

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 199 of 2016

STATE

v

AK

Counsel : Ms. Lavenia Bogitini for the State
Ms. Swarvana Prakash with Mr. Krisheel Chang for the Accused

Dates of Trial : 10-13, 16-17, 19-20 & 23 July 2018

Summing Up : 24 July 2018

The name of the accused and the complainant are suppressed. Accordingly, the accused will be referred to as "AK" and the complainant will be referred to as "LWN".

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 charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, 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 submissions made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11] As I already indicated to you, another matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15] According to the evidence you heard in this case, the complainant, LWN, was exactly 10 years old at the time of the alleged incidents, and was 12 years old when she testified in Court. Experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

- [16] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [17] You heard in this case the evidence of Arieta Naikabisa, the aunt of the complainant, who said that she questioned the complainant about the alleged incidents, on 5 March 2016, after finding the letters/notes under the mattress. You should consider whether this could be regarded as a complaint made by the complainant of the alleged incidents. If so you should also consider whether she made that complaint without delay and whether she sufficiently complained of the offences 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] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission 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 or omission, you may conclude that the underlying reliability of the account is unaffected.
- [21] However, if there is no acceptable explanation for the inconsistency or omission, 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 inconsistency or

omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider the witness to be reliable.

- [22] Ladies and Gentleman Assessor, 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.
- [23] 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.
- [24] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the charges. 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.
- [25] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [26] 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.
- [27] 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.

- [28] 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 fact and the inferences that could be drawn from them.
- [29] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [30] 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.
- [31] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [32] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [33] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [34] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [35] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty

dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.

- [36] 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.
- [37] The same applies for permitting a closed court proceedings when she gave evidence in this case.
- [38] Let us now look at the charges contained in the Amended Information.
- [39] There are four charges preferred by the Director of Public Prosecutions (DPP), against the accused:

COUNT ONE

Statement of Offence

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

Particulars of Offence

AK on the 23rd of December 2015, at Beqa Island, in the Central Division, penetrated the vagina of **LWN**, a child under the age of 13 years, with his tongue.

COUNT TWO

Statement of Offence

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

Particulars of Offence

AK on the 24th of December 2015, at Beqa Island, in the Central Division, penetrated the mouth of **LWN**, a child under the age of 13 years, with his penis.

COUNT THREE

Statement of Offence

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

Particulars of Offence

AK on the 24th of December 2015, at Beqa Island, in the Central Division, penetrated the vagina of **LWN**, a child under the age of 13 years, with his tongue.

COUNT FOUR

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

AK on the 24th of December 2015, at Beqa Island, in the Central Division, unlawfully and indecently assaulted **LWN**, by fondling and sucking the breasts of the said **LWN**.

[40] As you would notice the accused has been charged with two counts of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act); one count of Rape, contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act; and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act.

[41] Let me now explain the elements of counts one and three together, which are both counts of Rape contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act.

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

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

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

(2) A person rapes another person if —

(a); or

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

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

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

(2) A person rapes another person if —

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

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

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

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

- (i) The accused;
- (ii) On the specified date (in this case the 23 December 2015);
- (iii) At Beqa Island, in the Central Division;
- (iv) Penetrated the vagina of LWN, with his tongue; and
- (v) At the time LWN was a child under 13 years of age.

[48] Similarly, in order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified date (in this case the 24 December 2015);
- (iii) At Beqa Island, in the Central Division;
- (iv) Penetrated the vagina of LWN, with his tongue; and
- (v) At the time LWN was a child under 13 years of age.

[49] Let me now elaborate on these elements together in respect of counts one and three.

[50] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[51] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[52] The fourth element involves the penetration of the complainant's vagina, with his tongue. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. The element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the complainant's vagina, with his tongue, to any extent.

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

[54] The issue of consent will not arise in this case. A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 10 years of age at the time of the alleged incident, and therefore, she had no mental capacity to consent.

[55] Let me now explain the elements of count two, Rape contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act.

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

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

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

(2) A person rapes another person if —

(a); or

(b); or

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

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

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

(2) A person rapes another person if —

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

[59] Section 207(2) (c) refers to a person penetrating the mouth of the other person to any extent with that person's penis.

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

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

- (i) The accused;
- (ii) On the specified date (in this case the 24 December 2015);
- (iii) At Beqa Island, in the Central Division;
- (iv) Penetrated the mouth of LWN, with his penis; and
- (v) At the time LWN was a child under 13 years of age.

[62] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[63] The second element relates to the specific 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.

- [64] The fourth element involves the penetration of the mouth of LWN with his penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration.
- [65] The final element is that at the time of the incident LWN was a child under 13 years of age.
- [66] As stated earlier, the issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As indicted earlier, the complainant in this case was 10 years of age at the time of the alleged incident, and therefore, she had no mental capacity to consent.
- [67] Let me explain the elements of count four, Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act.
- [68] Section 210 (1) (a) of the Crimes Act reads as follows:

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

(a) unlawfully and indecently assaults another person;

- [69] Therefore, in order for the prosecution to prove the fourth count of Sexual Assault, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case 24 December 2015);
 - (iii) At Beqa Island, in the Central Division;
 - (iv) Unlawfully and indecently assaulted LWN, by fondling and sucking her breasts.
- [70] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [71] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

- [72] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of fondling and sucking the complainant's breasts by the accused is an indecent act and thereby amounts to Sexual Assault.
- [73] You need to bear in mind that although the charge refers to both fondling and sucking of the breasts of the complainant, it is sufficient for the prosecution to establish beyond reasonable doubt that the accused did either of the two acts-fondling the breasts or sucking the breasts of the complainant.
- [74] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape and Sexual Assault are obviously considered as Sexual Offences. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.
- [75] If you are satisfied beyond any reasonable doubt that the accused, on 23 December 2015, at Beqa Island, penetrated the complainant's vagina with his tongue, then you must find him guilty of the first count of Rape.
- [76] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the first count of Rape.
- [77] If you are satisfied beyond any reasonable doubt that the accused, on 24 December 2015, at Beqa Island, penetrated the complainant's mouth with his penis, then you must find him guilty of the second count of Rape.
- [78] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the second count of Rape.
- [79] If you are satisfied beyond any reasonable doubt that the accused, on 24 December 2015, at Beqa Island, penetrated the complainant's vagina with his tongue, then you must find him guilty of the third count of Rape.
- [80] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the third count of Rape.
- [81] If you are satisfied beyond any reasonable doubt that the accused, on 24 December 2015, at Beqa Island, unlawfully and indecently assaulted LWN by fondling and sucking her breasts, then you must find him guilty of the fourth count of Sexual Assault.

- [82] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the fourth count of Sexual Assault.
- [83] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [84] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as *“Final Admitted Facts”* without placing necessary evidence to prove them:
1. The complainant in this matter is LWN.
 2. The accused is AK.
 3. The accused is originally from Soliyaqa Village, Beqa Island.
 4. The complainant was at Soliyaqa Village, Beqa Island on the 23rd and 24th of December 2015 where she was spending her Christmas and New Year’s holidays.
 5. The complainant was medically examined by Dr. Sainimili Bulabu, on the 5th of March 2016.
 6. The accused was interviewed under caution on the 5th of May 2016 by DC Tevita Naiteqe.
 7. The accused was charged on the 5th of May 2016 by D/CPL 2030 Tuaci T.
- [85] Since the prosecution and the defence have consented to treat the above facts as *“Final 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

- [86] The prosecution, in support of their case, called the complainant (LWN), her aunt, Arieta Naikabisa, a Medical Officer, Dr. Sainimili Bulabu and four police witnesses. The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit PE1- Birth Certificate of the complainant.

Prosecution Exhibit PE2A-PE2D- Letters/Notes written by the complainant.

Prosecution Exhibit PE3- Medical Examination Report of the complainant.

Prosecution Exhibit PE4- The caution interview statement of the accused.

[87] Evidence of the complainant LWN

- (i) *The complainant stated that she is now 12 years of age. Her date of birth is 23 December 2005. Her birth certificate was tendered to Court as Prosecution Exhibit PE1.*
- (ii) *She testified that she currently lives at Malola in Nadi, with her aunt Arieta Naikabisa and uncle Setareki Inoke. She has been staying with them for 5 years. Both her parents had passed away. Apart from her uncle and aunt, her maternal grandmother, Makereta Lewaniceva, also stays in the same house.*
- (iii) *She is attending Shiri AD Patel Memorial Primary School in Nadi and is in Year 3.*
- (iv) *The complainant testified that she spent the Christmas holidays in 2015 in Soliyaga Village in Beqa Island. She had travelled to Beqa with her grandmother and her brother Avaitia Bavotua (who is now 15 years old). Whilst in Beqa she had stayed at her grandmother's residence.*
- (v) *She testified that on 23 December 2015, she was at her grandmother's home. Her grandmother had told her to get something from outside. When she was standing outside, she saw the accused, whom she refers to as Amena calling her from besides his home. Amena is her uncle from her mother's side. She said she had known Amena since she was in Class 1.*
- (vi) *The complainant said that she could see Amena's house from her grandmother's house, because her grandmother's house is located on top of the hill. At the time she had been wearing a top skirt and a shorts. She did not recall what she was wearing on her upper body.*
- (vii) *When she saw Amena calling her from his house, she had gone to his house. Amena had told her to go to the bush near his house. It had been between 1.00 and 2.00 in the afternoon. She said she knew the time as she was wearing a small watch.*
- (viii) *After going into the bush, Amena had first kissed her mouth. Then he had taken off her shorts and her panty and licked her vagina. He used his tongue to lick her vagina. She further testified to the incident which took place as follows:*

Q. *Can you tell us when he licked your vagina, how were you positioned?*

A. *I was standing.*

Q. *How were you standing?*

A. *I was standing straight.*

Q. *What were you standing on?*

A. *I was standing on the soil.*

Q. *And how was Amena positioned?*

A. *He was sitting down.*

Q. *What was he sitting on?*

A. *He was sitting on a rock.*

- Q. Where was Amena's hands?
- A. He was holding my legs.
- Q. And how was he holding your legs?
- A. I was standing, he was sitting down and holding my legs so I couldn't move.
- Q. When Amena was sitting down, where was Amena's face?
- A. Pointing to my vagina.
- Q. Can you tell us what did you feel in your vagina?
- A. It's feeling like its wet.
- Q. Do you know how did it get wet?
- A. No Madam.
- Q. Where did his tongue go?
- A. Inside my vagina.
- Q. Do you know how long his tongue was inside your vagina for?
- A. For 5 minutes.
- Q. When Amena was licking your vagina, what were you doing?
- A. I was just standing still.
- Q. When Amena was licking your vagina at the bush, was there anyone else at the bush?
- A. No.

- (ix) The witness testified that thereafter, Amena had told her to wear her clothes. He had also told her to meet him again tomorrow, in the afternoon, in the bush.
- (x) After this the complainant had then gone home. She had then gone with her cousin sister to have a bath. She had not told anyone about what happened on 23 December 2015, because she was scared. When asked what she was scared of, she said "If I tell my grandmother, my grandmother will scold me". "Because if I do something wrong, she would scold me and smack me".
- (xi) The witness then testified to the incidents which took place on 24 December 2015. Amena had called her again. She had gone to him. Then he told her to go into the bush, and she had complied. This was the same bush that she went to with Amena the previous day. The time had been between 1.00 and 2.00 p.m.
- (xii) She testified that Amena had then kissed her mouth, taken off her shorts and panty and licked her vagina. Then he had sucked her breasts, after which he had told her to wear her clothes. At the time Amena was licking her vagina, she had been standing on the soil. Amena had been sitting down on a rock. He had used his tongue to lick her vagina. When Amena was licking her vagina, his face was pointing towards her vagina. Amena's hand were holding her legs. She had felt Amena's tongue go inside her vagina, and felt wet. Amena had also been licking her vagina for about 5 minutes.

- (xiii) Prior to sucking her breasts, Amena had pulled her top skirt up. Amena had used his tongue to suck her breasts. He had been sucking her breasts for about 2 minutes.
- (xiv) After sucking her breasts, Amena had told her to wear her clothes and told her to wait. Thereafter, he had turned towards the sea, and taken out his penis. He had then forcefully put his penis into her mouth. Thereafter, a white chemical had come out of his penis. The witness testified that Amena's penis went inside her mouth. It had been inside her mouth for 2 minutes. Whilst his penis was in her mouth, Amena was pushing her head towards his penis.
- (xv) Thereafter, he had taken his penis out of her mouth. He had worn his shorts/pants and told her to go home.
- (xvi) The witness had then proceeded to her grandmother's house. She did not tell anyone about the incident which happened that day either. She explained that she was scared.
- (xvii) After spending Christmas and New Year at Soliyaga, the complainant had come back to Nadi. She testified that after returning to Nadi, she wrote a letter about what Amena did to her and put it under her mattress. When the complainant was asked the following questions she testified as follows:

- Q. Why did you write a letter?
- A. Because she used to think about it (the incident).
- Q. Who did you write the letter to?
- A. To Amena.
- Q. How did you feel about Amena at that time?
- A. I was feeling very good.
- Q. Why did you feel very good about Amena?
- A. Because what he did to me, I like it.

- (xviii) She stated, that her aunt, Arieta Nalkabisa had found the letter and had inquired from her about it.
- (xix) When asked as to whether the things which she described that Amena did to her, whether she had ever seen those things happen before, the complainant answered No.
- (xx) The complainant clearly identified Amena as the accused in Court.
- (xxi) The prosecution tendered the said letters/notes written by the complainant as Prosecution Exhibits PE2A-PE2D. The complainant confirmed that she had written the said letters herself and that all four notes were written on one day. The letters were written in the Itaukei language. The complainant read out the contents of the notes (which were then translated into English by my Assistant Court Officer/Court Clerk).
- (xxii) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.

- (xxiii) It was put to the complainant that she had never mentioned in her complaint made to the Nadi Police that the accused's tongue had gone inside/went inside, her vagina. It was also put to her that she had not mentioned in her statement made to the Nadi Police about the accused putting his penis in her mouth.
- (xxiv) Furthermore, it was put to the complainant that she had not made any mention in her statement to the Navua Police that the accused's tongue went inside her vagina.
- (xxv) It was also put to the complainant that certain things she had stated in the letters marked as Prosecution Exhibits **PE2A-PE2D** had never happened. The defence suggested to the complainant that she was merely imagining these things that she had stated in the letters, and that the accused had never done the things stated.

[88] Evidence of Dr. Sainimili Bulabu

- (i) Currently she is serving as a Medical Officer at the Nadi Hospital. She has been based at Nadi Hospital since 2015. She has been practising as a Medical Officer since 2013.
- (ii) She had conducted a medical examination on the complainant, on 5 March 2016 at 15.06 hours. The Medical Examination Report was tendered to Court as Prosecution Exhibit **PE3**.
- (iii) The Doctor testified as to the specific medical findings as found in column D12.
- (iv) The doctor was asked to explain the make-up of the female genitalia. She testified that the term external genitalia means everything outside the vagina – which comprises, inter alia, the clitoris, labia majora, and labia minora. The internal genitalia consists of the vagina because it is the only thing that goes inwards.
- (v) The Doctor was asked the following questions in examination in chief:
 - Q. If a female was to be standing and someone's face was directly facing her vaginal area, what part of the female genitalia would be exposed?
 - A. In that situation the whole female genitalia would be exposed – both the external and internal genitalia.
 - Q. And if that person who was facing the vagina had the tongue touching that area, would it be possible for the tongue to go into the vaginal opening?

A. Usually the tongue is a muscular organ that we use for chewing and mastication. So it is quite a strong organ. So it could have penetrated that area.

Q. If a tongue were to go into the vagina of a child of ten years of age, what type of injuries would you expect to see after 2 to 3 months?

A. Usually if it is done with force, you would see bruising around the period. But within 2-3 months the healing process would have occurred and none of those changes could be seen at the time of examination. Bruising would take minimum of 2-3 days to about 2 weeks to resolve/to heal.

Q. And in this particular patient you examined, you did not find any such bruising in the vaginal area?

A. No.

Q. If a penis had white chemical coming out after a penis had been placed inside a mouth, and the penis had been moving inside the mouth – what in your opinion would be that white chemical?

A. It would most probably be male's ejaculate, which consists of sperm or seminal fluid.

.....

Q. In your medical opinion, is it possible that the absence of any injury in the vagina does not rule out the possibility of penetration by tongue into the vagina which had occurred 2-3 months prior to examination?

A. Yes, it does not rule out.

[89] Evidence of Arieta Naikabisa

- (i) Currently she is residing in Malolo in Nadi. She works as a Machinist in Nadi.
- (ii) The complainant is her husband's niece. Her husband is the brother of the complainant's mother. The complainant and her brother reside with her and her husband in Malolo in Nadi.
- (iii) She testified that on 4 March 2016, she was cleaning the bedroom of the two siblings (the complainant and her brother). She said this was a Friday. She had held up the mattress to sun it out. Then she saw one piece of paper. It was folded nicely and was under the mattress. The complainant's

- purse was also under it. She had taken the paper and read it. At the time she read the first paper, she was scared and worried.
- (iv) Thereafter, she had opened the purse. There she had found two other pieces of paper. Later the witness said that she found three other pieces of paper inside the purse. She read them. "I thought that she is a small child writing this kind of thing".
 - (v) On the next day, which was a Saturday, when the complainant and the witness were along, she had called the complainant and asked about the pieces of paper and the contents thereof. The first thing she had asked the complainant was whether she had written these notes. The complainant then started crying. When asked for the reason she had written the letters, the complainant had said that one Amena did something to her in the village. She said, "Amena touched my breasts and sucked my breasts and force me to suck his balls. He took off my panty and licked me. He did it twice to me".
 - (vi) When asked, "Did she say where he licked her?" The witness stated thus: "He forced LWN. He licked her vagina.
 - (vii) Later that day, after lunch she had taken LWN together with the letters and gone and report the matter to the Nadi Police Station,
 - (viii) The witness testified that apart from the Nadi Police Station, statements had also been recorded at the Navua Police Station.

[90] Evidence of DC 4349 Tevita Naiteqe

- (i) He is an officer currently attached to the Navua Police Station. He has 18 years of service in the Fiji Police Force. For the past 10 years he has been serving at the Navua Police Station.
- (ii) He testified that on 5 May 2016, he was based at the Crime Branch of the Navua Police Station. He was on duty that day. He had been directed to record the caution interview statement of the accused, AK.
- (iii) The caution interview statement had been recorded by him in the Crime Office. The statement had been recorded in the English language and was in question and answer format. He and the accused had signed the said statement. The caution interview statement of the accused was tendered to Court as Prosecution Exhibit PE4.
- (iv) The witness testified that the recording of the statement had commenced at 9.30 in the morning, on 5 May 2016, and concluded at 2.50 in the afternoon. He confirmed that there was no witnessing officer present during the recording of the caution interview statement.
- (v) However, he has noted Crime Corporal Tuaci, and Detective Constable Naicker as other persons present during the interview. The witness explained that Crime Corporal Tuaci and DC Naicker had been present at the Crime Office that morning.

- (vi) *The witness testified that the accused gave his caution interview statement voluntarily and that no inducement, threat or promise was offered to the accused during the recording of his statement.*

[91] Evidence of Sergeant 2030 Tuaci Isaac Rasoqosoqo

- (i) *He is an officer currently attached to the Taveuni Police Station. He has 29 years of service in the Fiji Police Force.*
- (ii) *He testified that in May 2016, he was based at the Crime Branch of the Navua Police Station. He had served at the Navua Police Station for almost 20 years.*
- (iii) *He testified that on 4 May 2016, he was involved in the arresting of the accused. The accused had been arrested at Soliyaga village in Beqa Island. The officers had travelled to Beqa by fibre glass boat. WPC Maria Fane, the complainant and the complainant's aunt had also been present at the time.*
- (iv) *After arresting the accused and visiting the crime scene they had returned to Navua the same day.*
- (v) *The witness confirmed that WPC Fane was the Investigating Officer in the case.*
- (vi) *The witness also testified that he had been present in the crime office at the time DC Tevita had commenced recording the caution interview statement of the accused.*

[92] Evidence of WPC 4567 Maria Fane

- (i) *She is an officer currently attached to the Navua Police Station. She has served 10 years in the Fiji Police Force. She has been serving at the Navua Police Station since 2015.*
- (ii) *In May 2016, she was based at the Crime Branch of the Navua Police Station.*
- (iii) *She confirms that she was the Investigating Officer in this case. At the time she was the sole officer attached to the Sexual Offences Unit (SOU) of the Navua Crime Branch.*
- (iv) *The officer testified that on 4 May 2016, she was on duty at the Navua Police Station. She had been recording the statement of the complainant, LWN.*
- (v) *She testified that at 12.25 p.m., she had left the station. She had travelled from Navua to Beqa Island by fibre glass boat. She had wanted to visit the crime scene at Beqa Island. The complainant and her aunt had also accompanied her. She had requested Crime Corporal Tuaci to accompany her as well, as it was the first time she was travelling to Beqa Island.*

- (vi) *After visiting the crime scene, they had returned to Navua the same day. Crime Corporal Tuaci had taken into custody the accused in the case and he too had been brought to the Navua Police Station for investigations.*
- (vii) *She categorically denies that she met or spoke to the accused at the Traffic Room on 4 May 2016. She also denies that she ever spoke to the accused the next day, prior to his caution interview statement being recorded.*

[93] Evidence of PC 3633 Ravln Naicker

- (i) *He is an officer currently attached to the Navua Police Station. He has served the Fiji Police Force for the past 13 years.*
- (ii) *In May 2016, he was based at the Crime Branch of the Navua Police Station.*
- (iii) *On 5 May 2016, he was on duty as the "Inquiry Man". He had recorded the caution interview statement of a suspect by the name of Eugene Ladpeter. This had been conducted at the Crime Office. He had commenced the recording of the caution interview statement around 9.00 in the morning and concluded around 5.30 in the evening the same day.*
- (iv) *He confirms that DC 4349 Tevita was recording the caution interview statement of another suspect in the same room. Crime Corporal Tuaci had also been present at the commencement of the said caution interview statement.*
- (v) *The witness testified that he did not participate in the recording of the caution interview statement which DC Tevita was conducting.*
- (vi) *The witness categorically stated that other than for the named officers, no other Police Officers entered the Crime Office during the time the caution interview statements were being recorded.*

[94] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could give sworn evidence from the witness box and/or call witnesses on his behalf. He could also address Court by himself or his counsel. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to offer evidence under oath and also called a witness in support of his case.

Case for the Defence

[95] The accused gave evidence in support of his case. He also called witness Maikeli Tuwai.

[96] Evidence of AK

- (i) The accused testified that he is currently residing in Tacirua with his sister's family. He stays there with his mother, his wife and four children. He has been residing in Tacirua for more than one year. The witness later said, that he has been residing in Tacirua since November 2016.*
- (ii) Prior to coming to Tacirua he was residing in Soliyaga Village in Beqa Island.*
- (iii) He testified that during the month of December 2015, he was residing at Soliyaga Village in Beqa Island with his family. He also confirmed that the complainant was present in Beqa Island during the said period.*
- (iv) He testified that on 23 December 2015, he had got up in the morning and had his breakfast. Around 8.00 in the morning, he had seen the complainant was playing outside his house together with other children. After a while her grandmother had called the complainant and she had left. Later the witness said that it was around 10.00 in the morning when the complainant's grandmother had called her. He testified that was the last time he saw her that day.*
- (v) Thereafter, he said that he had gone to his plantation. The plantation is about 35 to 45 minutes from his house. He testified that he had spent the whole day in the plantation. He didn't even come home for lunch. He had returned home only around 6.00 or 7.00 in the evening.*
- (vi) He categorically denies that he ever called LWN or that he took her to the bush on 23 December 2015. He also categorically denies the allegations made against him in respect of that day.*
- (vii) On 24 December 2015, the witness stated that he had got up around 6.00 or 7.00 in the morning, had his breakfast and waited for Maikeli. They wanted to go to the forest together. Maikeli is his sister's son.*
- (viii) The witness testified that around 8.00 in the morning, he had left with Maikeli to Maikeli's plantation. He said it will take about one hour to get to his plantation. He testified that he had been with Maikeli at the plantation until about 4.30 in the evening that day. When they had returned back to the village, it had been around 6.00 in the evening.*
- (ix) The witness categorically denies that he ever called LWN or that he took her to the bush on 24 December 2015. He also categorically denies the allegations made against him in respect of that day.*
- (x) The witness testified to the events which took place in the afternoon of 4 May 2016. He had been at Soliyaga Village in Beqa Island. (Crime Corporal)*

Tuaci had informed him that they had come to take him to the Navua Police Station for questioning. He had then accompanied the officer to Navua. They had travelled to Navua by fibre glass boat. Along with him, officer Tuaci, WPC Maria, the complainant and her aunt had also travelled in the same boat.

- (xi) On arrival in Navua he had been escorted to the Navua Police Station by Tuaci. He had been told to wait in the Traffic Room. The witness testified that while he was in the Traffic Room WPC Maria had come and spoken to him. The witness had said he knew nothing about the case. Then WPC Maria had told him "If you don't make this easy we will go and get your family-your wife and your children". WPC Maria had then told him that she will come again and meet him the next morning.
- (xii) The witness had spent the entire night in the Traffic Room.
- (xiii) The witness testified that the next morning WPC Maria had come and met him once again. He said this was between 9.00 or 10.00 in the morning. Maria had repeated what she had told him the night before. After a few minutes, DC Tevita had come and taken him to the Crime Office.
- (xiv) Thereafter, DC Tevita had begun to question him. The witness testified that at the time he entered the Crime Office, in addition to DC Tevita, Tuaci, Naicker had been there and 2 or 3 other police officers were sitting just behind the main door of the Crime Office.
- (xv) The witness said that while he was being questioned by Tevita, one of these other officers had started swearing at him. He had said to make the case easy for them otherwise that he will be punched.
- (xvi) The witness testified that due to these threats from WPC Maria and this other police officer that he had felt threatened and decided to admit to the allegations made against him.
- (xvii) The accused was cross examined at length by the Prosecution. However, he continued to deny all the allegations against him.

[97] Evidence of Maikeli Tuwai

- (i) He testified that he resides in Soliyaga Village in Beqa Island. He does farming for a living. He is 27 years of age.
- (ii) He is a nephew of the accused.
- (iii) He confirmed that in December 2015, he was in Soliyaga Village in Beqa Island.

- (iv) *He testified that on 24 December 2015, he had woken up in the morning, had his breakfast, and left for the forest at around 8.00 in the morning. His uncle, AK had accompanied him.*
- (v) *The witness testified that he had been in his farm/plantation the whole day and had returned to the village only in the evening. He testified that the accused had been with him at his plantation the whole day.*

Analysis

- [98] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, her aunt, Arieta Nalkabisa, Medical Officer, Dr. Sainimili Bulabu and four police witnesses. The defence relied on the evidence of the accused himself and witness Maikeli Tuwai.
- [99] The prosecution tendered the letters or notes written by the complainant as Prosecution Exhibit PE2A-PE2D. Please bear in mind that you cannot use whatever is written in those letters to corroborate the evidence of the complainant. As I have stated earlier corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.
- [100] However, in reference to these letters, the defence position is that the complainant was imagining events or that those statements were inconsistent with her testimony in Court. It is open for you to consider the defence position in light of the directions I have given you in respect of how you deal with inconsistencies and omissions.
- [101] The prosecution relies upon the evidence of the Medical Officer, Dr. Sainimili Bulabu. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [102] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [103] In this case the prosecution is also relying on the admissions made by the accused in his caution interview statement.
- [104] Any admission made by an accused in his caution statement is admissible and sufficient evidence to prove his guilt to a charge. However, there are some applicable principles of law in relation to this evidence. The prosecution must prove that the caution interview statement was made by the accused voluntarily and fairly. The prosecution must establish these facts beyond reasonable doubt. The issue of

voluntariness and fairness is important in deciding the truthfulness of the statement and what weight and probative value should be attached to the said statement made by the accused.

[105] Whether the accused gave his statement voluntarily and fairly and whether the statement set out a set of events in relation to the offences on which you can rely and accept, is a matter for you. Of course if you believe that the statement was not made by the accused voluntarily or that there were general grounds of unfairness, you may think that you cannot put any weight on it. However, if you believe that the accused gave his caution interview statement without inducement, threat or promise, and that the police acted with fairness, you may think that they set out a version of the evidence which will assist you in deciding on the guilt or otherwise of the accused. However, the question of the truthfulness of the statement and what weight and probative value you can put on the admissions made in the said statement is a matter of fact for you to decide.

[106] The prosecution says that the caution interview statement was not obtained under inducement, threat or promise and that the police acted with fairness. You have heard from the police officers that there were no threats or force or any form of intimidation of any kind by anyone on the accused and his statement was freely and voluntarily given and that they correctly recorded what the accused said. I reiterate that the truthfulness of the accused's statement and what weight and probative value you give to the said statement made to the police is entirely a matter for you.

[107] As I have informed you earlier, the burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

[108] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.

[109] As I have stated before, 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 is proved as it has been agreed that 'The accused is AK'. All the other elements of the four offences must be proved by the prosecution beyond reasonable doubt.

[110] The accused has testified in Court and totally denies all the allegations against him. The accused is also taking up the defence of *alibi*, in respect of the incidents which took place on 24 December 2015. For this purpose he is relying on the evidence of Maikeli Tuwai, who is his nephew.

[111] May I now direct you on the defence of *alibi*. Defence of *alibi* means, the accused takes up the position that he was not at the crime scene but elsewhere at the time the

crime was committed. The accused says that he was in the forest/plantation together with his nephew Maikeli at the time the alleged offences were committed on 24 December 2015. He called his nephew Maikeli Tuwai to give evidence on his behalf on the defence of alibi.

- [112] Please bear in mind that though an accused raises the defence of *alibi*, there is no burden for the accused to prove that he was elsewhere during the time the offences are alleged to have been committed. The prosecution should still prove that it was the accused that committed the offences and therefore the *alibi* is not true.
- [113] When you consider the evidence of the accused regarding his *alibi*, if you think that the version of the accused is true or it may be true, then you must find the accused not guilty of the offences. However, you should also bear in mind that you should not assume that the accused is guilty of the offence merely because you decide not to accept his *alibi*. You should remember that sometimes an accused may invent an *alibi* just because it is easier to do so rather than telling the truth. The main question remains the same. That is, whether you are sure that it was the accused who committed the offences.
- [114] You have heard the evidence of the witnesses for the prosecution as well as the defence. Therefore, it is for you to decide which witnesses are truthful and which are not. If you accept the version of the accused that he was at Maikeli's plantation on 24 December 2015, and never got involved with the crime that day, then you must find the accused not guilty of the said charges (Counts 2, 3 and 4). However if you do not accept his version, that alone does not mean that he is guilty of the charges because the burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times. It is for the prosecution to prove that the accused committed the crime and not for the accused to prove that he was elsewhere.
- [115] The defence also showed certain inconsistencies and omissions in the evidence given by the complainant and her aunt during their testimony in Court. I have already directed you on how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected. However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question.
- [116] To what extent such inconsistency or omission 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.

- [117] 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 charges, 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 has proved the elements of four offences, beyond any reasonable doubt.
- [118] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider his evidence and the evidence of Maikeli Tuwai also for its consistency and also the probability of their version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case.
- [119] If you neither believe the evidence adduced by the defence nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charges.
- [120] However, I must caution you that even if you reject the evidence of the defence as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.
- [121] You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the other counts as well.
- [122] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you believe the evidence of the defence, then you must find the accused not guilty of the charges;*
 - ii. *If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charges;*
 - iii. *If you reject the version of the defence, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
 - iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charges;*
 - v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of rape and*

sexual assault have been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.

[123] Any re directions the parties may request?

[124] 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 separately on the charges 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.

[125] Your possible opinions should be as follows:

Count One

Rape- Guilty or Not Guilty

Count Two

Rape- Guilty or Not Guilty

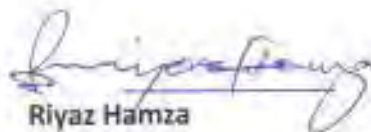
Count Three

Rape- Guilty or Not Guilty

Count Four

Sexual Assault- Guilty or Not Guilty

[126] I thank you for your patient hearing.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Solicitors for the State

Solicitors for the Accused

: Office of the Director of Public Prosecutions, Suva.

: Office of the Legal Aid Commission, Suva.