in Itakei (although it seems to have been translated contemporaneously to the English Language). Although the*

witness knows what the term "vagina" meant, at the time she gave the statement she had not used the term vagina, but the term 'pipi' (in reference to the female genitalia).

(xx) It was also revealed in cross examination that the accused had smacked the complainant as she had been fighting with her younger sister. The complainant had then run in to the bed and injured her right eye. This incident had happened prior to the witness meeting Bu Sereima on that Sunday.

(xxi) Finally in cross examination the following questions were put to the witness:

Q: When he (accused) smacked you, you were angry?

A: Yes

Q: You didn't like that he smacked you?

A: Yes

Q: So is this why you made these allegations of sexual assault and rape?

A: No

Q: Do you go horse riding a lot?

A: No

Q: But you agree you go horse riding to the plantation?

A: Yes

Q: Bu Pita told me that this incident of 15 October 2016 did not happen?

A: It happened.

Q: Bu Pita also told me that he didn't sexually assault you or rape you?

A: He did.

Q: As he was at sick and at home and not in the plantation with you?

A: He went to the plantation that day.

(xxii) In re-examination the complainant was asked the following questions with particular reference to horse riding.

Q: You were asked about horse riding?

A: Yes

Q: When you go horse riding do you go very far or near?

A: Not that far.

Q: Do you enjoy going on horse rides?

A: Yes

Q: Do you go horse riding alone?

A: No

Q: With whom do you go horse riding?

A: With Bu Pita and Loraina.

[57] Evidence of Dr. Mala Darshani

- (i) Currently she is serving as the Paediatric Registrar at the Lautoka Hospital.
- (ii) In 2015-2016, she had been serving as a Medical Officer at the Seaqaqa Medical Centre.
- (iii) She recalls conducting a medical examination on the complainant, on 23 October 2016, at 3.54 in the afternoon.
- (iv) The Medical Examination Report of the complainant has been tendered as Prosecution Exhibit P1.
- (v) The complainant's mother and another police officer had been present during the examination.
- (vi) As per the report the initial impression of the complainant was that she was calm and active, but not conversing.
- (vii) As to the specific medical findings the doctor testified as follows (Column D12 of the medical report):
 - Heads, eyes, ears, nose and throat (HEENT)-Bruise noted below right eye.
 - Chest, trunk, abdomen, extremities (arms and legs)- No bruise noted.
 - Vaginal examination- Hymen cannot be visualized. No foul smelling discharge. Small abrasion noted on right side of the vaginal opening. No active bleeding.
- (viii) The doctor testified that the hymen is a very thin membrane found just at the opening of the vagina.
- (ix) She explained what she meant by hymen cannot be visualized. "When we do vaginal examination, just behind the vaginal opening we should be able to see a thin membrane, which is usually crescent shaped, not totally obstructing the vaginal opening." She said in this case the complainant's hymen was perforated or broken.

- (x) The doctor further testified that a foreign object, if used to penetrate the vagina, can cause the hymen to be broken.
- (xi) It was put to her as follows: "From your professional opinion, where a child of 8 years suggests that her vagina had contact with the tongue of an adult for a long time and where she feels pain. Under those circumstances could such a force (use of the tongue) caused the rupture of the hymen?" The doctor said yes it can.
- (xii) It was also put to the doctor as follows: "Such abrasions noted on the right side of the vagina opening – in the case of an 8 year old who says her vaginal area was fingered or touched or had painful contact with the tongue, could such contact lead to such abrasions?" The doctor answered in the affirmative.
- (xiii) Under professional opinion the doctor has noted (Column D14 of the medical report)
- hymen not intact
 - small abrasion on right side of vagina
 - small bruise below right eye.
- (xiv) Under summary and conclusions (Column D16 of the medical report) the doctor had stated as follows:
- 1) hymen not intact
 - 2) small abrasion on right side of vagina opening
 - 3) bruise under right eye
 - 4) needs close supervision by caring parent or guardian
- (xv) The doctor testified further that the hymen of the female is present from birth. When the baby is also developing in the uterus, it is that time that the hymen is forming. When the child is born, when examining the vagina, it should be present.
- (xvi) As to vaginal opening the doctor meant the soft fragile part of the female reproductive system. That is where the abrasion is noted. When asked as to whether this meant inside the vagina or outside she said outside the vagina. Abrasions were found just at the opening on the right side.
- (xvii) The doctor was asked when the hymen is broken is it always the case you expect bleeding? She answered no not always.
- (xviii) In cross-examination it was put to her whether it was possible for an 8 year old child who was engaged in activity like horse riding in the village, could it be also the cause for the hymen not to be intact. The doctor answered yes. Literature suggests that horse riding can lead to perforated hymen.

- (xix) *As the age of the small abrasion noted on the right side of the vaginal opening? The doctor testified that there is no age of injury noted in the report. It is most likely a recent injury and not an old one. When asked as to what she meant by recent the doctor answered that there is no fixed definition. The vagina is a very vascular area. So any injury should heal really fast. Definitely within a week it should heal. In the case of the complainant she could see the abrasion. Therefore, the injury was definitely not more than one week old.*
- (xx) *In cross-examination it was asked from the doctor whether the said small abrasion noted on the right side of the vaginal opening could also be caused by horse riding. The doctor answered in my experienced I have not come across any patient who have such injury (blunt trauma injury) after horse riding.*
- (xxi) *When the doctor was asked regarding the age of the hymnal tear, the doctor answered that the hymen does grow back in some females. But in the case of the complainant she could not see the hymen at all. Thus she could not say with certainty as to when the hymnal tear had taken place.*
- (xxii) *In re-examination it was asked from the doctor as to what happens when the hymen is broken. The doctor testified that any foreign object if pushed through the vagina will tear the hymen and with that the person might feel a bit of discomfort – from mild pain to a lot of pain. It defers from every female. There could be some or no bleeding at all.*

[58] Evidence of Detective Corporal 3191 Neori Tavakaturuga

- (i) *He is currently serving as the Crimes Officer at the Nabouwalu Police Station.*
- (ii) *In the year 2016, he had been serving at the Seaqaaq Police Station until September 2016. Thereafter he had been transferred to the Nabouwalu Police Station.*
- (iii) *He had supervised the investigation into this case and had also attended the crime scene. He had assigned PC 3334 Dradra as the investigating officer in this case.*
- (iv) *He testified that on the 24 October 2016, he had visited the crime scene. It is the complainant who had guided him from the house right to the scene of the incident with no hesitation. The crime scene was about 1 kilometre away from the place she had been residing.*

- (v) *At the crime scene he had drawn a rough sketch plan of the scene. The said rough sketch plan has been tendered as Prosecution Exhibit P3.*
- (vi) *The witness testified that the complaint into this incident had been first made at the Lekutu Community Post. He had been informed through a call from the Post Officer of the Lekutu Community Post that they had received a report of a rape/incident from Banikea Village. He was informed that the report was reported on that same day (23 October 2016, which was a Sunday).*
- (vii) *The formal complaint of the complainant had been recorded at the Seaqqa Police Station, after she had been examined at the Seaqqa Health Centre. This was on 23 October 2016. He testified that the Lekutu Community Post is part of the area of operation of the Nabouwalu Police Station.*
- (viii) *The witness testified that the Banikea village is not accessible to phone networks. If they want to report a matter they have to travel all the way to Lekutu, which is roughly about 10 kilometres away. There is no public transport from the village. Therefore they have to walk down to Lekutu. It will take about 2 hours to get to Lekutu.*

[59] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could give sworn evidence and call witnesses on his behalf. He could also address Court. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to remain silent. You must not draw any adverse inference against the accused due to his choice to remain silent.

Analysis

[60] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, the medical officer and a police officer to prove its case.

[61] The prosecution relies upon the evidence of the medical witness. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you have heard, experts carry out examinations which are relevant to the issues

you have to consider. They are permitted to interpret results of the examinations for our benefits, and to express opinions about them, because they are used to doing that within their particular field of expertise. You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.

- [62] As I have informed you earlier, the burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [63] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [64] 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. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the two counts, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offences of Sexual Assault and Rape, beyond any reasonable doubt.
- [65] As you already know there is one count of Sexual Assault and one count of Rape against the accused in the information. You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the other.
- [66] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charges;*
 - ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of Sexual Assault and Rape have been established beyond any reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
 - iii. *As an alternative to Rape in count two, you may consider whether the accused is guilty or not guilty of Sexual Assault.*
- [67] Any re directions the parties may request?

[68] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the two counts separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[69] Your possible opinions should be as follows:

First Count

Sexual Assault- Guilty or Not Guilty

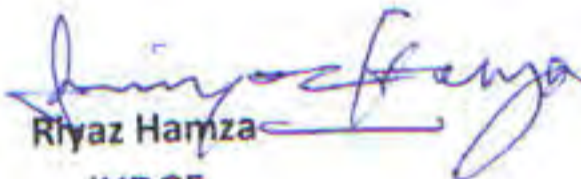
Second Count

Rape- Guilty or Not Guilty

OR in the alternative

Sexual Assault- Guilty or Not Guilty

[70] I thank you for your patient hearing.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT LABASA

Dated this 20th Day of October 2017

Solicitor for the State : Office of the Director of Public Prosecutions, Labasa.
Solicitor for the Accused : Office of the Legal Aid Commission, Labasa.