

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 39 of 2017**

**STATE**

**V**

**PONIRITE KOLI**

**Counsel** : Ms. Lavenia Bogitini with Mr. Zenith Zunaid for the State  
Ms. Vani Filipe with Mr. Vilisoni Tuicolo for the Accused

**Dates of Trial** : 6-9 November 2017

**Summing Up** : 13 November 2017

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

### **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 charge 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 charge 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, the documents tendered as prosecution exhibits and any admissions made by the parties by way of admitted facts.
- [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 his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, 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 6 years old at the time of the alleged incident (6 years and 9 months to be precise), in December 2016, and was 7 years old when he 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 his experience concerning the offence 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] You heard in this case that upon being asked as to what happened the complainant had informed his mother and his aunt of the alleged incident and as to what had taken place. You should consider whether this could be regarded as a complaint made by the complainant of the alleged incident. If so you should also consider whether he made that complaint without delay and whether he sufficiently complained of the offence the accused is charged with.
- [18] The complainant need not specifically disclose all of the ingredients of the offence and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that he made a prompt and a proper complaint, then you may consider that his credibility is strengthened in view of that recent complaint.
- [19] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. 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.
- [20] 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 that witness is for you to decide. 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 or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.
- [21] 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.

- [22] 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.
- [23] 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 guilty of the charge. 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.
- [24] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [25] 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.
- [26] 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.
- [27] 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.

- [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 the case. That burden rests entirely 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 offence charged. 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 degree 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 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 offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [32]** It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, 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.
- [33]** You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the 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.
- [34]** 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.
- [35]** The same applies for permitting a closed court proceedings when the complainant gave evidence in this case.
- [36]** Let us now look at the charge contained in the Information.

[37] There is one charge preferred by DPP, against the accused:

**FIRST COUNT**

***Statement of Offence***

**RAPE**: Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act 2009.

***Particulars of Offence***

**PONIRITI KOLI**, on the 20<sup>th</sup> of December 2016, at Suva, in the Central Division, penetrated the mouth of **PBN**, a child under the age of 13 years, with his penis.

[38] Section 207(1) of the Crimes Act No. 44 of 2009 (Crimes Act) reads as follows:

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

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

*(2) A person rapes another person if —*

*(a) .....; or*

*(b) .....; or*

*(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*

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

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

*(2) A person rapes another person if —*

*(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*

[41] Section 207(2)(c) refers to a person penetrating the mouth of the other person to any extent with that person's 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 count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 20 December 2016);
- (iii) at Suva, in the Central Division;
- (iv) penetrated the mouth of PBN with his penis; and
- (v) at the time PBN was a child under 13 years of age.

**[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 mouth of PBN with his penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration.

**[46]** The final element is that at the time of the incident PBN was a child under 13 years of age.

**[47]** The issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As indicted earlier, the complainant in this case was 6 years of age at the time of the alleged incident, and therefore, he had no mental capacity to consent.

**[48]** It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape is obviously considered a Sexual Offence.

**[49]** If you are satisfied beyond any reasonable doubt that the accused, on 20 December 2016, penetrated the mouth of PBN with his penis, then you must find him guilty of the count of Rape.

**[50]** If you find that the prosecution has failed to establish any of these elements in relation to the count, then you must find the accused not guilty of Rape.

**[51]** These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

**[52]** In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as “*Final Admitted Facts*” without placing necessary evidence to prove them:



1. The complainant's mother is Alena Vonokolua, 30 years, of Baikeitou Settlement, as at 21/12/16 (21 December 2016).

[53] You must therefore, treat the above facts as proved.

### **Case for the Prosecution**

[54] The prosecution, in support of their case, called the complainant PBN, his aunt, Mereti Ranadi, and his mother, Alena Vonokula. The prosecution also tendered the following document as a prosecution exhibit:

Prosecution Exhibit **P1** - The Birth Certificate of the complainant.

### **[55] Evidence of the complainant PBN**

- (i) *The complainant testified that he is currently residing with his grandmother at Naibulini (in Wainibuka, Tailevu). As per his birth certificate, his date of birth is 15 March 2010. Therefore, he is currently 7 years of age.*
- (ii) *He has one sister and 2 brothers.*
- (iii) *He is currently attending Nailegi District School and is in Class 2.*
- (iv) *The witness testified that before this he was staying at Nasole, Suva. At Nasole he was staying with his mother Alena, his father Vilikesa, and his grandfather, whom he referred to as Taitai Baks.*
- (v) *He refers to the accused as Taitai Vo or grandfather Vo.*
- (vi) *He testified that (on the day of the alleged incident) his mother had been cooking in the kitchen. She had sent him to go and fetch water from the tap outside the house. The accused had been bathing at the time. The accused had told him to go and leave the water and to come back to him.*
- (vii) *The accused had then asked the witness to suck his 'polo'. The witness had said no. The accused had then pushed the complainant's mouth to suck his polo. The witness demonstrated how the accused had pushed his mouth to suck his polo.*
- (viii) *When asked how the accused's polo looked like the witness testified that it was long.*
- (ix) *The witness further testified as follows:*
  - Q: *Did his polo go into your mouth?*
  - A: *Yes*
  - Q: *How do you know it went into your mouth?*
  - A: *I don't know*

Q: *You said his polo went into your mouth? Did you see him putting it inside your mouth?*

A: *Yes*

Q: *How did it feel inside your mouth?*

A: *It was dirty*

Q: *How long was it inside your mouth?*

A: *Just for a little while*

- (x) *When asked as to what the accused was wearing at the time, the witness testified that he was wearing an underwear. The accused had pulled down his underwear and put his polo into the complainant's mouth.*
- (xi) *When asked as to how far down the accused had pulled down his underwear, the witness stated right down.*
- (xii) *Apart from being long the witness testified that the accused's polo looked dirty.*
- (xiii) *The witness explained further that the polo he is referring to is the part with which males urinate with.*
- (xiv) *The witness also testified that when the accused's polo was in his mouth it was hard.*
- (xv) *When asked to demonstrate as to how the accused was pushing his polo into the witness's mouth, the witness put his hand on the back of his head and demonstrated how it happened.*
- (xvi) *When witness was asked to demonstrate and show as to how the accused's polo was going into his mouth, the witness demonstrated with his hands as to how it happened (one hand to depict the polo and the other hand to depict the mouth).*
- (xvii) *After this incident, the witness testified that his mother had called him and asked what happened. He had told his mother that his grandfather Vo (the accused) had told him to suck his polo. The witness testified that his aunt Mereti had also been present at the time. He also testified that the accused had said that he didn't do anything to the witness.*
- (xviii) *In cross examination the witness stated that he likes playing outside the house and even on the day of the incident he had been playing outside.*
- (xix) *The witness admitted that on the day in question he had taken a big empty bottle of coke to fill the water. As to who filled the water into*

*the bottle, at first he said it was himself but later he said it was the accused who filled the bottle.*

*(xx) It was put to the witness in cross examination as follows:*

*Q. All of a sudden your mum called you?*

*A. Yes*

*Q. You then went back to mum?*

*A. Yes*

*Q. Then mum told you that aunty Me said that she heard Tai Vo saying, to put his polo in your mouth?*

*A. Yes*

*.....*

*Q. The whole time you were there to fill the bottle you never got wet, right?*

*A. Yes*

*.....*

*Q. I am suggesting to you that Tai Vo did not push your head towards him that's why you did not get wet?*

*A. Yes*

*Q. And I suggest to you that Tai Vo did not put his polo in your mouth?*

*A. Yes*

*Q. That's why you did not get wet?*

*A. Yes*

*Q. PBN, I noticed that yesterday you had been using the word "polo"?*

*A. Yes*

*Q. When you said polo yesterday, you had said this is the male part where the urine comes out?*

*A. Yes*

*Q. Polo is the only name that you know for the male part that urine comes out?*

*A. Yes*

*Q. You don't know it by any other name, right?*

- A. Yes
- Q. *PBN, you were telling me that you had gone to the Police the day after this incident had happened?*
- A. Yes
- Q. *So, PBN, you told the Police that Taitai Vo told you to suck his soresore?*
- A. Yes
- Q. *PBN, you never said the word polo to the Police, right?*
- A. Yes
- Q. *You would agree with me that the soresore is not where the urine comes from?*
- A. Yes
- Q. *The soresore is that other part below that is connected to the part that the urine comes out?*
- A. Yes
- Q. *You told the Police that Tai Vo pulled your head towards his soresore?*
- A. Yes
- Q. *PBN, you did not tell the Police at any time that Tai Vo put his polo in your mouth?*
- A. Yes
- Q. *And the Police had told you to tell them everything that happened?*
- A. Yes
- Q. *But you never said polo to the Police?*
- A. Yes
- Q. *You just said soresore?*
- A. Yes
- Q. *So, PBN, which one is correct? Was it the polo that he put in your mouth or was it the soresore he put in your mouth?*
- A. *The polo.*

Q. *When you were telling the story to the Police you were not telling the truth?*

A. *Yes*

Q. *And also, when you were telling the story to court yesterday, you were not telling the truth?*

A. *Yes*

Q. *PBN, it was your mother who told you to come and tell this story in court?*

A. *Yes*

Q. *But, what you are telling me today is the truth?*

A. *Yes*

*(xxi) In re-examination, the witness testified as follows:*

Q. *Can you just clarify whether you were playing (outside the house) on the same day that Tai Vo put his polo in your mouth?*

A. *Yes*

Q. *Can you clarify to us whether this was before or after Tai Vo put his polo in your mouth?*

A. *Before that*

.....

Q. *What did your mother give to you to fetch water?*

A. *A bucket*

Q. *Can you describe the size of the bucket?*

A. *Witness demonstrated with his hands*

Q. *Earlier in cross examination, you agreed that it was a big empty bottle?*

A. *Yes*

.....

Q. *You said, just now that you used the bucket?*

A. *Yes*

Q. *Then you said, you also used a big empty bottle?*

A. *Yes*

Q. *Did you use the big empty bottle or a bucket to fill water for the rice?*

A. *Big bottle*

Q. *What did you use that bucket for then, on that day?*

A. *I don't know*

Q. *You said, your mum gave you a bucket to fill? Did you end up using that bucket?*

A. *Yes*

.....

Q. *Did your mum call you after Tai Vo put his polo in your mouth?*

A. *Yes*

Q. *You said, earlier in cross examination, that your mum told you that Tai Vo put his polo in your mouth?*

A. *Yes*

Q. *Can you remember that conversation?*

A. *No*

Q. *What did you mean when your mum told you, that Tai Vo put his polo in your mouth?*

A. *Yes*

Q. *Can you explain to us what you meant?*

A. *No*

.....

Q. *Earlier, you were asked about how your mum told you to tell the story to the Police and you said, yes?*

A. *I don't know*

Q. *You told us earlier how Tai Vo put his polo in your mouth?*

A. *The witness demonstrated how*

Q. *Can you just clarify to us how did you know that Tai Vo put his polo in your mouth?*

A. *I just know*

Q. *You said that you just knew that Tai Vo put his polo into your mouth. How did it feel?*

A. *Dirty*

Q. *You were also asked how Tai Vo did not push your head towards him, can you clarify whether Tai Vo pushed your head towards him?*

A. *Yes*

Q. *Can you show us how Tai Vo did that?*

A. *The witness demonstrated how*

.....

Q. *You were asked earlier about Tai Vo putting his polo into your mouth. Did Tai Vo put his polo in your mouth?*

A. *Yes*

Q. *You were asked several times about Tai Vo putting his polo into your mouth, how did polo look like?*

A. *It looks ugly/bad*

Q. *You told the Police that you sucked Tai Vo's soresore?*

A. *Yes*

Q. *What did you mean, when you told the police that you sucked his soresore?*

A. *I don't know*

Q. *You remember being asked about the soresore in cross examination?*

A. *Yes*

Q. *Do you know what soresore means?*

A. *I don't know*

Q. *Do you know where the soresore is?*

A. *No*

.....

Q. *Earlier in cross examination, you said, that the soresore is the part below where the urine comes from?*

- A. Yes
- Q. So, PBN, you know where the sore is?
- A. No
- Q. Earlier you were asked about the time you were telling your story to the Police?
- A. Yes
- Q. You were also asked, whether you were telling the Police the truth?
- A. Yes
- Q. Can you clarify to us whether you told the Police the truth?
- A. Yes
- Q. Now, PBN, you were also asked about when you told the story in court yesterday?
- A. Yes
- Q. Can you clarify to us whether you were telling the truth yesterday?
- A. Yes
- Q. Can you clarify to us whether you are telling the truth today?
- A. Yes
- Q. You were asked in cross examination about your mother telling you to talk about your story?
- A. Yes
- Q. Can you tell us what story was this?
- A. Yes
- Q. Can you explain to us the story you were asked about?
- A. Yes, about coming to court
- Q. You were also asked about the place where Tai Vo was bathing?
- A. Yes
- Q. Can you tell us, how far was this tap from your home?
- A. Behind our house, that is where our bathroom is



- Q. You were also asked about the tarpaulin in the tap area?
- A. Yes
- Q. Can you tell us the colour of the tarpaulin?
- A. Yellow
- Q. You said the tarpaulin was on the side facing aunty Me's house?
- A. Yes
- Q. From the place where the tap is, can you clarify whether you can see aunty Me's house?
- A. Yes

**[56] Evidence of Mereti Ranadi**

- (i) She is an aunt of the complainant PBN.
- (ii) She has been residing at Baikeitou Settlement in Nasole for 20 years. She is staying there with her husband and three children.
- (iii) Her closest neighbour is her cousin Alena (PBN's mother). Alena's father is older than her father.
- (iv) She testified that PBN is like her son and has a shy personality.
- (v) She refers to the accused as Ta levu Vo (uncle Vo). He is also known as Voniriti Koli and Ponirite Koli.
- (vi) On 20 December 2016, she had been attending to her household chores, after that she had gone to do her washing. This was around 4.00 p.m. The washing area is outside the house.
- (vii) From the washing area, she could clearly see, Alena's house and the place where Alena's tap is situated outside the house.
- (viii) Uncle Vo had come and asked for a piece of soap. She had told him that soap only costs \$1. After that the accused went to have his bath at the back tap (Alena's back tap).
- (ix) The witness demonstrated, that the tap in Alena's house is 8 metres from where she was washing.
- (x) The witness testified that when she looked towards Alena's tap area she saw the accused putting on his underwear. The underwear reached half way on his thighs. When she looked, she saw PBN was standing in front of the accused holding onto the front of his pants. The witness demonstrated how this happened. She testified that she had a clear view and nothing was obstructing her view.

- (xi) *She then saw PBN looking up to Ta levu Vo, the accused. The accused had then pulled PBN's head towards his polo. She had seen PBN moved down and opened his mouth. PBN was bowing down and opening his mouth.*
- (xii) *When asked as to what she meant by polo, the witness said the male genital.*
- (xiii) *When asked, as to what PBN opened his mouth to, the witness said, he was moving down to Ta levu's polo.*
- (xiv) *She had then run to Alena and told Alena to call her son and ask him what uncle Vo did to him. Alena had been at home at the time.*
- (xv) *Alena had then called out to PBN. After she called out several times PBN had come there. When PBN had arrived he had looked lost. When questioned as to what the accused had done to him, PBN had said that the accused told him to suck his soresore.*
- (xvi) *Both Alena and she had then confronted the accused. The accused had said that he did not do anything. Thereafter, the witness had spoken to the accused in an angry tone and told him that she saw what he did. The accused said that he did not do anything.*
- (xvii) *Thereafter, Alena had gone and reported the matter to the Kalabu Police Post. The Kalabu Police Post Officers took them to the Valalevu Police Station.*
- (xviii) *The witness testified that by polo and soresore, she meant the same thing.*
- (xix) *At the time she saw this incident, the accused had been wearing a black vest and had a towel wrapped around his waist. He had finished taking his bath.*
- (xx) *At the time she saw the accused pulling the complainant's head towards his groin area, he had pulled his towel up. The witness demonstrated as how this had happened. The underwear was on his thighs. The accused had been putting on his underwear first, whilst the towel was wrapped around his waist.*

**[57] Evidence of Alena Vonokula**

- (i) *She is the mother of the complainant PBN. She testified that PBN has a shy personality. She produced the complainant's birth certificate, which is marked as Prosecution Exhibit **P1**. As per the birth certificate, the complainant's date of birth is 15 March 2010.*

- (ii) *She has been residing at Baikeitou Settlement in Nasole for the past 4 years. She is staying there with her husband and three children.*
- (iii) *She has three other children namely; Fulori (13 years), Rupeni (11 years), and Peniasi.*
- (iv) *The accused is her uncle. Her father and the accused are cousin brothers. At the time of the incident, the accused had been staying at her house. He had come to look for employment. That is how he came to stay at her house. So he was staying at house temporarily. He had arrived there about two months before the incident.*
- (iv) *On the 20 December 2016, she had told, PBN to go and fetch water from the tap. She had given him a small bucket of biscuit to fetch the water. The accused went to have his bath at the tap at the same time. The tap is located at the back of the house.*
- (v) *Her immediate neighbour is Mereti, her cousin. The two houses are situated nearby. She described that her house was at a slightly higher elevation than Mereti's house.*
- (vi) *She too described that from where the tap is located at the back of her house to the place where Mereti washes clothes, the distance is 8 metres.*
- (vii) *She testified that PBN had come, kept the water and went back. Thereafter, Mereti came and told her to call PBN and to ask him what the accused did to him. This was about 30 minutes after PBN had left.*
- (viii) *The witness had then called out to PBN. When he came, she had asked him what the accused had said to him. PBN had informed that the accused had told him to suck his polo.*
- (ix) *The witness had then asked the accused, why he did this to her son, when she is looking after him. The accused just looked at her. At the time Mereti had got angry with the accused as he denied what happened.*
- (x) *Following this incident, she had reported the matter to the Police.*

**[58]** 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 from the witness box and/or call witnesses on his behalf. He could also address Court by himself or through his counsel. 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. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

## Analysis

- [59] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, his aunt, Mereti Ranadi, and his mother, Alena Vonokula, to prove its case.
- [60] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [61] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [62] The defence is totally denying that the incident took place. The defence position, is that the complainant would do or say anything his mother or aunty would want him to say. The defence also state that Mereti could not have seen the incident from her washing area as her vision would have been obstructed by cassava, dalo and banana trees and also by the tarpaulin which is placed around the bathing area.
- [63] The defence also takes up the position that when the complainant made his statement to the Police he only referred to “soresore” and never referred to the term “polo”.
- [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 count of Rape, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence of Rape, beyond any reasonable doubt.
- [65] 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 charge of Rape;*
  - ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Rape has been established beyond any reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
- [66] Any re directions the parties may request?

[67] 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 count of Rape 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.

[68] Your possible opinions should be as follows:

**First Count**

Rape- Guilty or Not Guilty

[69] I thank you for your patient hearing.



**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**



AT SUVA

Dated this 13<sup>th</sup> Day of November 2017

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