

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 24 of 2015**

**STATE**

**V**

**FEROZ KUMAR**

**Counsel** : Mr. A. Datt for the State.  
: Ms. J. Singh [LAC] for the Accused.

**Dates of Hearing** : 24, 25, 30 April, 2018  
**Closing Speeches** : 01 May, 2018  
**Date of Summing Up** : 02 May, 2018

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**SUMMING UP**

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

**Ladies and Gentleman Assessors**

1. It is now my duty to sum up this case to you.

**ROLE OF JUDGE AND ASSESSORS**

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion

of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

### **BURDEN OF PROOF AND STANDARD OF PROOF**

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

### **INFORMATION**

13. The accused is charged with one count of rape and one count of indecent assault. (A copy of the information is with you).

### **FIRST COUNT**

#### *Statement of Offence*

**RAPE**: Contrary to section 207 (1) & (2) (b) and 207 (3) of the Crimes Act No. 44 of 2009.

#### *Particulars of Offence*

**FEROZ KUMAR** aka **RAKESH KUMAR** aka **PILLU**, on the 24<sup>th</sup> day of August, 2010, at Naidrodro, Ba in the Western Division, penetrated the vulva of "UN" with his finger and at the relevant time the said "UN" was under the age of 13 years.

## **SECOND COUNT**

### *Statement of Offence*

**INDECENT ASSAULT**: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

### *Particulars of Offence*

**FEROZ KUMAR** aka **RAKESH KUMAR** aka **PILLU**, on the 24<sup>th</sup> day of August, 2010 at Naidrodro, Ba in the Western Division, unlawfully and indecently touched the backside of “UN” without the said “UN”s consent.

14. To prove count one the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Penetrated the vulva of the complainant “UN” with his finger;
  - (c) “UN” was below the age of 13 years.
  
15. The slightest of penetration of the complainant’s vulva by the accused’s finger is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case the complainant was 7 years of age during the period of the alleged offence. I therefore direct you that consent of the complainant is not an issue in this trial.
  
16. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
  
17. The second element is the act of penetration of the complainant’s vulva by the accused with his finger.
  
18. The final element of the offence is the age of the complainant. The complainant was born on 15 March, 2003 which establishes that she was below the age of 13 years at the time of the alleged incident.

19. If you are satisfied that the accused had penetrated the vulva of the complainant with his finger then you must find the accused guilty of rape. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape then you must find the accused not guilty of the offence of rape.
20. In this trial the accused has denied all elements of the offence of rape he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vulva of the complainant with his finger.
21. To prove count two the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
  - (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant "UN".
22. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence.
23. The words "unlawfully" and "indecently" in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
24. Assault is the unlawful use of force on the complainant "UN" by the act of touching her backside/buttocks.
25. In respect of the count of indecent assault the accused has denied all the elements of the offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant "UN" by touching her backside/buttocks.

26. If you are satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then you must find the accused guilty of the offence of indecent assault. However, if you have a reasonable doubt in respect of any elements of the offence of indecent assault then you must find the accused not guilty of the second count.
27. In this case, the accused is charged with two offences, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
28. You must be satisfied that the prosecution has proved all the elements of both the offences beyond reasonable doubt in order for you to find the accused guilty of either or both the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or both the offences, then you must find the accused not guilty.

### **ADMITTED FACTS**

29. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as agreed facts.
30. The admitted facts are as follows:
  - “1. *The complainant in this matter is one “UN” of Naidrodro, Ba (“the complainant”).*
  2. *The accused in this matter is one Feroz Kumar of Naidrodro, Ba (“the accused”)*
  3. *The date of the alleged offending was 24 August, 2010.*
  4. *At the time of the alleged offending the complainant’s family and the accused were next door neighbours.*
  5. *The complainant’s mother is one Sereana Marama (“the mother”)*

6. *At the time of the alleged offending the complainant had an elder sister ("the elder sister") and a younger brother ("the younger brother").*
7. *On the day of the alleged offending, the mother had gone to town with the elder sister.*
8. *Furthermore that the complainant was alone at their house looking after the younger brother.*
9. *On the morning of 25 August, 2010 the complainant told the mother about the alleged offending and they reported the matter to the Police.*
10. *The complainant was medically examined on 26 August 2010 at Lautoka Hospital by Dr. Eseta Nakasigaleka.*
11. *The accused was cautioned interviewed in Hindi language on 24/12/14 by DC 3890 Ravi Kumar*
12. *The cautioned interview of the accused in Hindi language was translated into English by DC 3890 Ravi Kumar.*
13. *The cautioned interview of the accused was witnessed by DC 3016 Kamal.*
14. *That the accused was formally charged with 1 count of Rape in Hindi language on 24/12/14 by DC 3237 Aveen.*
15. *The charge statement of the accused in Hindi language was translated into English by DC 3237 Aveen.*
31. From the admitted facts you will have no problems in accepting the above as proven beyond reasonable doubt and you can rely on it.
32. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
33. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If

I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your opinion in this case.

### **PROSECUTION CASE**

34. The prosecution called 4 witnesses to prove its case against the accused.
35. The first prosecution witness was the complainant "UN". On 24 August, 2010 the complainant with her mother, elder sister and younger brother was living with her aunt and her family at Naidrodro, Ba.
36. The complainant was about 7 years of age in 2010 born on 15 March, 2003. The birth certificate of the complainant was marked and tendered as prosecution exhibit no. 1. The complainant knew the accused who was known as Pillu, the accused was identified in court by the complainant. The accused's house was not very far away from where the complainant was living in her aunt's house.
37. On 24 August, 2010 at about 8.30am the complainant was at home with her 1 year old brother Rupeni since her mother and eldest sister had gone to the Ba Market to sell 'kai'.
38. The accused came into the house got hold of her brother and put him on the floor. After that the accused touched the backside/buttocks of the complainant with his hands. This was done once only, the complainant did not like it and had not allowed the accused to touch her buttocks.
39. Thereafter the accused lifted the complainant and took her to the settee in the sitting room where he took off her panty, leaned over her and poked her vagina with his middle finger once. The poke was a hard one which was painful.



40. The complainant further stated that the accused poked inside her vagina and his finger went in a bit. The complainant was not sure how far the finger had gone inside and she did not like what the accused had done.
41. The complainant then went to the bathroom to have her shower and then to the bedroom to dress up. She locked the door of the bedroom with her brother inside with her since the accused was outside the bedroom. He was knocking on the door of the bedroom saying that he wanted to see the complainant's vagina.
42. The complainant did not open the door, after a while she came out of the bedroom with her brother and went to play in the porch of the house. After sometime the complainant's cousin Sera came, the complainant told Sera that the accused had touched her. Sera did not say anything and did not stay for long.
43. At about 11.00am the complainant's mother came home she did not tell her mother what had happened to her since she was afraid.
44. Next day in the morning the complainant's mother was preparing to go to town to sell 'kai'. Her mother told her to stay home with Rupeni. At this time the complainant told her mother that the accused had come and carried her to the settee and poked her 'via' meaning her vagina.
45. Upon hearing this, the complainant's mother went to the accused after she returned the complainant and her mother went to the Ba Police Station to report the matter. The complainant was later taken to the Lautoka Hospital for medical examination she was admitted for 3 to 4 days at the hospital.
46. In cross examination the complainant was referred to the police statement she had given to the police when everything was fresh in her mind. The complainant read paragraph 1 of the statement:

*"I have been residing at the abovementioned address since birth, I am staying with mother Sereana Marama and my sister and brother. My sister's name is Miliiana Ranadi 10 years, Class 5 at FSC Primary School, the youngest is Rupeni Yavusa 1 year, I am attending FSC Primary School in Class 3."*

47. The complainant agreed that she did not tell the police that there were 4 other people living with her.
48. The complainant when questioned where Pillu was after her mother and sister had left home, the complainant stated that she did not know. She was then referred to paragraph 10 of her police statement which was read as *"I was staying behind looking after my small brother and our next door neighbour Pillu was at his room whilst I was carrying Rupeni."*
49. The complainant agreed that when she gave the above statement to the police she had said that the accused was in his room.
50. Furthermore the complainant agreed that after the accused had poked her vagina she had said *"don't do that bad thing to me"* she then got up and went to have her bath without any conversation with the accused. She was again referred to her police statement to the last sentence of the first page which was read as *"I then told him don't do that bad thing to me but Pillu replied just leave it, I was scared and started crying. Pillu then made me wore my panty again after I went to drink water and Pillu said let's go to my room I told him no. I then went to have my bath"*
51. The complainant confirmed giving the above version to the police.

## Ladies and Gentleman Assessors

52. The learned counsel for the accused in this regard was cross examining the complainant about some inconsistencies in the statement she gave to the police immediately after the incident when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant with her evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.
53. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
54. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of the witness.
55. The complainant maintained that the accused had come to her house and had inserted his finger into her vagina. She also stated that when her mother came home after selling 'kai' she did not tell her mother about what the accused had done to her because she was afraid to tell her mother.
56. The complainant also maintained that the accused had touched her buttocks on 24 August, 2010. The complainant disagreed with the

suggestion that whatever she had alleged was done by someone else but not the accused. She also denied that it was her grandfather Josaia Cama who had done what she told the court.

57. The second prosecution witness was the mother of the complainant Sereana Marama. She informed the court that the accused was their neighbour and she knew him from the year 2001. The witness had a good relationship with the accused and his family sometimes they would come to her home and sometimes she would go to his house. Apart from this, there was no other relationship between her and the accused.
58. On 25 August, 2010 the witness was getting ready to go to the market with her daughter Miliana. She told the complainant to stay home with Rupeni.
59. The complainant at this moment told the witness that she was so frightened since the accused had taken her to the settee and pulled her panty and poked his hands to her via. The witness narrated what the complainant had told her that day in the itaukei language as *“Na o Pillu koyā lako mai ke keveti au e na delani settee, qai luvata noqu i taurausese ka tara na noqu via.”*
60. The above when translated in English language meant: *“Mum Pillu came here lifted me onto the settee he then took off my panty and touched my vagina.”*
61. The witness immediately went to the accused and confronted him the accused denied doing anything to the complainant. Thereafter the matter was reported to the police and the complainant was medically examined.
62. In cross examination the witness disagreed that her father Josaia Cama was living with the witness at the time of the incident. The witness stated that

she did not have any ill feelings against Pillu and also she was not in a de-facto relationship with him.

63. The witness agreed that the complainant had told her that the accused had only touched her vagina and nothing else.

#### Ladies and Gentleman Assessors

64. Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for a child of 7 years not to complain about what she had gone through when her mother came home on the day of the alleged incidents. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
65. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in this case did not inform her mother immediately after she came from town about both the incidents until the next day. On the next day the complainant told her mother only about the accused poking her vagina but not about the accused touching her buttocks.
66. This is commonly known as recent complaint evidence. The evidence given by Sereana is not evidence as to what actually happened between the complainant and the accused since Sereana was not present and did not see what had happened between them.

67. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant complained to her mother about what the accused had done to her although in respect of the count of rape the next day of the alleged incident and therefore she is more likely to be truthful. On the other hand, the defence says that the complainant did not complain to her mother the same day of the incident since it did not happen. Furthermore the complainant did not say anything about the accused touching her buttocks and therefore she should not be believed.
68. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.
69. The third prosecution witness was Dr. Eseta Vakasigaleka who obtained her MBBS Degree from the Fiji School of Medicine in the year 2000 with a Post Graduate Diploma in Child Health in the year 2005.
70. The Doctor confirmed that on 26 August, 2010 she had examined the complainant at the Lautoka Hospital. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 2.
71. The specific medical findings at D (12) of the medical report were:
- (a) No bruises;*
  - (b) No torn Frenulum;*
  - (c) Vaginal examination the hymen is intact;*
  - (d) Erythematous at 3, 5, 8, and 9 o'clock positions;*
  - (e) no lacerations, nil discharge and nil bleeding."*

72. The Doctor explained her specific medical findings in the following words:
- (a) no bruises were seen on the general examination of the complainant's body;
  - (b) Frenulum is the part of the skin under the tongue that connects the tongue to the floor of the mouth;
  - (c) Hymen is the inner membrane or wall inside the vaginal canal which is about 3cm inside from the vaginal opening;
  - (d) Erythematous means redness at the different positions such as 3, 5, 8 and 9 o'clock positions;
  - (e) Laceration is a tear or cut, nil discharge means no abnormal discharge.
73. The Doctor further explained that Erythematous could be caused in two major instances namely by trauma which can be either sharp or blunt trauma or by infection. Trauma means injury, sharp injury causes tear whereas blunt injury will not always cause a tear or a cut.
74. The Doctor drew a diagram of the female reproductive organ which was marked and tendered as prosecution exhibit no. 3.
75. According to the Doctor the areas of redness she had seen was between the vaginal opening and the hymen after going past the labia majora, the labia minora and the vaginal opening known as the vulva.
76. The professional opinion of the Doctor at D (14) of the medical report was:
- "The areas of erythema indicate a recent blunt injury most likely this week consistent with the patients story of use of a finger."*
77. In cross examination the Doctor stated that it was possible for little girls to get infected when they scratched themselves but the scratch was more

restricted to the external area. Similarly, when a child goes to bath and while washing her genitalia could cause blunt trauma to the external surface only.

78. The Doctor stated that a 7 year old child when washing the genitalia area will not be able to reach inside the vault between the vaginal opening and the hymen. The Doctor recalled asking the mother of the complainant after she had examined the complainant a general question of who lived with her not specifically during the time of the incident. The Doctor was informed that the complainant lived in Ba with her mother, maternal grandfather Josaia Cama, sister Miliana Ranadi and brother Rupeni Yavusa.

Ladies and Gentleman Assessors

79. You have heard the evidence of Dr. Vakasigaleka who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the Doctor said in her evidence as a whole is to assist you.
80. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the Doctor.
81. You should remember that this evidence of the Doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your



decisions, you must reach your decision having considered the whole of the evidence.

82. The final prosecution witness was the Investigating Officer WDC Miriama Nadumu who informed the court that the victim "UN" had reported that one Pillu in their area had poked her vagina. The victim was accompanied by her mother.
83. The witness confirmed completing the first page of the Fiji Police Medical Examination Form which was later completed by the Doctor who had examined the victim. Upon the recommendation of the Doctor at the Ba Mission Hospital the victim was taken to the Lautoka Hospital.
84. Before going to the Lautoka Hospital the witness visited the crime scene and drew a rough sketch plan. The rough sketch plan dated 25 August, 2010 was marked and tendered as prosecution exhibit no. 4. The victim was admitted at the Lautoka Hospital.
85. The witness upon returning to Ba made attempts to locate the accused but was not successful. The suspect was finally located on 23 December, 2014. The investigation diary of the witness which mentions the attempts made by the witness to locate the accused was marked and tendered as prosecution exhibit no. 5.

#### Ladies and Gentleman Assessors

At this point I direct you not to draw any adverse inference against the accused as to his whereabouts there can be many reasons why he could not be located by the police.

86. This was the prosecution case.

Ladies and Gentleman Assessors

87. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.
88. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination.

**DEFENCE CASE**

89. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath. The accused is not obliged to give evidence. He is not obliged to call any witnesses. He does not have to prove his innocence in effect he does not have to prove anything.
90. However, the accused decided to give evidence. You must then take into account what the accused adduced in evidence when considering the issues of fact which you are determining.
91. The accused informed the court that in 2010 he was a Fisherman he lived at Naidrodro, Ba with his step father, mother and brother.
92. On 24 August, 2010 the accused was at his home and did not go anywhere. His parents left for the garden at about 8.30 to 9.30am. The accused knew Sereana Marama the mother of the complainant from before 2010, according to the accused he was in a relationship with her.
93. The accused knew Ana and her family and also Sereana and her children. Ana's house was about 6 to 7 meters away from the house of the accused.

After Sereana moved into the neighbourhood the accused used to drink grog with Sereana smoke together and she used to ask for money from him.

94. The accused knows the complainant was Sereana's daughter. He stated that on 24 August 2010 he did not go to Ana's house where the complainant was living. As a result of this incident the stepfather of the accused had chased him out of the house and threw all his clothes outside. The accused immediately left for Suva to be at his sister's place. The accused does not know Josaia Cama who was staying with Sereana and the family.
95. The accused denied both the allegations.
96. In cross examination the accused stated that his finger in one hand could not be straightened due to a cut but his fingers in the other hand was okay. The accused would visit the complainant's home and Sereana would come to his home as well and the relationship between the two neighbours was good.
97. Being a Fisherman the accused would spend about 2 or 3 days in the sea. The accused confirmed that Sereana had come to his house to ask him if he had inserted his finger into the complainant's vagina and he had denied.
98. The accused told Sereana to go and report the matter to the police he agreed that Josaia Cama only used to visit Ana's house. The accused recalled telling the police officer during his interview that the injury suffered by the complainant was caused by the complainant's mother Sereana. The reason why he said this was because the complainant's medical was done one day after the incident.
99. The accused denied committing the offences as alleged.
100. This was the defence case.

## **ANALYSIS**

101. The prosecution alleges that on 24 August, 2010 the complainant who was about 7 years of age was at home with her brother Rupeni. The accused came into the house got hold of her brother and put him on the floor. After that the accused touched the backside/buttocks of the complainant with his hands.
102. Thereafter the accused lifted the complainant and took her to the settee in the sitting room where he took off her panty, leaned over her and poked her vagina with his middle finger. The poke was a hard one which was painful and his finger had gone inside the vagina of the complainant.
103. At about 11.00am the complainant's mother came home but she did not tell her mother what had happened to her since she was afraid.
104. Next day in the morning the complainant told her mother that the accused had come and carried her to the settee and poked her 'via' meaning her vagina.
105. The mother of the complainant Sereana Marama informed the court that on 25 August, 2010 she was informed by the complainant that she was frightened to stay home since the accused had taken her to the settee and pulled her panty and poked his hands to her via.
106. The matter was reported to the police and the complainant was medically examined.
107. Dr. Vakasigaleka confirmed that on 26 August, 2010 she had examined the complainant at the Lautoka Hospital. The professional opinion of the Doctor was that the areas of erythema (redness) indicated a recent blunt injury consistent with the use of a finger.

108. The defence on the other hand denied both the allegations stating that on the day of the alleged incidents the accused had not left his home and that the complainant had made up a story against him orchestrated by her mother Sereana. The defence also says that the grandfather of the complainant had committed the alleged acts but the accused has been blamed.

#### Ladies & Gentleman Assessors

109. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.

110. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthwith and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

111. In deciding the credibility of the witnesses and the 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 is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

112. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether

the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

113. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
114. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt for both the counts. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
115. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
116. In this case, the accused is charged with one (1) count of rape and one (1) count of indecent assault, as mentioned earlier you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
117. Your possible opinions are:-

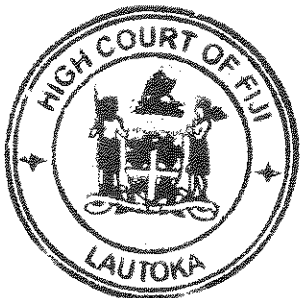
Count One:            **RAPE**: GUILTY OR NOT GUILTY

Count Two:           **INDECENT ASSAULT**: GUILTY OR NOT GUILTY

Ladies and Gentleman Assessors

118. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.

119. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



**At Lautoka**

02 May, 2018

**Sunil Sharma**  
**Judge**

Solicitors

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**