

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 205 of 2016

STATE

V

JONE KALE

Counsel : Ms. L. Latu for the State.
: Ms. K. Vulimainadave [LAC] for the Accused.

Dates of Hearing : 11 and 12 March, 2019
Closing Speeches : 13 March, 2019
Date of Summing Up : 14 March, 2019

SUMMING UP

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

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 eight counts of rape. (A copy of the amended information is with you).

COUNT 1

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, sometime between the 1st day of January, 2015 and the 18th day of January, 2015 at

Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, a child under the age of 13 years.

COUNT 2

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, sometime between the 19th day of January, 2015 and the 24th day of January, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, a child under the age of 13 years.

COUNT 3

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, sometime between the 1st day of May, 2015 and the 31st day of May, 2015 at Toge, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

COUNT 4

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, on the 31st day of December, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

COUNT 5

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, sometime between the 1st day of August, 2016 and the 31st day of August, 2016 at Babriban, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

COUNT 6

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, on the 3rd day of September, 2016 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

COUNT 7

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, on the 5th day of September, 2016 at Babriban, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

COUNT 8

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, on the 3rd day of October, 2016 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

14. To prove counts one and two the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant "RM" with his penis;
 - (c) "RM" was below the age of 13 years.
15. 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 12 years and 8 months during the period of the alleged offences in counts one and two. I therefore direct you that consent of the complainant is not an issue in respect of these two counts.
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 vagina with the penis. The slightest of penetration of the complainant's vagina by the accused's penis is sufficient to satisfy the act of penetration.
18. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was born on 29 May, 2002 which establishes that she was below the age of 13 years at the time of the alleged incidents in counts one and two.

19. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis then you must find the accused guilty of rape for counts one and two. 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 offences of rape in counts one and two.
20. In this trial the accused has denied committing the offences 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 vagina of the complainant with his penis.
21. You must be satisfied that the prosecution has proved all the elements of counts one and two beyond reasonable doubt in order for you to find the accused guilty. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offences, then you must find the accused not guilty.
22. To prove counts three to eight the prosecution must prove the following elements of the offences of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant "RM" with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
23. In this trial the accused has denied committing the offences of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the

- complainant was not consenting or didn't care if she was not consenting at the time.
24. The first element of the offences is concerned with the identity of the person who allegedly committed those offences.
 25. The second element is the act of penetration of the complainant's vagina by the penis. The slightest of penetration of the complainant's vagina by the accused's penis is sufficient to satisfy the act of penetration.
 26. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
 27. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
 28. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
 29. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's vagina without her consent as per counts three to eight then you must find the accused guilty as charged.

30. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offences of rape, then you must find the accused not guilty of the offences he is charged with.
31. 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.
32. In this case, the accused is charged with eight counts of rape, you should bear in mind that you are to consider the evidence in 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.
33. You must be satisfied that the prosecution has proved all the elements of all the offences beyond reasonable doubt in order for you to find the accused guilty of either or all the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or all the offences, then you must find the accused not guilty.

FINAL AMENDED ADMITTED FACTS

34. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final amended admitted facts.
35. From the final amended admitted facts you will have no problems in accepting the above as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should

accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.

36. 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 not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

37. The prosecution called 8 witnesses to prove its case against the accused.
38. The complainant informed the court that she was born on 29 May, 2002. The birth certificate of the complainant was marked and tendered as prosecution exhibit no.1. From 1st January, 2015 she started staying with her mother and step father the accused at Balevuto, Ba. The house in which they were living did not have any rooms.
39. The complainant was able to recall eight occasions the accused had forcefully penetrated her vagina with his penis. The complainant informed the court as follows.
40. Between 1st January, 2015 to 18th January, 2015 the complainant after lunch returned home from the river to change her wet clothes. The complainant wanted to change her clothes in the bathroom but the accused insisted that she changed her clothes in the house. At this time the accused was lying on the bed.

41. There was no one else in the house other than the complainant and the accused. After sometime the accused came pulled the hand of the complainant and made her lie on the bed. The complainant was still wearing her towel. The accused thereafter forced his penis into her vagina when she shouted, the accused blocked her mouth with a pillow.
42. After this, the accused threatened the complainant with a knife and warned her if she told anyone about what he had done to her he would kill her. The complainant's mother was not at home.
43. When the complainant's mother came home she did not tell her anything about what the accused had done to her because of the threat made to her by the accused.
44. The second incident also happened in January, 2015 during the first term of the school she was in class 8. After returning home from school the complainant was changing her clothes, the accused was in the house.
45. While changing her clothes the accused came and pulled her hand and held it tightly. The accused warned her not to shout since he had a knife ready. The accused made her lie down and forcefully inserted his penis into her vagina. The complainant was crying and tried to call for help but the accused was blocking her mouth.
46. The accused thereafter threatened the complainant not to tell anyone about what he had done otherwise he will kill her. The complainant's mother was not at home at the time, when her mother came home the complainant did not tell her mother what the accused had done to her because the accused had threatened her with a knife not to tell anyone.

47. The third time was in May, 2015 at around 11.00pm the accused and the complainant went on horseback to a village in Toge, when they were returning the accused forcefully had sexual intercourse with her. The accused had a cane knife with him, he told the complainant to remove her clothes or else he will do something to her.
48. When the complainant refused he forcefully removed her clothes, made her lie down in the bush and forcefully inserted his penis into her vagina. The complainant wanted to shout but did not since it was night time and they were far away from the village. The accused thereafter warned the complainant not to tell her mother or anyone about what he had done to her. The complainant did not tell anyone about the incident.
49. The fourth incident happened on New Year's Eve on 31st December, 2015 in the night there was a church service on the other side of the village. Before the church service finished the accused went home leaving behind the complainant and her mother.
50. When the church service was about to end the complainant was sent home by her mother to bring the torch. When the complainant reached home the accused opened the door and asked the complainant whether the church service had finished.
51. The complainant told the accused it had not, upon hearing this, the accused pulled her into the house and closed the door. The accused made the complainant lie on the bed removed her clothes and forcefully inserted his penis into her vagina. The accused also blocked the complainant's mouth. The accused threatened the complainant with a knife and warned her not to tell anyone about what he had done.

52. After this the accused gave the complainant the torch, when she arrived at the church she did not tell anything to her mother because the accused had threatened her with a knife not to tell anyone.
53. The fifth incident happened in August, 2016 at Babriban when the accused and the complainant were returning home on horseback. It was night time around 11.00pm the accused after pulling some cassava plants forcefully removed the complainant's clothes and forcefully inserted his penis into her vagina. The complainant wanted to shout for help but did not since they were in the middle of the bush and no one would hear her. After this the accused warned the complainant not to tell her mum or anyone otherwise he would kill her.
54. When the complainant reached home she did not tell her mother about what the accused had done to her because of his threats.
55. The sixth incident happened on 3rd September, 2016 when she came home from town after about 6.00pm. The accused was at home the complainant went and changed her clothes and then had tea.
56. After a while the complainant went to lie down on the bed shortly after she saw the accused lying beside her. When the complainant told the accused to go and lie down on the floor he blocked her mouth and told her to remove her clothes. After this, he forcefully inserted his penis into her vagina. The complainant tried to shout but the accused pushed her down and blocked her mouth. Her mother was not at home at this time.
57. The accused warned the complainant not to tell anyone about what he had done to her. The complainant's mother returned home in the night but she did not tell her mother what the accused had done to

her because the accused had threatened her if she told anyone he would kill her.

58. The seventh incident also happened in Babriban on 5th September, 2016 the complainant went with the accused during the night, her mother had allowed her to go with the accused. They had gone to check the fence, on their way back the accused forcefully removed her clothes and forcefully inserted his penis into her vagina.
59. The complainant shouted for help but they were far away from the village, after this the accused warned the complainant not to tell anyone about what he had done to her. He also threatened her that he will kill her if she told anyone.
60. The eighth incident happened on 3rd October, 2016 at home when she returned from the Ba Riverside Carnival.
61. The complainant came home at night her mother was not at home. The accused was at home, the complainant went to change her clothes at this time the accused came got hold of her and pulled her to the bed. The accused forcefully inserted his penis into her vagina.
62. The complainant shouted for help but no one came to rescue her. The accused later showed her the knife and threatened her not to tell anyone. When her mother came home she told her what the accused had done to her but she did not believe the complainant.
63. The accused told her mother that the complainant was a liar and for her not to believe the complainant. During a counselling session by her School Teachers on an allegation of vandalism against the complainant she told her teachers what the accused was doing to her. The matter was reported to the police by her School Teachers. The

complainant was medically examined by a doctor on 6th October, 2016. The complainant identified the accused in court.

64. The complainant in cross examination maintained that all the incidents she had told the court had happened and the accused had forcefully inserted his penis into her vagina. The complainant further denied she had made up a story to implicate the accused.
65. In respect of the 4th incident during the new year's eve the complainant agreed she had gone past many houses and many people on her way to the church but she did not complain to anyone because the accused had threatened her with a knife that he will kill her if she told anyone. When the complainant gave the torch she did not tell her mother because her mother was busy preparing food for everyone. Although there were many people in the church including her school friends the complainant did not tell them about what the accused was doing to her because of the threats made to her by the accused.
66. Again the complainant maintained that all the incidents she had narrated to court had happened and she did not tell anyone because she was really afraid of the accused. The complainant agreed when she went to the School Counselor she knew the end result of the accusation against her for vandalism would be an expulsion or suspension from the school. At the counseling the complainant agreed she had come up with the story against the accused.
67. The complainant also agreed when the accusation of vandalism had surfaced against her at school she was not staying with her mother and the accused but was staying with a couple in the village who disliked the accused.

68. The complainant disagreed with the suggestion that the couple had influenced her against the accused to make up a story of rape against him.
69. In re-examination the complainant clarified that the reason why she did not tell anyone about what the accused was doing to her was because the accused was threatening her and she did not have any money to leave the house. The complainant maintained she did not make up stories against the accused.
70. The second witness Dr. Farina Bibi Fatima informed the court that she had graduated with an MBBS degree from the University of the South Pacific in 2014.
71. On 6th October, 2016 the doctor recalled examining the complainant at Ba Mission Hospital. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no.2.
72. The initial impression of the complainant was that the complainant was alert, coherent and not in distress. The specific medical findings of the doctor were:
 - (a) The abdomen (stomach) of the complainant was soft, private part had no bruises, laceration or hematoma. The doctor explained hematoma was a collection of blood;
 - (b) Hymen was perforated meant it was broken. This could have been caused by penetrative injury such as sexual activity, penis or finger or by an object.
73. The professional opinion of the doctor was that the complainant's hymen was perforated and there were no signs of forceful penetration.

74. In cross examination the doctor stated that there was no way she could have determined the age of the perforated hymen. The doctor agreed there were no signs of any forceful penetration, however, the doctor's findings could be consistent with forceful penetration but that depended upon the force used.
75. The doctor did not rule out that a hymen could get perforated by vigorous exercises or by anything that might have penetrated the complainant.
76. In re-examination the doctor clarified that blunt force injuries could also possibly cause the injuries noted by her.

Ladies and Gentleman Assessors

77. You have heard the evidence of Dr. Fatima 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.
78. 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.

79. 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.
80. The third witness Rosalia Raqato informed the court that on 6th October, 2016 she was a teacher at Nukuloa College where the complainant was a student. The witness was tasked by the Assistant Principal to investigate an incident of vandalism in the girls' washroom.
81. During internal investigations the complainant was questioned by the witness. When the witness asked the complainant some personal questions the complainant told the witness about her step father. The complainant told her whenever she went to have her shower she normally wore tights and bra but her step father told her not to wear them while having her shower. Furthermore, when she would have her shower the accused would spy on her.
82. Her step father used to make comments such as "big breast" and "black bum" while she had her shower. At times he would show her his private parts, whenever her mother would not be at home they used to have sex together or whenever there was any opportunity they used to have sex.
83. The last time the complainant had sex with her step father was during the Ba Riverside Carnival. The witness had observed that when the complainant was talking tears were rolling from her eyes and she was in fear. The witness also informed the complainant that whatever she will tell her would be confidential. The matter was then reported to the police.

84. In cross examination the witness stated that a student would not be suspended or expelled for vandalism in the school, and it was during counseling session the complainant came with the story about what the step father was doing to her.
85. The witness agreed she did not tell the police in her police statement that the complainant had tears in her eyes or was fearful when telling her about what the step father was doing to her.
86. In re-examination the witness clarified that since this was the first time she was writing her police statement she did not know that she had to write everything. She had observed that the complainant had tears in her eyes and was fearful.

Ladies and Gentleman Assessors

87. Victims of sexual offences may react in different ways to what they may have gone through. 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.
88. 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 tell her mother or anyone about what the accused was doing to her immediately after those incidents. However, when the School Teachers were investigating the complainant about vandalism in the school the complainant told her teacher about what the accused had been doing to her.

89. This is commonly known as recent complaint evidence. The evidence given by Rosalia Raqato is not evidence of what actually happened between the complainant and the accused since Rosalia was not present and she did not see what had happened between the complainant and the accused.
90. 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 did not tell her mother or anyone about what the accused was doing to her because she was afraid of the accused who had threatened to kill her if she told anyone. However, she told her teacher that the accused was having sexual intercourse with her and therefore she is more likely to be truthful. On the other hand, defence says the complainant did not complain to her mother or anyone immediately after the alleged incidents since nothing had happened. The complainant fabricated a story against the accused during the counseling session with the teacher to avoid being suspended or expelled from the school for vandalism and therefore she should not be believed.
91. 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.
92. The fourth witness was Sergeant Simione Tuvuiya, who recalled on 6th October, 2016 at about 8.30pm he received a call from the charge room that there was a report of an allegation of rape. The witness went to Ba Police Station and formed a team after the police statement of the school teacher was recorded.

93. The witness with Constable Moro went in the police vehicle to Balevuto Village. It took them about 1 hour. The witness approached the Turaga ni Koro who directed the Police Officers to the shed where the accused was.
94. The witness and Constable Moro waited for the accused to come out of the shed when the accused came out Constable Moro approached the accused and brought him to the witness. The accused was conveyed to Ba Police Station he was cooperative and at the Police Station the accused was handed over to the charge room.
95. In cross examination the witness stated that Police Officer Sikeli was not part of the team that went to arrest the accused. The witness also stated that he was in charge of the team that arrested the accused. The accused was not handcuffed by Constable Moro and was explained why he was arrested.
96. The witness agreed it was not in his police statement that he had explained to the accused the reasons of arrest because he forgot to write this in his statement.
97. Furthermore the witness denied the accused was assaulted in his presence in the police vehicle or at Nukuloa or at the police station. The witness said that the accused was cooperative so there was no need to assault the accused.
98. The witness also denied the interviewing officer Miriama had complained to him and the other Police Officers that the accused was denying in his caution interview that he and other police Officers had physically assaulted and verbally abused the accused. The witness stated he was not part of the interviewing team.

99. The fifth witness was Detective Constable Sikeli Tokovou who informed the court that he was not involved in this case.
100. In cross examination the witness denied being part of the team that went to Balevuto Village to arrest the accused. The witness also denied assaulting the accused upon his arrest in the police vehicle from Balevuto Village to Nukuloa and from there to Ba Police Station.
101. The witness also denied assaulting the accused at the Police Station or during the caution interview of the accused after the interviewing officer had complained the accused were denying the allegations.
102. The sixth witness Morotikei Vocevoce informed the court that he has left the Fiji Police Force about 2 years ago, however, in October 2016 he was a Police Officer based at Ba Police station.
103. The witness recalled in October, 2016 he had arrested the accused at Balevuto Village he had gone with Sgt. Simione in a police vehicle to arrest the accused.
104. At the Balevuto Village the Turaga ni Koro assisted the police team by taking them to the shed where the accused was. The accused came out of the shed the witness told the accused the reason of his arrest and took him to where Sgt. Simione was waiting. The accused was not handcuffed and taken to the waiting police vehicle.
105. Upon reaching Ba Police Station the accused was taken to the crime office. Apart from arresting the accused the witness had no other involvement in the matter.
106. According to the witness when they were escorting the accused from Balevuto Village to the Police Station the accused was cooperative, he

did not make any complaints when driven to the Police Station and also at the Police Station.

107. In cross examination the witness stated he told the accused the reason for his arrest but did not handcuff him. The accused was escorted to the waiting police vehicle after his arrest by the witness accompanied by Sgt. Simione and Turaga ni Koro.
108. The witness was asked that in his police statement he had stated that the accused was escorted by villagers the witness clarified that he had meant the Turaga ni koro.
109. The witness denied assaulting the accused in the police vehicle with Constable Sikeli Tokovou, he also denied assaulting the accused at Nukuloa and shining torch light on the face of the accused whilst the accused was handcuffed.
110. The witness maintained that he was the arresting officer and that he had not seen any other Police Officer assaulting the accused at the Police Station. He stated that he had left the accused at the investigating office and left.
111. The witness denied being part of the team that verbally abused and physically assaulted the accused, he also denied the interviewing officer had informed them that the accused was denying the allegations in the caution interview.
112. The seventh witness Miriama Nadumu informed the court that she was the investigation and the interviewing officer in this case.
113. Upon receipt of the report lodged at Ba Police Station the witness went to Nukuloa College where she met the complainant, her School Teachers and the School Principal. The complainant was escorted to

the hospital for a medical check - up. On 7th October, 2016 the witness took the complainant for a crime scene visit. The witness prepared a rough sketch plan of the crime scene in the presence of the complainant. The rough sketch plan of the crime scene the house of the accused dated 7th October, 2016 was marked and tendered as prosecution exhibit no.3.

114. The witness also interviewed the accused in the iTaukei language on 8th October, 2016 which was marked and tendered as prosecution exhibit no.4. The witness also translated the original caution interview into the English language which was marked and tendered as prosecution exhibit no.5.
115. The witnessing officer was Cpl. Tomasi Nakeke whose role was to see that the interview was conducted fairly. Before the interview the accused was cooperative, she greeted the accused who appeared well.
116. The accused gave the answers in the caution interview voluntarily, he was not forced whatever answers he gave was noted down. The accused did not complain about anything, during the interview he also denied the allegation. There was no threat or assault by the witness or any other Police Officers including the witnessing officer on the accused.
117. In cross examination the witness stated that it was not true that the accused was in pain and couldn't walk properly to the crime office before the interview commenced. Further the witness said before the interview commenced she had requested the accused to be handcuffed for her safety since she was interviewing a male.
118. The handcuff was removed after question 25 before lunch. Before questioning the accused informed her that his head was paining but he did not wish to go to the hospital. The witness denied the accused had asked for pain killers due to the assaults on him by the Police

Officers. The witness agreed the accused had denied the allegation up to Q.46 of the caution interview. The witness stated it was not true that after the accused denied everything in the caution interview she complained to the other Police Officers who came and physically assaulted the accused and verbally abused him.

119. In re-examination the witness stated that the reason why the handcuff of the accused was removed was because she had gained confidence of the accused he was cooperating and voluntarily answering questions. The witness further stated the accused wanted a pain killer which was given for his headache. The accused did not want to go to the hospital.

Ladies and Gentleman Assessors

120. The caution interview of the accused is before you, the answers in the caution interview are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview.
121. During the cross examination of the Police Officers the counsel for the accused had asked questions of these officers suggesting verbal abuse, assault and unfairness by them on the accused. This means counsel was putting to these witnesses that the admissions made by the accused contained in the caution interview was not voluntarily given by him and therefore you should disregard those admissions.
122. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his caution interview then you should disregard them. If you are sure that those admissions were made by the accused, then you should consider whether those

admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.

123. The final witness was Cpl. Tomasi Nakeke who was the witnessing officer when the accused was caution interviewed. The witness was present throughout the interview to ensure that the caution interview was conducted fairly. According to the witness the accused was in good health during the interview he never complained about anything and gave his answers voluntarily to the questions asked.
124. In cross examination the witness agreed the handcuff of the accused was removed after question 25 which was fair. The witness stated that the accused was well despite asking for pain killers. He denied the interviewing officer had complained about the accused denying the allegations in the caution interview resulting in Police Officers assaulting and verbally abusing the accused. The witness stated that there was no complaint made to him by the accused and if there had been one raised he would have looked into it.
125. This was the prosecution case.

Ladies and Gentleman Assessors

126. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent and not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent.

DEFENCE CASE

127. According to the line of cross examination defence takes up the position that the accused did not penetrate the vagina of the complainant with his penis as alleged. Further defence says the complainant made up a story to avoid any suspension or expulsion from school on accusation of vandalism and was also under the influence of a couple in the village who hated the accused.
128. This was the defence case.

ANALYSIS

129. The prosecution alleges between 1st day of January, 2015 and the 24th day of January, 2015 the accused who was the step father of the complainant had forcefully penetrated her vagina with his penis on two separate occasions. At this time the complainant was 12 years and 8 months old.
130. The prosecution further alleges between 1st day of May, 2015 to 3rd day of October, 2016 on six different occasions the accused had forcefully penetrated the vagina of the complainant with his penis without her consent. The accused committed all the offences when the complainant was alone with him and on each occasion he had threatened the complainant not to tell her mother or anyone otherwise he will kill her. The complainant was afraid of the accused hence she did not tell anyone until she attended a counselling session with her School Teacher Rosalia Raqato.
131. Rosalia Raqato informed the court that the complainant told her about what her step father was doing to her, whenever she went to have her shower she normally wore tights and bra but her step father

told her not to wear them while having her shower. When she would have her shower the accused would spy on her.

132. Her step father used to make comments such as “big breast” and “black bum” while she had her shower. At times he would show her his private parts, whenever her mother would not be at home they used to have sex together or whenever there was any opportunity they used to have sex.
133. The last time the complainant had sex with her step father was during the Ba Riverside Carnival. The witness had observed that when the complainant was talking tears were rolling from her eyes and she was in fear. The matter was then reported to the police.
134. Dr. Fatima who had examined the complainant on 7th October, 2016 informed the court of her specific medical findings:
 - (a) The abdomen (stomach) of the complainant was soft, private part had no bruises, laceration or hematoma;
 - (b) Hymen was perforated meant it was broken. This could have been caused by penetrative injury such as sexual activity, penis or finger or by an object.
135. The professional opinion of the doctor was that the complainant’s hymen was perforated and there were no signs of forceful penetration.
136. On 8th October, 2016 the accused was caution interviewed by the police in which he admitted having sexual intercourse with the complainant.
137. The defence on the other hand denies committing the offences as alleged. According to the line of cross examination defence takes up the position that the accused did not penetrate the vagina of the

complainant with his penis as alleged. Further defence says the complainant made up a story to avoid any suspension or expulsion from school on accusation of vandalism and was also under the influence of a couple in the village who hated the accused.

Ladies and Gentleman Assessors

138. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
139. 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 forthright 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.
140. 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.
141. 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 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.

142. 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.

143. 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. 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.

144. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

145. In this case, the accused is charged with eight counts of rape, as mentioned earlier you should bear in mind that you are to consider the evidence in respect of 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.

146. Your possible opinions are:-

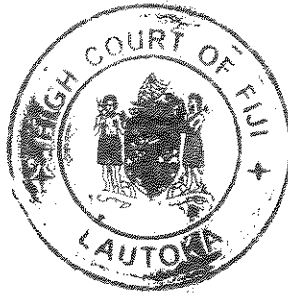
Count One:	<u>RAPE:</u>	GUILTY OR NOT GUILTY.
Count Two:	RAPE:	GUILTY OR NOT GUILTY.
Count Three:	RAPE:	GUILTY OR NOT GUILTY.
Count Four :	RAPE:	GUILTY OR NOT GUILTY.
Count Five:	RAPE:	GUILTY OR NOT GUILTY.
Count Six:	RAPE:	GUILTY OR NOT GUILTY.
Count Seven:	RAPE:	GUILTY OR NOT GUILTY.

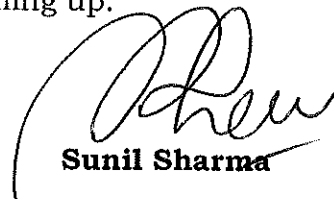
Count Eight: **RAPE:** GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

147. 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.

148. 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.




Sunil Sharma
Judge

At Lautoka
14th March, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.