

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 395 of 2016

STATE

vs.

- 1. EV**
- 2. MN**

Counsel: Mr. T. Tuenuku for the State
Mr. A. Chand for Accused 1
Mr. A. Rayawa for Accused 2

Date of Hearing: 28th, 29th, 30th, 31st January 2019

Date of Summing Up: 04th February 2019

SUMMING UP

1. The names of the complainant and the accused are suppressed.
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.

3. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
4. I may comment on the facts if I think it will assist you when 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 facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
5. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.

7. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

8. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
9. The burden of proof of the charge against the accused is on the prosecution. It is because the two accused are presumed to be innocent until they are proven guilty. In other words there is no burden on the accused person to prove their innocence, as their innocence is presumed by law.
10. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information and elements of the offence

11. The first accused EV is being charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act and the second accused, MN, is being charged with one count

of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are before you in the information.

12. The prosecution alleges that the first accused on the 16th of July 2016, had penetrated into the vagina of the complainant with his penis without the consent of the complainant. In respect of the second count, the prosecution alleges that the second accused has penetrated into the vagina of the complainant with his penis without her consent
13. The main elements of the offence of Rape as charged are that;
 - i) The accused, (in respect of the first count EV and for the second count, it is MN),
 - ii) Penetrated into the vagina of the complainant with his penis,
 - iii) The complainant did not consent to the accused to penetrate into her vagina with his penis,
 - iv) The accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner,

Agreed Facts

14. I now request you to draw your attention to two sets of agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.

Separate Consideration

15. The first accused is charged with one count of Rape and the second accused is charged with a separate count of Rape. It is your duty to consider each of these two counts separately. If you find the first accused guilty to the first count that does not automatically make the second accused guilty to the second count. Likewise, if you find the first accused not guilty to the first count, that does not automatically make the second accused not guilty to the second count.

The Accused

16. It is the onus of the Prosecution to prove that it was the accused who has committed this crime on the complainant. As I explained above, at no point of time the onus shift on the Accused to prove that it was not him who has committed this crime.

Penetration

17. I will now explain you the element of penetration. Evidence of slightest penetration of the penis of the accused into the vagina of the complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Consent

18. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent to the two accused to insert their penis into her vagina on the two separate occasions as charged in the first and second counts.
19. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A

consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.

20. The complainant must have the freedom to make the choice. It means that she must not being pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. The consent for sexual intercourse must be comfortable to the person who makes such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.
21. If you are satisfied, that the accused had inserted his penis into the vagina of the complainant and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or reckless that the complainant was freely consenting for this alleged sexual intercourse. I must advice you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual intercourse. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that were prevailed at the time of the alleged incident.

Corroboration

22. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable, credible and truthful; you are not required to look for any other evidence to support the account given by the complainant.

23. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.
24. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses during the course of the hearing.
25. You must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanours of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

Evidence of the Prosecution

26. Let me now remind you briefly the summary of the evidence presented by the prosecution and the defence during the course of the hearing. I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
27. The first witness of the prosecution is the Complainant. She had been living at Nabouciwa village with her uncle and his family in the year of 2016. The uncle and his wife have four children. Apart from that, the grandmother of the complainant, whose one leg was amputated was also living with them in the year 2016. Grandmother had an eye problem too.

28. On the 16th of July 2016, it was a Saturday, the uncle and his family went to the church leaving the complainant at home with the grandmother. The family of the uncle usually go to the church on every Saturday. At around 6 p.m. to 7 p.m. the complainant had gone to the kitchen to prepare tea, which was situated four to five steps away from the main house. While she was preparing tea, EV, the first accused came and asked her to have sexual intercourse with her. During this time, the complainant was attending school at the Ratu Veikoso Primary school. The complainant had refused the request, stating that she was still a student. After a while, EV had pulled her from her hand and closed her mouth. He then took her to the back of the kitchen. The complainant could not push him and run as he had pulled her hand and squeezed her mouth. EV then took off his clothes and spread it on the ground. He made the complainant to lie on it and took off her clothes. Once he removed her clothes, he came on top of her and inserted his penis into her vagina. He had penetrated her vagina with his penis three times, and then left her, leaving at the back of the kitchen. The complainant said that she could not resist to EV as he was pressing his knees against her hand and closed her mouth. After EV left, the complainant put her clothes on and came back home. The grandmother was already lying on the mattress. The complainant said that she told her grandmother about what EV did to her, but not others. She said that her uncle and aunty do not usually believe what she tells them therefore she decided not to tell about this incident. Moreover, she knew that the uncle and the aunty are related to EV.
29. You may recall that the complainant then explained about an incident that took place in the months of August 2016. It was also a Saturday, where her uncle and the family had gone to the church, leaving the complainant with the grandmother at home. She had first cleaned the house and then went to the shop to buy eggs. On her way back home, she has seen MN was alone at home. He had called her. The complainant had gone to his house as he is a cousin. When she went to the house, MN had asked her to suck him, which she had refused saying that they are cousins. He had then pulled her by her hand and closed her mouth. After that he took her into his room, where he opened his pants and squeezes her mouth and forced his penis inside into it. He then made her lie on the bed and cover her face with a pillow. MN then removed his clothes and also the clothes of the complainant. He had

then penetrated his penis into the vagina of the complainant. He had penetrated two times. The complainant said that she did not like for what MN did to her. After that MN had let her go home. When she reached home, grandmother was angry as she was delayed in returning from the shop.

30. The complainant said that she did not tell these incidents to her uncle or his family as she was scared and thought that they do not trust her. Moreover, the complainant said that MN and EV are related to her uncle. The complainant had then decided to inform these incidents to her teachers. The teachers had questioned her about it and then taken her to the medical examination. They have then taken her to the village and then told her to be with her parents and not to stay in the village. The complainant said that she first suggested to the teachers that she wanted to be with her aunty.
31. Ladies and Gentleman, you may recall that the learned counsel for the first accused cross examined the complainant. During the cross examination, the complainant said that the house of EV is 40 to 50 meters away from her uncle's house. There is a rule in the village that everyone has to go into their respective houses when the '*lali*' is beaten at 6 p.m. to do the family devotion. During the cross examination the complainant was asked whether she informed the police that she had told the grandmother about the first incident soon after EV had allegedly raped her. The complainant said that it has not been recorded in the statement.
32. The learned counsel for the first accused further cross examined the complainant, suggesting her that if EV had removed his and her clothes, he would have used his both hands, for which the complainant said no. The learned counsel further suggested to the complainant that if EV spread his clothes on the floor, he would have used his hands, to which the complainant said no. The complainant said that she could not escape and ran away because he was holding her.
33. Moreover, you have heard that the learned counsel for the first accused suggested to the complainant that any of these incidents that she claimed never happened as EV never came to her while she was in the kitchen on the 16th of July 2016. The complainant did not agree

with the said suggestion and said that what she said was actually happened. The complainant denied the proposition made by the counsel of the 1st accused that she made these false allegations because she was accused of stealing a mobile phone in the village. She further said that she did not steal any mobile phone from Kelevi. Moreover, the complainant said that Kelevi never told her that if the complainant failed to return the phone in the afternoon of the 18th of October 2016, she will bring the police.

34. The complainant said that there was a meeting for the Youths of the village in the evening of the 16th of July 2016. The meeting was held at Jovesa's house. The meeting commenced around 7 p.m. and went on till late evening.
35. I now take your attention to the evidence given by the complainant during the cross examination by the learned counsel for the second accused. The complainant said that she could not recall the exact date of this alleged incidence. However, she could recall that it was a Saturday and the time was around 4 pm to 5 pm. The complainant then said that when she was taken to the medical examination, the Doctor questioned her about the incident. The complainant had told the Social Welfare Officer about the incident and then the Social Welfare officer had taken her into a room. The Social Welfare Officer then had a conversation with the Doctor, which the Doctor had recorded under the item D10 and D11 of the Medical Report. The complainant said that she was not present when the Doctor recorded the information pertaining to D10 and D11.
36. Madam and Gentleman assessors, you have heard that the complainant said that she made some allegations against five other males in the village in the same statement that she made to the police. She has alleged that those males had attempted to have sexual intercourse with her, which she managed to avoid. The complainant then explained about an incident, where Ilaitia was trying to have sexual intercourse with her. He then saw Levi was on the breadfruit tree and got disturbed and left her.

37. In respect of the second count, the complainant said that MN had just inserted his penis into her mouth and then made her lie down and covered her face with a pillow. She had no opportunity to shout or to resist as MN was holding her and squeezing her mouth.
38. The second witness of the prosecution is Ms. Sereima Tikoinakeba. She is a primary school teacher. She has been teaching at the Ratu Veikoso Primary School for 18 years. The complainant is one of her students. She could recall that she was tasked to counsel the complainant on the 18th of October 2016. The complainant had already told the culture teacher about this incident when she started to counsel her. During the counselling, Ms. Sereima had further questioned the complainant. The complainant had then explained to her that two boys EV and MN have abused her. She has further told the teacher that she has not informed her uncle or the aunty as she thought that they would not believe her and also she was scared to be in the village. After counselling the complainant, Ms. Sereima had compiled a report and handed it over to the Head Teacher.
39. During the cross examination, Ms. Sereima said that she did not visit the grandmother of the complainant.
40. The next witness of the prosecution is Doctor Elvira Ongbit. She is a doctor of medicine and has conducted the medical examination of the complainant on the 25th of October 2016. Doctor in her evidence explained the medical findings that she made during the examination. Apart from the staff nurse, there was no one present with her during the examination. The complainant related her the history of this incident, which she recorded under D10 and D11 of the report. During the vaginal examination, the doctor has noted healed hymenal lacerations at 3 o'clock, 6 o'clock and 9 o'clock positions in the vaginal opening. The Doctor explained that any forced applied on the vaginal opening like an erected penis, would definitely cause such lacerations. During the cross examination, she further explained that anything that goes through the vaginal opening with force can cause such injuries. According to her opinion, the injuries that she noted on the hymen of the complainant is consistence with penial penetration.

41. Doctor Elvira then explained that the healed lacerations are older than fifteen days. If a person scratches the vaginal opening, it could cause more of abrasions than laceration. Moreover, Doctor Elvira said that if someone stretches beyond the limits that one should do, it could cause laceration. She said laceration is also a form of wound.

Evidence of the Defence

42. At the conclusion of the prosecution case, the two accused were explained about their rights in defence. The accused opted to give evidence on oath and to call witnesses for their defence.
43. The first accused in his evidence said that he was at his home at 6pm. on the 16th of July 2016. He has been living with his uncle and aunty, their children and his grandmother in the village. He has been living in the village since he was very young and knows everyone in the village. The village consists with about 40 houses.
44. It is a rule in the village that everyone must go into their respective houses to perform the family devotion at 6 p.m. The lali will be beaten to mark the time. The first accused was at home when the lali was beaten at 6 p.m. and took part at the family devotion with the members of the family. They then had dinner straight after the devotion. After the dinner he went to the youth club meeting at the village. It was held at Jovesa's house, which is just few meters away from his house. The meeting was held at their porch, outside the house, which can be seen from his house. The first accused is closely related to the Complainant and also to the second accused. He stayed at the youth meeting until it was over and then straight away went back home.
45. The first accused denies this allegation made by the complainant that he had raped her on the 16th of July 2016. According to the first accused that he has not met the complainant on the 16th of July 2016.

46. You may recall that the learned counsel for the prosecution cross examined the first accused regarding the agreed facts. As I explained you, the agreed facts are the facts that the prosecution and the accused have agreed without dispute. You are allowed to take them into consideration as proven facts by the prosecution beyond reasonable doubt. You have heard that the first accused said “yes” when the learned counsel asked him that paragraph six of the admitted facts refers to the alleged incident concerning him, which happened in the village. The accused then changed his position and said “no” when the learned counsel put to him that the accused had admitted that this alleged incident took place on the 16th of July 2016. The learned counsel then questioned the accused if then what is the alleged incident that the accused has admitted in paragraph six of the admitted facts, for which the accused said that he does not know about it.
47. The first accused said that he has never been to the house of Jovilisi, where the complainant used to live. However, he knew that the complainant was living in that house with her grandmother.
48. The second witness of the first accused is Tulia Cakauniceva. She is the maternal grandmother of the first accused. She has been living in with her son and his family in the village. According to her evidence, the first accused is residing with his mother. Tulia said that she could recall the 16th of July 2016 as it was the day the youth always have their meeting. On the 16th of July 2016, the family gathered at the house, including the first accused at 6 p.m to have the family devotion. They all had the devotion together and then from 6.30 to 7.30 p.m. they had dinner. Between 7.30 p.m. to 8 p.m. the first accused had gone to the youth meeting which was held at Jovesa’s house. Jovesa’s house is 50 feet away from her house. The meeting was held in the living room of Jovesa’s house, which she could see from her house. She has seen the first accused was at the meeting. According to Tulia, EV has not gone anywhere else on that evening.
49. During the cross examination by the learned counsel for the prosecution, Tulia said that she made a statement to the police regarding this incident and everything stated in the said statement is true. Moreover, she confirmed that what has written in the line five of the

statement is true. Tulia then said that it was the 16th of June 2016, that she saw the first accused was going to attend the meeting at Jovesa's house. She then said that it was June and not 16th of July 2016 as she said in her evidence in chief.

50. During the re-examination, Tulia said that this incident took place on a Saturday and 16th of June 2016, was a Saturday.
51. The second witness of the first accused is Jone Kubu. He is the uncle of the first accused. He was living in his house with his wife, mother and the first accused who is the son of his sister. On the 16th of July 2016, he was at home with his wife, his mother and the first accused at 6 p.m. for the devotion. They then had their dinner and he went out and stayed at the veranda. Between 7.30 to 8 p.m he saw the first accused was going to Jovesa's house to join the youth meeting of the club. Jovesa's house is located few feet away from his house. According to Jone, the first accused was at home until he left to the meeting. He does not know where the first accused went after the meeting.
52. During the cross examination, the learned counsel for the prosecution questioned him about the statement he made to the police on the 27th of October 2016. He then said what he has stated in the statement is true, specially the information contain in between line 4 to 10 of the statement. In the statement Jone has stated that he saw the first accused was going to the youth meeting on 16th of June 2016. However, he changed his position in the evidence and said that the police came to question them about this matter on the 16th of June 2016. He has seen the first accused was going to the youth meeting on the 16th of July 2016. Moreover, you may recall that the learned counsel for the prosecution questioned Jone in respect of the two notices of alibi filed by the first accused. Jone said that the first accused went to the youth club meeting between 7.30 to 8 p.m. and was not with him till 9 p.m.
53. The last witness of the first accused is DC 3503 Jitendra. He gave evidence about the statements made by Tulia and Jone in respect of the events occurred on 16th of June 2016.

Evidence of the Second Accused

54. Let me know take your attention to the evidence given by the second accused. According to his evidence, he was at Kalabu at his uncle's place during the month of August 2016. He was there to attend School as he was doing a course of small engine repair at TPF. He is a pathfinder counselor and a member of the board of deacons at his church. He has gone to a youth camp during the first Saturday in the month of August. He was at another combine church camp during the second Saturday in the month of August. During the third and fourth Saturdays of August, he was at the church which is about 1.5. k.m. or 2 k.m away from the village. According to the second accused he had not gone to the village in the month of August 2016.
55. The second accused said that he knows the complainant and she was staying at the house of his father's brother, Jovilisi. He said that he did not meet the complainant during the month of August 2016. According to second accused, he neither smoke nor drink alcohol. He further said that he never had sexual intercourse with a female until he got married.
56. During the cross examination, he said that he could not recall where was he during the month of July 2016. His mother was staying in the village in the month of August 2016. If the complainant wants to go to the canteen in the village or to town, she has to walk pass his house.
57. The second witness of the second accused is Raijieli Turaganiqali. She is the wife of the second accused. She explained in her evidence the event that took place in the first night of their marriage.
58. The next witness of the second accused is Alitia Lagimiri. According to her evidence one of her uncles had punished her for writing love letters to the brother of the complainant. Later, she heard that the complainant was telling her mother, that the complainant had actually wrote those love letters.

59. The fourth witness of the second accused is Ilaitia Leniloma. He said that he was attending school on the 1st of October 2016 and was not in the village at around 11 am to 12 pm on that day. The last witness of the second accused is Levi Balanavosa. He said that he did not climb to any breadfruit tree at around 11 a.m. on the 1st of October 2016.

Analysis and Directions

60. You heard the evidence presented by the prosecution and the defence. The prosecution alleges that the first accused came into the kitchen while the complainant was boiling tea and pulled her from her hands to the back of the kitchen and then inserted his penis into her vagina without her consent. The first accused in his defence adduced evidence that he was with his grandmother and uncle and then he had gone to the youth meeting during the time that is material to the first count. In respect of the second count, the prosecution alleges that the second accused had called the complainant into his house when she was passing his house. He then took her into the room and then penetrated into her vagina without her consent. The second accused denies the allegation and said that he was not in the village in any of the Saturdays in the months of August 2016.

Evaluation of Evidence

61. It is your duty now, to determine whether the prosecution has established that the first and second accused had sexual intercourse with the complainant on two separate occasions without her consent as alleged in the first and second count. In order to do that you have to evaluate the evidence presented by the prosecution and defence and determine **the reliability and credibility of evidence given by the witnesses**. You must be satisfied that you can rely on the evidence as the true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

62. The assessment of credibility of evidence does not concern with unintended inaccuracy, mistakes or errors. It is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his motivations, his relationship to and the reaction to the particular situation.
63. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, 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.
64. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
65. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.
66. Moreover, you must bear in your mind that 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 accurate in another thing.

Inconsistencies

67. You have heard that the learned counsel for the defence cross examined the complainant about the inconsistent nature of her evidence given in the court with the statement she had

given to the police and also the information that was provided to the doctor who conducted the medical examination of the complainant during the investigation.

68. Moreover, the learned counsel for the prosecution cross examined the first accused and the two of his witnesses regarding the inconsistency nature of their evidence given in the court and the statements that they have made to the police during the investigation. Apart from that, the learned counsel for the prosecution further cross examined the witnesses of the first accused about the notice of alibi and the amended notice of alibi filed in the court. I will explain them in detail in a while. I now only explain you the legal position on such inconsistencies which would undoubtedly assist you in your deliberation.
69. You are allowed to take into consideration about such inconsistencies when you consider credibility and reliability of the evidence given by the witness. However, the previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the court.
70. It is 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. Moreover, as I explained above, the victims of rape react differently to the trauma and the experience they have gone through, especially in revealing those incidents to another person.
71. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

Presentation of the Evidence of the Child Complainant

72. You have seen that the complainant gave evidence in a closed court. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the accused.

Child Complainant

73. The most important part of your task is to judge whether the complainant has told the truth, and has given a reliable account of the events that she was describing. The complainant is young adolescent. Some of you will have children and grandchildren who are of a similar age to the complainant. If so, I think you will recognize the sense of the advice that I am going to offer you about your judgment of the evidence of such a witness, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice if you do not agree with it.
74. Young adolescent as of this complainant may not have the same life experience as adults. They may not have the same standards of logic and consistency. Their understandings of life may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a young adolescent may seem very different from life viewed by an adult.
75. Remember how you normally talk to a person of this age. You should bear those considerations in mind when you consider the evidence given by the complainant. All decisions about the evidence are for you to make.

First Count

76. Let me now take your attention to the defence to the first count and second count, where the first and the second accused claimed that they were at somewhere else at the time material to these respective counts.
77. As I explained before, the accused are not obliged to prove his innocence and also not required to give evidence. However, in this hearing, the accused not only elected to give evidence on oath but also called witnesses to give evidence for the defence. Therefore, you have to take into consideration the evidence adduced by the accused when you determine the issues of fact of this case.

Defence of Alibi

78. The accused's defence is alibi. EV says he was not present at the kitchen of Jovilisi's house between 6 p.m. to 7 p.m. on the 16th of July 2016, as he was taking part in the family devotion and then had dinner with them. He had then gone to attend the meeting of the youth club. By putting this defence, the first accused claims that such an incident never took place on that day.
79. The second accused claims that he was attending in church events during the four Saturdays in the month of August.
80. While the first and second accused have put forward the defence of alibi, the burden of the proving the case against them remains on the prosecution. The prosecution must prove so that you are sure that the first and second accused were present at the respective scene of the crime and these two alleged crimes actually took place, therefore, that their alibi are untrue.
81. The first accused gave evidence and called two witnesses to support his assertion that at the time this alleged incident took place, he was with the two witnesses, attending the family

devotion at his uncle's house. The accused and the two witnesses were cross-examined about the alibi and you are invited by the prosecution to conclude that they were lying.

82. If you conclude that the accused's alibi is true or may be true, then he cannot have participated in this alleged sexual intercourse with the complainant and you must find him not guilty. If, on the other hand, you are sure, having considered the evidence carefully, that the accused's alibi is false, that is a finding of fact which you are entitled to take into account when judging whether he is guilty. But do not jump to the conclusion that because the alibi put forward is false the accused must be guilty. You should bear in mind that sometimes an alibi is invented because the accused thinks it is easier than telling the truth. The main question for you to answer is: are we sure that each of these alleged incidents actually took place as claimed by the prosecution.
83. In respect of the defence of alibi, the accused is not required to prove beyond reasonable doubt that he was with the two witnesses of the defence, attending the family devotion. In respect of the second accused, he is not required to prove beyond reasonable doubt that he was at the church functions. The burden on them to prove the alibi is evidential burden. It means that the accused has to adduce or point to evidence that suggests a reasonable possibility that he was with the two witnesses of the defence at the material time relevant to the first count, or the second accused was attending the functions in the Church. Such evidence that could point or suggest that the accused was somewhere else, and not at the scene of the crime, has to be credible and reliable evidence.
84. The prosecution claims the evidence of the accused as well as his two witnesses are not credible on the ground of inconsistency.
85. According to section 125 (5) of the Criminal Procedure Act, you are allowed to deem that accused had given his authority to his lawyer to file the notice of alibi, stating the nature of his alibi defence. In this case, the first accused filed two notices of alibi, which were marked and tendered in evidence by the prosecution as prosecution exhibits 4 and 4A. The first alibi notice which was filed on the 18th of April 2018, states that the accused was

with Tulia and Jone at their house in the evening of 16th of June 2016 between 6 p.m. to 9 p.m. As I explained before, you are allowed to deem that this notice of alibi was filed with the authority of the accused. The accused then gave evidence and stated that he was with Tulia and Jone, attending the family devotion at 6 p.m. on the 16th of July 2016. He had then had his dinner and then went to attend to the youth meeting that was held at Jovesa's house around 7 p.m. to 7.30 p.m.

86. Tulia, in her evidence said that the accused was with them, attending to the family devotion at 6 p.m and then had his dinner and left to the meeting around 7.30 p.m to 8.00 p.m in the evening of 16th of July 2016. However, she accepted that she made a statement to the police on the 27 of October 2016 and whatever she has stated in it is true. According to the statement she has mentioned the date as 16th of June 2016. You have heard the evidence of Tulia in respect of the dates and her statement.
87. The defence then filed an amended notice of alibi, stating that the accused was with the two witnesses at their house on the 16th of July 2016, between 6 p.m to 9 p.m. Then Jone gave evidence stating the accused was at his home in the evening of 16th of July 2016, and left to the meeting between 7.30 p.m. to 8 p.m.
88. You can take into consideration these inconsistencies and the contradictions, between the witnesses and also with the previously made statements to the police and with the two alibi notices, when you determine whether the evidence of alibi is reliable and credible. Then you can decide what weight you would give to these evidence in order to conclude whether it is true or may be true, or false.
89. As I explained before, if you conclude the alibi is false, do not straight away proceed to the conclusion that the accused guilty. Still you have to examine the evidence of the prosecution to satisfy that the prosecution has established all the essential elements of the offence beyond reasonable doubt.

90. Let's move onto the second count. The second accused in his defence stated that he was not in the village during any of the Saturdays in the month of August 2016. He was staying with his uncle at Kalabu and had gone to attend church camp on the first two Saturdays of the month. He has attended to the church service in the village during the last two Saturdays of the month, but had not gone to the village as the church is 1.5 k.m to 2 k..m away from the village.
91. You have heard the second accused was cross examined and he said that he could not recall where he was in the month of July. He admitted that he knows the complainant and she had to go pass his house, if she wants to go to the canteen in the village. Moreover, you heard that his mother was in the village in the month of August.

Sexual Experiences of the Second Accused

92. The second accused further claims that he never had sexual intercourse with a female until his first night with his wife. The defence called the wife of the second accused to give evidence regarding the first night of their marriage. If you find that the evidence of the wife of the second accused has any relevancy either to prove or disprove the claim of the second accused about his sexual experience prior to the marriage, you can take them into consideration and if not you can disregard them.
93. The evidence of Alitia Lagimiri., stating that she heard the complainant was telling her mother that the complainant wrote the love letters pretending that it was Alitia. The defence brought this evidence to establish the nature of complainant's character where she falsely makes allegations against others.
94. It is for you to decide whether you believe the evidence given by the defence. If you consider that the account given by the accused is or may be true, then you must find the accused not guilty for the offence.

95. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then find the accused not guilty for the offence as charged.
96. Even if you reject the version of the defence, that does not mean that the prosecution has established that the accused guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed the offence as charged in the information.

Evidence of the Prosecution

97. The two accused claim that none of these two incidents as alleged in the information ever happened. Therefore, you must determine whether you can accept the evidence of the complainant as reliable, credible and truthful evidence. If you are satisfied, you must then proceed to determine whether what she said in evidence is probable or improbable according to the circumstances which she was explaining.
98. The one of the main contentions of the defence in respect of each counts, that the evidence given by the complainant is not reliable and credible. The two accused challenged the complainant asking her, why did not she resist or escape or alert the others in the village when these two incidents took place.
99. In respect of the first count, the complainant said that the first accused held her hands and covered her mouth when he took her to the back of the kitchen. According to the evidence adduced by the prosecution and the defence, it is a rule in the village that everyone has to be at their houses to attend the devotion at 6 p.m. The complainant alleges that this incident took place between 6 p.m. to 7 p.m. It is the time that most of the people are in their houses for the devotion. The house of the second accused, whom are related to the complainant is just few steps away from her house. The prosecution did not adduce any evidence to explain the vicinity of the place where this alleged incident took place or the distance of it from the other houses.

100. The complainant explains in her evidence that she did not run away or shout for help as her mouth was covered and her hands were held by the accused. When you consider this explanation, you can take into consideration her evidence, stating that the accused had removed his t-shirt and clothes and also removed her clothes. He had then laid his clothes on the ground and made her to lie down there. Do we have evidence to conclude, whether she was asked to lie down, or was she pushed to lie down or she voluntarily lie down, or perhaps she was threatened to lie down.
101. It is important that you must not speculate or presume anything. You can only infer the existence of any facts, from another fact which you have already accepted as true and reliable.
102. The complainant then said that she told her grandmother about this incident. The complainant did not further explain what was the reaction of her grandmother when she told her about this incident on the 16th of July 2016. You may recall that the complainant further said that the grandmother was angry when she got delay in returning from the shop, in respect of the second count. Moreover, the complainant admitted in her evidence that it has not been stated in the statement that she made to the police.
103. In respect of the second count, you have to determine what the complainant said was probable or improbable considering the circumstances of the matter. She said that the second accused pulled her from the hand and covered her mouth. That was the reasons she could not resist or escape from the scene. When you consider her reason for not to resist or escape, you could take into consideration the evidence of the complainant, where she said that the accused removed his clothes as well as hers. He then forced her to suck him. The complainant did not explain what was the position she was at that time when he forced his penis into her mouth. Weather she was seated or standing. According to her evidence, she was then made to lie down. She did not explain how the accused made her lie down. The accused had then covered her face with a pillow. You must ask yourself that whether the accused inserted his penis into her vagina while the pillow was still covering her face or not.

104. The complainant had reported these incidents to the teachers at her school on the 18th of October 2016. That was nearly more than three months after the first incident and two months after the second incident. It is a matter for you to decide, whether the delay of such nature, would affect the credibility of the evidence given by the complainant.
105. It would be wrong to assume that every person who has been the victim of a sexual assault of this nature, will report it as soon as possible. The experience of the court is that, victims of sexual offences can react to the trauma that they have faced in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion or cultural taboos, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise an immediate complaint does not necessarily demonstrate a true complaint.
106. In this case, the complainant said that she did not tell her uncle or his family about these incidents, as she thought that they would not believe her. Moreover, she said that she was scared to be in the village. However, she has told her grandmother about the first incident, just after that incident took place. Eventually, the complainant reported to her teachers in the school about these two incidents on the 18th of October 2016. You have to take into consideration was there any reason that made her to wait till October to report this matters to the teachers. The defence suggested to the complainant during the cross examination that she told teachers because of the fact that she was threatened by the mother of the second accused that she would report to the police that the complainant had stolen a mobile phone. The complainant denied the said proposition. The questions of the counsel are not evidence, unless it is admitted or affirmed by the witness in his or her answering. The defence did not call any witnesses in respect of the stolen mobile phone.
107. The complainant in her evidence said that she does not know what has been recorded in D10 and D11 of the Medical Certificate as she only told her story to the Social Welfare Officer and not to the Doctor. The Social Welfare Officer had related those facts to the

Doctor during the medical examination, while the complainant was in a different room. However, the doctor in her evidence said that the complainant related the facts to her which she recorded under D10 and D11 of the Medical Certificate.

Expert Evidence

108. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.
109. In this case you have heard the evidence of Dr. Elvira Ongbit. She is a medical doctor and gave her professional opinion about the injuries that she found during the medical examination of the complainant on the 20th of October 2016. She has noted healed lacerations in the vaginal opening of the complainant. According to her opinion, these lacerations are older than fifteen days. When you take the opinion of Dr. Elvira into consideration, you must bear in your mind that the first incident took place on the 16th of July 2016 and the second incident took place in August. Dr. Elvira did not specially state that these healed lacerations were caused during any of the alleged incidents. It is for you to decide whether the expert opinion given by Dr. Elvira is relevant to the matter that you have to determine. If you decide it is relevant, then you have to decide what is the weight you give to this expert evidence. If not you can disregard it.

Evidence of Recent Complaint

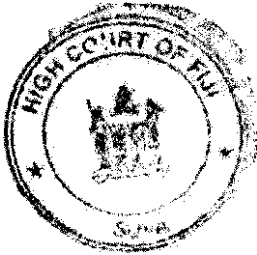
110. You have heard that the complainant had told Ms. Sereima Tikoinakeba about these two incidents on the 17th of October 2016. According to Ms. Sereima, the complainant had told her that the first accused came to her while she was preparing breakfast.

111. The evidence given by Mrs. Sereima is known as evidence of recent complaint. It is not an evidence as to what actually happened between the complainant and the accused. Mrs. Sereima was not present and witnessed what happened between the complainant and the accused.
112. You are entitled to consider the evidence of recent complaint in order to decide whether or not the complainant has told the truth. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the complainant and the victim.

Final Directions

113. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the first accused has committed the offence of rape as charged under count one, you can find the accused guilty for the said offence of Rape.
114. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the first accused has committed the offence of Rape as charged under count one, you must find the accused not guilty for the said count of Rape.
115. Likewise, if you are satisfied that the prosecution has proven beyond reasonable doubt that the second accused has committed the offence of rape as charged under count two, you can find the accused guilty for the said offence.
116. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the second accused has committed the offence of rape as charged under count two, you must find the accused not guilty for the said offence.

117. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.




R.D.R.T. Rajasinghe
Judge

At Suva

04th February 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the 1st Accused.

Koroi Law for the 2nd Accused.