

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 112 of 2017**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

**PENI BULAGO**

**Counsel** : Ms. S. Sharma for State  
Mr. F. Vosarogo for Accused

**Hearing on** : 22<sup>nd</sup> - 24<sup>th</sup> January 2018

**Summing up on** : 25<sup>th</sup> January 2018

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

**SUMMING UP**

Madam and gentleman assessors;

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

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

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of his/her the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and

decide how much of it you believe. You may believe all, part or none of any witness' evidence.

7. When the complainant gave evidence she said she is 13 years old. You may have come across children of this age. You will have an idea of the way a child of a particular age behave, think, talk and the way they describe things.
8. Children can be confused about what has happened to them; sometimes children blame themselves for what had happened. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time what they were doing was wrong. They may be embarrassed because they found that some aspects of the attention they were getting from the individual concerned were enjoyable.
9. I mention these possibilities because experience shows that victims of sexual offences may react in different ways to what they went through and children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.
10. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.

11. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on 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.
12. 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.
13. 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 the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
14. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
15. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as

directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.

16. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
17. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
18. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of an offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.
19. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not those charges have been proved.
20. I must explain to you as to the reason for the use of the screen when the complainant gave evidence. It was a normal procedure adopted in courts on the request of the prosecution to make a particular witness relatively more

comfortable when giving his/her evidence. You must not infer that such a protection to the witness was warranted due to the accused's behaviour and should not draw any adverse inference against him on that account.

21. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
22. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

#### **FIRST COUNT**

*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Act 2009.

*Particulars of Offence*

**PENI BULAGO** between the 1<sup>st</sup> day of January 2012 and 31<sup>st</sup> day of December 2014 at Kalabu, in the Central Division unlawfully and indecently assaulted IT (name suppressed) by touching her vagina.

#### **SECOND COUNT**

**Representative Count**

*Statement of Offence*

**SEXUAL ASSAULT :** contrary to section 210(1)(a) of the Crimes Act 2009.

*Particulars of Offence*

**PENI BULAGO** between the 1<sup>st</sup> day of January 2012 and 31<sup>st</sup> day of December 2014 at Kalabu, in the Central Division on an occasion other than the first count unlawfully and indecently assaulted IT (name suppressed) by rubbing a banana on top of her vagina.

#### **THIRD COUNT**

**Representative Count**

*Statement of Offence*

**RAPE:** contrary to section 207(1) and (2)(b) and (3) of the Crimes Act of 2009.

*Particulars of Offence*

**PENI BULAGO** between the 1<sup>st</sup> day of January 2012 and the 31<sup>st</sup> day of December 2014 at Kalabu, in the Central Division penetrated the vagina of IT

(name suppressed), a child under the age of 13 years with a banana.

23. Though the accused is charged with three counts you should remember to consider each count separately. You must not assume that the accused is guilty of the other count just because you find him guilty of one count.
24. You would notice that the three counts are representative counts. When it comes to a representative count, the law says that it shall be sufficient for the prosecution to prove that between the dates specified in the particular count or charge at least one offence was committed. If we take count one as an example, in count one the prosecution alleges that during the period between 1<sup>st</sup> day of January 2012 and 31<sup>st</sup> day of December 2014 several acts of sexual assault as stated in the particulars of that count took place. If you are satisfied that the prosecution has proved beyond reasonable doubt at least one incident of sexual assault committed by the accused against the complainant between that period, you should find the accused guilty of the first count.
25. The accused is charged with the offence of sexual assault on the first and the second counts. To prove the offence of sexual assault, the prosecution should prove the following elements beyond reasonable doubt;
  - a) the accused;
  - b) unlawfully assaulted the complainant; and
  - c) the said assault is indecent and sexual.
26. The first element involves the identity of the offender who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence.
27. When you consider the evidence on the identification of the accused in respect of each offence, please bear in mind that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances

among others when you evaluate the evidence given by the complainant on identification of the accused in relation to each offence;

- a) Duration of observation;
- b) The distance within which the observation was made;
- c) The lighting condition at the time the observation was made;
- d) Whether there were any impediments to the observation or was something obstructing the view; and
- e) Whether the complainant knew the accused and for how long.

28. Assault is the use of unlawful force. A touch constitutes an assault if it is done without a lawful excuse.

29. The word "unlawfully" simply means without lawful excuse.

30. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. You should also ask yourself, firstly, whether you consider that indecent assault could also have been sexual because of its nature; and if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.

31. To prove the third count, the prosecution must prove the following elements beyond reasonable doubt;

- a) the accused;
  - b) penetrated the vagina of the complainant with a banana;
  - c) without the consent of the complainant; or
- that the complainant was below the age of 13 years at the material time.

32. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence.



33. The second element involves the penetration of the complainant's vagina. The law states that this element is complete on penetration to any extent. Therefore, it is not necessary to have evidence of full penetration. A slightest penetration is sufficient to satisfy this element.
34. To prove the third element, the prosecution should prove beyond reasonable doubt that the complaint was below the age of 13 years at the time the alleged offence was committed. At law, a person under the age of 13 years is incapable of giving consent when it comes to the offence of rape.

***Prosecution case***

35. The complainant said in her evidence that;
- a) *She is 13 years old. In year 2012 she was studying in class 1 at Kalabu Primary School. At that time she was living with her grandparents, her aunt and uncle. One night while she was sleeping inside the bedroom, she felt that her trousers had gone down. She could feel that a banana was being rubbed on her private part. When she woke up she saw a banana right next to her and the accused standing next to her.*
  - b) *She said that after she felt her trousers had gone down the accused was rubbing the banana and he was also touching her body and her private part. She said that the banana was unpeeled. She said the accused inserted the banana into her private part. She knew that because she felt pain and the banana was inside her. She said this happened in the night time when the others who were living in that house were not in the house. She said the light in the bedroom was on.*
  - c) *She said the accused had touched her body many times. The accused had rubbed her private part many times and he had inserted bananas in her private part many times. When he was doing this to her she did not do anything because she was scared. She did not tell her grandmother, aunty and the uncle who were living with her because she was scared of talking to them. She said she was scared of them because they will spread rumors. She said she knew that the accused touched her body because she could feel his hand coming close to her and touching her.*
  - d) *She said she saw the banana being rubbed on her private part. She was just lying down when he was doing that. She said she could not do anything because she was still a kid. She said she knew that the accused inserted a banana in her private part because she saw it and she felt the pain. She said she cried because of the pain.*
  - e) *She said there were three houses nearby. She said she did not shout or scream because he did something to prevent her from shouting. When she was asked what, she said there was a piece of cloth inside her mouth. She then said that the accused put a piece of cloth in her mouth when he touched her body, when he rubbed her private part and also when he inserted the banana in her private part. She said the accused had always put a piece of cloth in her mouth whenever he did that to her.*

- f) *She said, after the incident she was scared of the accused. She said she was seven years old in 2012. She recognized the accused in open court.*
- g) *During cross examination she said 'yes' when it was suggested to her that from January 2012 to May 2012 she was in class 2 at Ravitaki District School in Kadavu. She also agreed with the suggestion that it is not right that in 2012 she was in class 1 in Kalabu. She then agreed that she came with her grandparents from Kadavu to Kalabu in May 2012. She said the aunt and the uncle who were living with her had children and their son 'Tom' was in her class.*
- h) *She said her aunt Vasenai usually stays at home and her uncle was working. Her parents were living in Lautoka and they used to visit her during the period between 2012 and 2014. She agreed with the suggestion that in 2012 her aunt Elenoa and her family came to live with her and the grandparents. She said Elenoa had three children and they were attending secondary school.*
- i) *She agreed that one room in that house was occupied by aunt Vasenai and her family and the other bedroom was given to aunt Elenoa and her family by the accused. She also agreed that she would normally sleep in the sitting room with her grandparents.*
- j) *She agreed that she met with an accident in June 2013 where she was hospitalised till December 2013. She also agreed that throughout the time she was in the hospital she was looked after by her grandmother. She agreed that she spoke with her mother in March last year regarding the allegations in this case. She also agreed that since March last year, her parents and her brothers are living with her at Kalabu. It was again suggested to her that her parents and siblings came to Kalabu in December 2016 and therefore they had spent more than one year with her. She agreed.*
- k) *She agreed that her police statement does not mention about the accused putting a cloth inside her mouth. She agreed that her grandmother had stood up for her even when her mother wanted to smack her and that the grandmother would stand up for her any day. When it was suggested that she is comfortable talking to her grandmother she said 'no'. She said she does not want to talk too much with her. When she was asked whether she passed blood from her private part at any time she said 'no'.*
- l) *During re-examination she said she was in class 2 at Ravitaki District School but she had to repeat class 1 at Kalabu Primary School. She said she did not tell the police about the cloth because she did not remember. She said, when the incident happened the two aunts were still living in the same house but no one else were at home at that time. It was clarified by her that by the term 'private part', she refers to the body part in her lower body where she urinates.*

36. The second witness for the prosecution said that;

- a) *She was staying at Kalabu from 2009 to 2012. The house she lived in Kalabu was close to the house where the complainant lived. One day since there was no water supply in her house she used the toilet in the accused's house. When she was inside the toilet she heard the complainant crying. She then went inside the house and*

called her name. The complainant was inside the bedroom and she went straight to her. She saw the complainant sitting on the bed. She asked her what happened and the complainant told her that 'tutu did it here' pointing to her private part. She said she saw a banana right next to the complainant. She said the complainant was crying and was lost for words. Then she took the complainant to her house. She said this incident took place in 2012. She also said that during 2009 to 2012 she stayed with the complainant and her grandparents for one week. During that period it was her family, the complainant and the grandparents who were living in that house.

- b) During cross examination she said she did not report the matter to the police in 2012. She said the same evening she told the complainant's grandmother about the incident. She did not mention that in her police statement because the police only asked her what happened. She said the incident she witnessed happened sometime between June and August 2012.
- c) She said one Salote was also with her that day but she was told by a police officer not to mention Salote's name. When it was pointed out to her that in her police statement she had said that Salote called her when she was inside the toilet and then she went next to the window where Salote told her to come inside and see, she said she was inside the toilet when she heard the complainant crying but she also came with Salote.
- d) She said this happened after lunch. She said she did not see the accused when she went inside the house at that time. The next morning complainant's grandmother and the accused came to her house and she told the accused what the complainant told her. Then the accused asked the complainant whether that is true. The complainant said 'no'. Thereafter she just left it as it is. She further said that when the accused asked the complainant whether the story is true or not the complainant stared for a while before saying 'no'.
- e) During re-examination she said she did not report the matter to the police in 2012 because when the accused asked the complainant, the complainant said it is not true. She said she did not want to proceed with the matter when the complainant denied in front of her the next morning. She said when the accused confronted the complainant in front of her, his tone was stern. The accused then told her not to spread any false stories.

37. The third prosecution witness said that;

- a) She is a medical doctor with more than thirty one years of practice and she is specialized in obstetrics and gynaecology. She examined the complainant on 18/03/17 at Medical Services Pacific. She tendered the relevant medical report as PE 1. During the vaginal examination she noticed a healed hymenal laceration at 4 o'clock position. She said that injury would have happened two weeks prior to the examination. She did not see any other injuries. At D 14 in the medical report she wrote 2012 to 2014 based on what she was told by the complainant. She said anything hard that goes through the vaginal opening will cause a hymenal laceration.

- b) *During cross examination she said that it is possible for the injury she observed to have happened in January 2017. She was not aware that the complainant had met with an accident in June 2013.*
- c) *During re-examination she said that it is possible to have a hymenal laceration if the complainant's vaginal opening was injured during the accident.*

38. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent. That is his right. You should not draw any adverse inference against the accused because he chose to exercise his right to remain silent.
39. Please note that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I have not referred to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

#### ***Belated Complaint***

40. As I have mentioned to you, experience has shown that victims of sexual offences react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, if there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. When there is a delay, you should look whether there is a reasonable explanation to such delay. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

#### ***Medical Opinion***

41. The third prosecution witness gave her medical opinion based on what she observed and her experience. You are not bound to accept that evidence. You

will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the third prosecution witness. Evaluating her evidence will therefore include a consideration of her expertise, her findings and the quality of the analysis which supports her opinion.

42. The third prosecution witness' opinion was that the injury she observed would have been caused by a hard object that went through the complainant's vaginal opening. With regard to the age of the injury, her opinion was that the injury would have occurred two weeks before the examination, that is, two weeks before 18/03/17. The complainant gave evidence of an incident that took place in 2012 and she said that it happened many times.
43. When you consider PE 1, you should bear in mind that what is written in A(4) and D(10) are not admissible in considering whether the facts stated there are true. This is because those parts are filled based only on information received but the individual who filled A(4) and the third prosecution witness who filled D(10) did not see what actually happened. Further, even though the title of D(14) is 'Professional Opinion', the third prosecution witness admitted that she wrote '2012 - 2014' there simply based on what she was told by the complainant.

### *Analysis*

44. The defence totally deny the allegations and says that the complainant is lying. The defence says that there are inconsistencies in the evidence given by the complainant and also in the evidence given by the second witness. You should follow the directions I have given you when you deal with inconsistencies. The defence pointed out that the third prosecution witness had conducted the medical examination about 3<sup>1</sup>/<sub>2</sub> years after the last day of the time frame mentioned in the

charges and the medical opinion was that the injury that was noted was two weeks old.

45. In order to prove the first count the prosecution should prove beyond reasonable doubt that the accused sexually assaulted the complainant by touching her vagina during the period between 01/01/12 and 31/12/14. It is sufficient for the prosecution to prove that one such offence was committed during that period.
46. To prove the second count the prosecution should prove beyond reasonable doubt that the accused on an occasion other than the one relevant to the first count sexually assaulted the complainant by rubbing a banana on top of her vagina during the period between 01/01/12 and 31/12/14. It is sufficient for the prosecution to prove that one such offence was committed during that period.
47. To prove the third count the prosecution should prove beyond reasonable doubt that the accused penetrated the complainant's vagina with a banana and the complainant was below the age of 13 years at the material time. You should remember that a slightest penetration is sufficient to establish penetration. It is sufficient for the prosecution to prove that one such offence was committed during that period.
48. Any re-directions?
49. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
50. Your possible opinion should be as follows;
  - 1<sup>st</sup> count (sexual assault) – guilty or not guilty
  - 2<sup>nd</sup> count (sexual assault) – guilty or not guilty

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



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitor for the Accused : Mamlakah Lawyers, Suva.

