

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 399 of 2016

STATE

V

ANANAIASA QAQATURAGA

Counsel : Ms. Lavenia Bogitini for the State  
Ms. Talei Kean with Ms. Anisha Singh for the Accused

Dates of Trial : 3-5 December 2018

Summing Up : 6 December 2018

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

### SUMMING UP

Madam Assessors and Gentleman Assessor,

- [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, MS, was 17 years old at the time of the alleged incident, in October 2016, and was 19 years old when she testified in Court (She said her date of birth was 22 December 1998). 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 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 the evidence of Elenoa Bainivalu, a first cousin of the complainant. She testified that on 15 October 2016, the complainant had come to her house. When the witness saw her face, she looked frightened. The witness had asked her what happened. The complainant had then told her what the accused had done to her. 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 she made that complaint without delay and whether she 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 the complainant made a prompt and a proper complaint, then you may consider that her credibility is strengthened in view of that recent complaint.
- [19] It must be borne in mind that the complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [20] Ladies and Gentleman 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.
- [21] 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.
- [22] 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.

- [23] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [24] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [25] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [26] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary facts and the inferences that could be drawn from them.
- [27] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [28] 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.
- [29] 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?

- [30] 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. The doubt must only be based on the evidence presented before this Court.
- [31] 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.
- [32] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant 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.
- [33] 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.
- [34] The same applies for permitting a closed court proceedings when the complainant gave evidence in this case.
- [35] Let us now look at the charge contained in the Information.
- [36] There is one charge preferred by DPP, against the accused:

#### COUNT ONE

#### Statement of Offence

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

Particulars of Offence

**ANANAIASA QAQATURAGA**, on the 15<sup>th</sup> of October 2016, at Gau Island, in the Eastern Division, penetrated the vagina of **MS** with his penis, without her consent.

[37] 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.*

[38] Section 207(2) (a) of the Crimes Act is reproduced below.

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

*(a) the person has carnal knowledge with or of the other person without the other person's consent;*

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

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

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

*(a) the person has carnal knowledge with or of the other person without the other person's consent.*

[40] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207(2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

[41] 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 15 October 2016);
- (iii) At Gau Island, in the Eastern Division;
- (iv) Penetrated the vagina of MS with his penis;
- (v) Without the consent of the complainant; and

- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

- [42] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.
- [43] The second element relates to the specific time period during 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.
- [44] The fourth element involves the penetration of the complainant's vagina; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.
- [45] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.
- [46] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone 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; or
  - (e) by false and fraudulent representations about the nature or purpose of the act; or
  - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.



- [47] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.
- [48] 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 17 years of age at the time of the alleged incident, and therefore, she had the mental capacity to consent.
- [49] 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. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.
- [50] If you are satisfied beyond any reasonable doubt that the accused, on 15 October 2016, at Gau Island, penetrated the vagina of MS with his penis, without the consent of the complainant and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the count of Rape.
- [51] If you find that the prosecution has failed to establish any of these elements in relation to the count of Rape, then you must find him not guilty of Rape.
- [52] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [53] 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 "*Admitted Facts*" without placing necessary evidence to prove them:
1. The accused is Ananaisa Qaqaturaga, 39 years of Sawaleke Village, Gau as at 15.10.16.
  2. The complainant in this matter is MS of Sawaike Village, Gau as at 15.10.16.
  3. The accused is the complainant's uncle from her maternal side.

4. The complainant refers to the accused as 'Tu Ana'.
5. On 15.10.16, the complainant went to the accused house to wash the accused's clothes.
6. The accused gave \$15 to the complainant for washing their clothes.
7. The accused daughter is Alumita, 12 years of age as at 15.10.16.
8. The accused also calls MS by her second name 'S'.

**[54]** Since the prosecution and the defence have consented to treat the above facts as "Admitted Facts" without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

#### **Case for the Prosecution**

**[55]** The prosecution, in support of their case, called the complainant, MS, her first cousin, Elenoa Bainivalu, and her mother, Naina Qaranivalu. The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit **PE1 (A)** – A rough sketch depicting the accused's house and shop and veranda/porch.

Prosecution Exhibit **PE1 (B)** - A rough sketch depicting the inside of the accused's house.

#### **[56] Evidence of the complainant MS**

- (i) *The complainant testified that she is currently residing in Gaji Road, Samabula. She just came to stay there this year. Later in her testimony she said that she was staying in Gaji Road, Samabula with her aunty.*
- (ii) *The complainant said her date of birth was 22 December 1998. So she is currently 19 years old. She will be turning 20 on the 22 December this year.*
- (iii) *She testified that on 15 October 2016, she was staying in Sawaike Village, in Gau. She was living with her parents, her two brothers and sister. She is the third eldest in the family. Her mother's name is Naina Qaranivalu. Her sister's name is Raijieli, who is younger than her. The witness said that Raijieli is 15 years old now.*
- (iv) *On 15 October 2016, the complainant was 17 years of age. She was attending Gau Secondary School and was in Form 6.*
- (v) *The complainant testified that on 15 October 2016, she was at home in the morning. Her mum sent her to Ratu Ananiasa's shop to buy butter. She knows Ananiasa as Tu Ana. She went with her sister Raijieli. After*

buying the butter they had left. Tu Ana had then asked her to wash his clothes.

- (vi) The complainant went home and informed her mother and father (about what Tu Ana had told her). They agreed to it (to wash his clothes).
- (vii) The complainant testified that she then went to Ananiasa's house to wash his clothes. That was the first time she was going to wash his clothes. She said, it takes about 2 minutes to walk to Tu Ana's house. Tu Ana's shop is located in front of his house.
- (viii) When she went to Tu Ana's house, only Tu Ana and his daughter, Alumita, were there. She was 12 years old at the time. There were others drinking grog in front of Tu Ana's shop.
- (ix) After arriving at Tu Ana's house, the complainant had first swept the house and soaked his clothes in the sink. She testified that she swept the house because it has not been swept. At this time, Alumita was sitting in the living room.
- (x) The witness said that Tu Ana is her uncle from her mother's side. Tu Ana's wife was said to be in Suva at the time.
- (xi) After soaking the clothes, the complainant had gone into the living room. This is because Tu Ana had bought biscuits and peanut butter for them to have tea. The witness had taken the biscuit and the peanut butter and kept it on the cupboard.
- (xii) Thereafter, the complainant had gone to wash clothes in the bathroom. The bathroom has one exit. This exit leads to the door that goes outside.
- (xiii) While the complainant was washing clothes inside the bathroom, Tu Ana was going around the living room. He had then come to the complainant with a bottle of oil and asked her to massage his head. The witness explained that when Tu Ana was going around the living room, he had pulled down the curtains. She had seen Tu Ana pulling down the curtains when she went to hang the clothes.
- (xiv) When the complainant went to hang the clothes, she had heard Tu Ana tell Alumita to go and look for their phone. Later she said that he had told her to go and look for it at another house.
- (xv) When Tu Ana had asked the complainant to massage his head, she was in the bathroom at the time. At that time only Tu Ana and the complainant were in the house.
- (xvi) Tu Ana had then entered the bathroom. The witness said that she felt shocked because at the time Tu Ana had asked her whether she wants to smoke. She said she could not believe that Tu Ana will come and ask her to massage his head and ask her to smoke.

(xvii) Thereafter, the witness testified that Tu Ana tried to 'harass her.' She explained that he had entered the bathroom, held her and pushed her on the wall. At the time he entered the bathroom, he had taken off his t-shirt. He had been wearing a three quarter (trouser). At the time, the complainant had been wearing a blue t-shirt and a pink sulu.

(xviii) The complainant testified that when Tu Ana had pushed her, she had screamed. Tu Ana had asked her why she screamed for. The witness had then cried. She said she cried because she could not believe what Tu Ana did to her.

(xix) The complainant was then asked the following questions in evidence in chief:

Q. What did he do to you?

A. He pulled away my sulu, he pulled down my panty and he tried to insert his male private part to me.

Q. Can you tell us the name of this male private part?

A. Penis.

Q. What exactly was he doing with his penis?

A. He tried to insert it into my female private part.

Q. Can you tell us the name of this female private part?

A. Vagina.

Q. You said, he was trying to insert his penis into your vagina. Where did his penis go?

A. It went inside me.

Q. Inside which part?

A. My private part.

Q. And how do you know that his penis went inside your private part?

A. Because it was painful.

Q. Which area or what was painful?

A. My private part. When he was trying to insert his penis into my vagina.

Q. How were you and Tu Ana positioned, when he was inserting his penis into your private part?

A. We were standing.

Q. And you mentioned that his penis went inside your vagina? How was he able to do this?

- A. *He forced himself.*
- Q. *How did he force himself?*
- A. *He pushed me and he tried to insert his private part to me.*
- Q. *Earlier you mentioned that you cried when he was inserting his penis into your vagina, what were you doing at the time?*
- A. *I was shocked.*
- Q. *How long was he doing this to you? Inserting his penis into your vagina?*
- A. *5 minutes.*
- Q. *And during those 5 minutes how did you feel mentally?*
- A. *I was trying to do something to him to release me so I can go outside.*
- Q. *What exactly did you do?*
- A. *I tried to push him but he was holding on to me tightly.*
- Q. *After those 5 minutes, what did he then do?*
- A. *When I felt that he had released me, I went outside, I opened the door then I ran.*
- Q. *Where did you run to?*
- A. *I wanted to run home, but then I went to my cousin's place.*
- Q. *Can you tell us the name of your cousin?*
- A. *Elenoa Vadel.*
- Q. *Why did you go to your cousin's house?*
- A. *Because their house is closer to Tu Ana's house.*
- Q. *What did you do when you went to Elenoa's house?*
- A. *I told her about what Tu Ana had done to me.*
- Q. *Why did you tell Elenoa?*
- A. *I cannot run home, when I saw Elenoa, because their house is closer to Tu Ana's house.*
- .....
- Q. *I will take you back to when you and Tu Ana were in the bathroom. You mentioned that you had screamed because you were shocked at what he did to you. What was Tu Ana's reaction when you screamed?*
- A. *He covered my mouth*

Q. *How did you react after he covered your mouth?*

A. *I was crying. Then he asked me why I was crying.*

Q. *How long was he covering your mouth for?*

A. *2 minutes.*

Q. *After those 2 minutes of covering your mouth, how were you feeling?*

A. *I felt that he had released me.*

Q. *To clarify. You had already told us that Tu Ana had inserted his penis into your vagina. At what point in time did you scream?*

A. *Before he had done that. He was still trying to insert. Before he tried to insert his penis, I screamed.*

Q. *What point in time did he then cover your mouth?*

A. *When he tried to insert his male private part.*

Q. *You also said you were crying when he was harassing you? At what point in time were you crying?*

A. *When he was doing it.*

Q. *Doing what?*

A. *When he inserted his penis into my vagina.*

Q. *Are you able to tell us, how long you were crying for?*

A. *5 minutes.*

.....

Q. *You said, you had run out of Tu Ana's house when Tu Ana had released you? From your observation, how was Tu Ana able to release you?*

A. *I felt that he had released me.*

Q. *How did he release you?*

A. *I felt that he had weakened his body from me.*

Q. *When Tu Ana had inserted his penis into your vagina, did you in any way agree for him to do this?*

A. *No.*

.....

Q. You said at the time Tu Ana was inserting his penis into your vagina, both of you were standing?

A. Yes.

Q. In what position were you standing?

A. I was facing him.

Q. Where was Tu Ana facing?

A. He was facing me.

Q. What time of the day was this happening?

A. It was in the afternoon.

Q. Was this before or after mid-day?

A. After mid-day.

Q. How do you know it was Tu Ana?

A. Because I saw his face.

Q. Tu Ana had given you \$15 for washing the clothes?

A. Yes.

Q. At what point in time did he give this \$15 to you?

A. Before he did that thing to me.

(xx) The complainant identified Tu Ana as the accused in the dock.

(xxi) She said the matter was reported to Police on 28 October 2016. She was unaware as to why the matter was not reported to the Police until 28 October 2016. It was her mother who had reported the matter to the Police. When the complainant was telling Elenoa as to what the accused had done to her, her mother had entered Elenoa's house. Then Elenoa had told her mother the story.

(xxii) The witness further testified, when the accused had asked her to massage his head, she had done so. She had massaged his head in front of the bathroom (outside the bathroom).

(xxiii) The complainant also demonstrated in Court as to how the accused had pushed her against the wall.

(xxiv) Several suggestions were put to the complainant by the defence counsel in cross examination.

(xxv) The complainant admitted that at the time she was doing the washing at the accused's house, there were two teachers drinking grog at the shop veranda.

*The complainant said that the distance from the bathroom to the shop veranda, is about 10 footsteps.*

*(xxvi) The following further questions and suggestions were also put to the complainant in cross examination:*

*Q. I suggest to you that Tu Ana did not rape you in the bathroom that morning whilst you were doing the washing?*

*A. He raped me.*

*Q. I suggest to you, that Tu Ana did not ask you to smoke in the bathroom that morning?*

*A. He told me.*

*Q. After the alleged incident, when you left Tu Ana's house, the two teachers were still drinking kava at the shop veranda?*

*A. Yes*

*Q. And you didn't tell those two teachers about the incident in the bathroom?*

*A. Yes.*

*Q. I suggest to you that you didn't tell the two teachers, because Tu Ana didn't rape you.*

*A. He raped me. The reason why I did not tell them was when I ran out, I ran straight to Elenoa's house.*

*Q. The two teachers, are they male or female?*

*A. Females.*

*Q. How do you know they were teachers?*

*A. Because while I was doing my washing, one of the teachers came and asked if she can use the toilet.*

*Q. Have you seen them before?*

*A. Only one of them.*

*Q. The lady who came to use the toilet, or the other lady?*

*A. The other lady. I have seen the other lady before.*

*Q. Do you know in which school they were teaching?*

*A. Lamiti.*



(xxvii) During the re-examination of the witness, Court permitted for a rough sketch depicting the accused's house, shop and veranda/porch; as well as for a rough sketch depicting the inside of the accused's house to be tendered in evidence. The two rough sketches were tendered to Court by the consent of both prosecution and defence.

**[57] Evidence of Elenoa Bainivalu**

- (i) She is 24 years of age and currently residing at Nakavu in Namosi. She is originally from Sawaieke Village in Gau.
- (ii) The complainant is her first cousin – the complainant is her mother's brother's daughter. She said the complainant and she are best friends.
- (iii) She testified to the events which took place on 15 October 2016. On that day she was at home in Sawaieke Village in Gau. The complainant had come to her house. When the witness saw her face, she looked frightened. The witness had asked her what happened. The complainant had then told her that Tu Ana had tried to take off her clothes so that they can stay together. Later the witness said, "For them to sleep together".
- (iv) After a while, the complainant's mother had arrived at her house. The witness had informed the complainant's mother about what the complainant had told her.
- (v) The witness testified that the accused is her uncle. Her grandmother and the accused's father are siblings. She described in Court the distance from her house to the accused's house. She said the distance was from the Court room to the corner near the Criminal Registry.

**[58] Evidence of Naina Qaranivalu**

- (i) She is the mother of the complainant. Currently she is residing at Jittu Estate in Gaji Road, Samabula.
- (ii) She testified to the events which took place on 15 October 2016. She confirmed that she had permitted the complainant to go to the accused's house to wash his clothes.
- (iii) The witness testified that she was feeling restless because the complainant was getting late (to come home). So around 1.00 or 2.00 in the afternoon she had left home. She was going towards the accused's house. When she reached the road, she saw the complainant coming from the accused's house. The complainant had been coming towards her but then she turned and went to Elenoa's house.

- (iv) *The witness had also gone to Elenoa's house. When she reached Elenoa's house, she saw the complainant crying. As soon as she entered Elenoa's house, Elenoa had said Tu Ana had harassed the complainant. She had asked the complainant what the accused did to her. The complainant kept on crying. Then she had told the complainant that they should go home and inform the complainant's father. Then they left.*
- (v) *The complainant kept saying that Tu Ana had harassed her. "She only told me that Tu Ana had closed her in the bathroom and harassed her".*
- (vi) *When the witness was asked as to what she meant by the word "harassed", she said that "I thought that he had closed her and touched her." Later in her testimony, the witness said "That he held her and tried to take off her clothes".*
- (vii) *The witness testified that on the next day which was a Sunday, she had taken the complainant and dropped her at her teacher's house at Gou Secondary School.*
- (viii) *The witness also testified as to how the matter came to be reported to the Police.*

[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 address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. 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.

[60] 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**

[61] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, MS, her first cousin, Elenoa Bainivalu, and her mother, Naina Qaranivalu, to prove its case.

[62] As I have informed you earlier, the burden of proving each ingredient of the charge of Rape 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] In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt. Based on the said agreed facts the identity of the accused, the date of incident (15 October 2016), and the place of incident (Gau Island), are proved beyond reasonable doubt.
- [65] However, the prosecution must prove that the accused penetrated the vagina of MS with his penis; and that the accused penetrated the vagina of MS with his penis without her consent; and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [66] The accused is totally denying that the incident of Rape ever took place.
- [67] It has been suggested by the defence that if the complainant had screamed, the people who were near the accused's shop veranda would have heard her screams.
- [68] It was suggested to the complainant that she didn't tell the two teachers, who were drinking kava at the shop veranda, about the incident because the accused did not rape her. The complainant has stated that the reason why she did not tell the two teachers was because when she ran out, she ran straight to Elenoa's house. She was not paying attention to the people at the veranda.
- [69] It has also been suggested by the defence that it is physically impossible to commit rape in a standing (face to face) position.
- [70] It has also been suggested by the defence that there was a long delay in reporting the matter to the Police. The prosecution has explained the reason for the delay in reporting the matter. You must also bear in mind that the complainant has testified that she had informed Elenoa about the alleged incident as soon as she left the accused's house.
- [71] It is for you as judges of fact to consider the totality of the evidence and come to a finding on all of the above matters.
- [72] 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.

[73] 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.*

[74] Any re directions the parties may request?

1. The Learned State Counsel brings to the attention of Court that my directions at paragraph 69 which states: "It has also been suggested by the defence that it is physically impossible to commit rape in a standing (face to face) position", needs clarification as this was not a suggestion made by the defence to the prosecution witnesses, but merely a statement or argument taken up by the Defence Counsel in her closing address.

I agree with the Learned State Counsel and redirect the Assessors accordingly. I also remind the Assessors of what I have stated at paragraph 10 of my summing up: "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."

2. I give a similar re-direction to the Assessors in respect of paragraph 67 of my summing up which reads: "It has been suggested by the defence that if the complainant had screamed, the people who were near the accused's shop veranda would have heard her screams."

Again I re-direct the Assessors that this was not a suggestion made by the defence to the prosecution witnesses, but merely a statement or argument taken up by the Defence Counsel in her closing address.

3. I give a similar re-direction to the Assessors in respect of the first sentence of paragraph 70 of my summing up which reads: "It has also been suggested by the defence that there was a long delay in reporting the matter to the Police."

Again I re-direct the Assessors that this was not a suggestion made by the defence to the prosecution witnesses, but merely a statement or argument taken up by the Defence Counsel in her closing address.

4. The Learned State Counsel further submits that in summarizing the evidence of Naina Qaranivalu the following passage requires further clarification.

- (vi) *When the witness was asked as to what she meant by the word "harassed", she said that "I thought that he had closed her and touched her." Later in her testimony, the witness said "That he held her and tried to take off her clothes".*

As per the Learned State Counsel it must be made clear to the Assessors that the portion of the evidence which reads *"I thought that he had closed her and touched her"* was what the witness understood when the complainant had said she was harassed.

And the portion of the evidence which reads *"That he held her and tried to take off her clothes"* was what the witness had stated when State Counsel asked her to say the exact words the complainant had used.

I re-directed the Assessors accordingly.

- [75] Madam Assessors and Gentleman Assessor, 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.

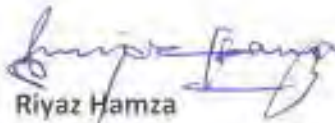
- [76] Your possible opinions should be as follows:

**Count One**

Rape- Guilty or Not Guilty

- [77] I thank you for your patient hearing.



  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI

AT SUVA

Dated this 6<sup>th</sup> Day of December 2018

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