

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 259 of 2018**

**STATE**

**V**

**RATU SELA DRADRA MATIA**

**Counsel** : Ms. Kimberly Semisi for the State  
Ms. Litiana Ratidara with Ms. Ruci Nabainivalu for the Accused

**Dates of Trial** : 8-12 July 2019

**Summing Up** : 15 July 2019

***The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "BVS".***

### **SUMMING UP**

Madam Assessors and Gentleman Assessor,

**[1]** It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the documents tendered as prosecution exhibits and any admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submissions made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, a matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14]** The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15]** According to the evidence you heard in this case, the complainant, BVS, was between 8 and 9 years of age at the time of the alleged incidents, and was 10 years old when she testified in Court [Her date of birth is 27 January 2009]. Experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

- [16]** You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [17]** You heard in this case the evidence of the Head Teacher of Levuka Primary School, Iosefo Vulaloa, that on 12 June 2018, the complainant had related to him the alleged acts which the accused had committed on her. You should consider whether this could be regarded as a complaint made by the complainant of the alleged incidents, at least in relation to Count 4. If so you should also consider whether she made that complaint without delay and whether she sufficiently complained of the offence the accused is charged with.
- [18]** The complainant need not specifically disclose all of the ingredients of the offence and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that the complainant made a prompt and a proper complaint, then you may consider that her credibility is strengthened in view of that recent complaint.
- [19]** It must be borne in mind that the complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [20]** In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [21]** However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability

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

- [22] Ladies and Gentleman Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [23] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [24] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the charges. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [25] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [26] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [27] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by

evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.

- [28] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [29] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [30] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [31] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [32] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [33] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [34] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [35] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the victim or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty

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

[36] I must also explain to you as to the reason for the use of screen, when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when a screen is placed, the complainant is relieved of any mental pressure to describe the often unpleasant incidents. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

[37] The same applies for permitting a closed court proceedings when she gave evidence in this case and also to permit a support person from the Fiji Women's Crisis Centre (Mrs. Lavenia Tuitabu) to sit beside the complainant when she testified in Court. Again please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

[38] Let us now look at the charges contained in the Amended Information.

[39] There are four charges preferred by the Director of Public Prosecutions (DPP), against the accused:

### **COUNT 1**

#### ***Statement of Offence***

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

#### ***Particulars of Offence***

**RATU SELA DRADRA MATIA**, between the 1<sup>st</sup> day of January 2017 and the 31<sup>st</sup> day of December 2017, at Kadavu, in the Southern Division, had carnal knowledge of BVS, a child under the age of 13 years.

### **COUNT 2**

#### ***Statement of Offence***

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

***Particulars of Offence***

**RATU SELA DRADRA MATIA**, between the 1<sup>st</sup> day of January 2017 and the 31<sup>st</sup> day of December 2017, at Kadavu, in the Southern Division, unlawfully and indecently assaulted BVS, a child under the age of 13 years, by kissing her mouth, touching her breasts and biting her breasts.

**COUNT 3**

***Representative Count***

***Statement of Offence***

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

***Particulars of Offence***

**RATU SELA DRADRA MATIA**, between the 1<sup>st</sup> day of January 2017 and the 31<sup>st</sup> day of December 2017, at Kadavu, in the Southern Division penetrated the vagina of BVS, a child under the age of 13 years, with his tongue.

**COUNT 4**

***Statement of Offence***

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

***Particulars of Offence***

**RATU SELA DRADRA MATIA**, on the 9<sup>th</sup> day of June 2018, at Kadavu, in the Southern Division, penetrated the vagina of BVS, a child under the age of 13 years, with his fingers.

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

**[41]** Let me now explain the elements of Count 1, Rape contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act.



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

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

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

*(2) A person rapes another person if —*

*(a) the person has carnal knowledge with or of the other person without the other person's consent;*

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

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

*(2) A person rapes another person if —*

*(a) the person has carnal knowledge with or of the other person without the other person's consent.*

[45] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207(2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

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

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

- (i) The accused;
- (ii) During the specified time period (in this case between 1 January 2017 and 31 December 2017);
- (iii) At Kadavu, in the Southern Division;
- (iv) Penetrated the vagina of BVS with his penis; and
- (v) At the time BVS was a child under 13 years of age.

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

[49] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was

committed. The prosecution should prove these elements beyond any reasonable doubt.

[50] The fourth element involves the penetration of the complainant's vagina; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

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

[52] The issue of consent will not arise in this case. A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 8 years of age at the time of the alleged incident referred to in Count 1, and therefore, she had no mental capacity to consent.

[53] Let me now explain the elements of counts 3 and 4 together, which are both counts of Rape contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act.

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

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

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

*(2) A person rapes another person if —*

*(a) .....*; or

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

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

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

*(2) A person rapes another person if —*

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

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

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

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

- (i) The accused;
- (ii) During the specified period (in this case between 1 January 2017 and 31 December 2017);
- (iii) At Kadavu, in the Southern Division;
- (iv) Penetrated the vagina of BVS, with his tongue; and
- (v) At the time BVS was a child under 13 years of age.

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

- (i) The accused;
- (ii) On the specified date (in this case the 9 June 2018);
- (iii) At Kadavu, in the Southern Division;
- (iv) Penetrated the vagina of BVS, with his fingers; and
- (v) At the time BVS was a child under 13 years of age.

**[61]** Let me now elaborate on these elements together in respect of Counts 3 and 4.

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

**[63]** The second element relates to the specific time period or date during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

**[64]** The fourth element involves the penetration of the complainant's vagina, with his tongue for Count 3 and with his fingers for Count 4. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. The element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the complainant's vagina, with his tongue for Count 3 and with his fingers for Count 4, to any extent.

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

**[66]** The issue of consent will not arise in this case. A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 8 years of age at the time of the alleged incident referred to in Count 3, and 9 years of age at the time of the alleged incident referred to in Count 4, and therefore, she had no mental capacity to consent.

**[67]** Let me explain the elements of Count 2, Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act.

**[68]** Section 210 (1) (a) of the Crimes Act reads as follows:

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

(a) unlawfully and indecently assaults another person;

**[69]** Therefore, in order for the prosecution to prove the second count of Sexual Assault, they must establish beyond any reasonable doubt that;

(i) The accused;

(ii) During the specified period (in this case between 1 January 2017 and 31 December 2017);

(iii) At Kadavu, in the Southern Division;

(iv) Unlawfully and indecently assaulted BVS, by kissing her mouth, touching her breasts and biting her breasts.

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

**[71]** The second element relates to the specific period during which the offence was committed. The third element relates to the place at which the offence was

committed. The prosecution should prove these elements beyond any reasonable doubt.

**[72]** The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of kissing her mouth and biting the complainant’s breasts by the accused are indecent acts and thereby amounts to Sexual Assault.

**[73]** The complainant in her evidence did not make reference to the accused touching her breasts. You need to bear in mind that although the charge refers to both touching of the complainant’s breasts and biting of the breasts, in addition to kissing of her mouth, it is sufficient for the prosecution to establish beyond reasonable that the accused did either of the two acts-touching her breasts or biting the breasts of the complainant.

**[74]** I must also explain to you another legal provision that you may consider when dealing with Count 4. Section 182 (3) of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”) provides that:

*“(3) Variance between the charge and the evidence produced in support of it with respect to —*

*(a) the date or time at which the alleged offence was committed; or*

*(b) the description, value or ownership of any property or thing the subject of the charge —*

*is not material and the charge need not be amended for such variation.”*

**[75]** This is a provision that is directly applicable to proceedings in the Magistrate’s Courts. However, in the absence of any similar provisions for proceedings in the High Court, this provision maybe used for proceedings before the High Court as well.

**[76]** It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape and Sexual Assault are obviously considered as Sexual Offences. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

**[77]** It is also my duty to mention another relevant legal requirement concerning Count 3. Count 3 is titled as a representative count. This representative count of Rape against the accused is based on an act or series of acts done during a specified time period (In this instance between 1 January 2017 and 31 December 2017). Such a charge is described generally as a representative count in legal terminology. The prosecution is

expected to prove just one incident of Rape which falls within this period in respect of that count. They need not prove a continuous or a series of incidents of Rape in support of a representative count.

- [78] If you are satisfied beyond any reasonable doubt that the accused, between 1 January 2017 and 31 December 2017, at Kadavu, penetrated the complainant's vagina with his penis, then you must find him guilty of the first count of Rape.
- [79] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the first count of Rape.
- [80] If you are satisfied beyond any reasonable doubt that the accused, between 1 January 2017 and 31 December 2017, at Kadavu, unlawfully and indecently assaulted BVS by kissing her mouth and biting her breasts, then you must find him guilty of the second count of Sexual Assault.
- [81] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the second count of Sexual Assault.
- [82] If you are satisfied beyond any reasonable doubt that the accused, between 1 January 2017 and 31 December 2017, at Kadavu, penetrated the complainant's vagina with his tongue, then you must find him guilty of the third count of Rape.
- [83] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the third count of Rape.
- [84] If you are satisfied beyond any reasonable doubt that the accused, on 9 June 2018, at Kadavu, penetrated the complainant's vagina with his fingers, then you must find him guilty of the fourth count of Rape.
- [85] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the fourth count of Rape.
- [86] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [87] In terms of the provisions of Section 135 of the Criminal Procedure Act, the prosecution and the defence have consented to treat the following facts as "*Admitted Facts*" without placing necessary evidence to prove them:
1. The complainant is one BVS, 9 years old student of Kabariki Village, Nabukelevu, Kadavu and the accused is one Ratu Sela Dradra Matia, 45 year old farmer of Kabariki Village, Nabukelevu, Kadavu.

2. The complainant and the accused are related. The complainant is the accused's niece. The complainant and the accused are also staying in the same village.

[88] Since the prosecution and the defence have consented to treat the above facts as "Admitted Facts" without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

### **Case for the Prosecution**

[89] The prosecution, in support of their case, called the complainant (BVS), the Head Teacher of her school, Iosefo Vulaloa Nabi, a Medical Officer, Dr. Marshanell Veronica Leong and one police witness, WPC 4632 Miliana. The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit **PE1**- Medical Examination Report of the complainant.

Prosecution Exhibit **PE2**- Birth Certificate of the complainant.

### **[90] Evidence of the complainant BVS**

- (i) *The complainant stated that she is now 10 years of age. Her date of birth is 27 January 2009. Her birth certificate was tendered to Court as Prosecution Exhibit PE2.*
- (ii) *She testified that she currently lives at Nauluvatu, Reservoir Road. She is staying there with her mother (Jokapeti Ba), father (Ratu Nacani Turaganivalu), grandmother and her siblings (two brothers and a sister).*
- (iii) *Currently she is attending Suva Primary School and is in Class 4.*
- (iv) *Prior to moving to Nauluvatu she was living with her family at Kabaraki Village in Kadavu and was attending Levuka Primary School.*
- (v) *The complainant said that in the Year 2018, she was in Class 3 and in Year 2017 in Class 2. She attended Classes 1-3 at Levuka Primary School.*
- (vi) *The complainant testified to an incident which took place in June 2018 (she could not recall the exact date). She was in Class 3 at the time. When asked as to what happened, the witness said: "I went to buy biscuits. I wanted to pee on the way. I placed the biscuits on top of the fridge. Then I had to go the main door. I called Tai Pata. No one heard me calling. I opened the door of the washroom. I took off my panty. Then I peed. Ratu Sela pushed the door of the washroom. He carried me up and then used his two fingers and he poked my private part/lady's part".*
- (vii) *The witness explained that by her private part, she meant her 'mimi'. She said that her mimi bled. Then she had worn her panty again. Ratu Sela had told her not to tell anyone (about what he did).*
- (viii) *The witness further explained that she went to buy biscuits at the shop in the village. The shop is close to her house. She said it takes about one minute to go to the shop. This was in the afternoon. She had brought the biscuits from*

*the shop and returned to her home. Then she had placed the biscuits on the fridge. She had wanted to go to the toilet to urinate. However, since the toilet in her house was not working properly (as the pipes were broken), she had wanted to go Tai Pata's house to use the bathroom.*

- (ix) The witness testified that Tai Pata is the accused Ratu Sela's mother. Tai Pata's house is opposite their house. She had called out for Tai Pata from outside the house. However, nobody answered. Thereafter, she had gone to the toilet in Tai Pata's house. The toilet is situated outside Tai Pata's house.*
- (x) At the time she was wearing a shorts and a panty inside. On top she was wearing a singlet or a t-shirt. She had taken off her shorts and panty and sat on the toilet seat and was urinating.*
- (xi) The accused had then pushed opened the door. He had carried her and put her on the floor. She had shouted. But the accused had blocked her mouth with his hands and told her not to tell anyone. The accused had pulled her shorts and panty right down up to her leg. Then he had used his two fingers and touched and poked her private part (mimi). Later, the witness said that she started shouting when the accused was poking her mimi.*
- (xii) The witness said when this happened, it had been painful. She had told the accused not to do it. But the accused had told her to bear with it.*
- (xiii) The witness was then asked the following questions:*

*Q. When Ratu Sela had poked your mimi at the time, which part of the mimi did he poke?*

*A. The hole of my mimi.*

*Q. What do you mean, hole of your mimi?*

*A. The hole of the mimi of the female.*

*Q. Can you tell us where is the hole of your mimi?*

*A. It is in my private part/my mimi.*

*Q. How far did he poke the hole of your mimi with his two fingers?*

*A. One minute. He just poked it and pulled it out.*

*Q. Yesterday you said your mimi had bled?*

*A. Yes.*

*Q. How did you know that your mimi had bled at the time?*

*A. Blood came out from my mimi.*

*Q. How long had Ratu Sela poked his fingers into your mimi before pulling it out?*

*A. It was one minute. It was a short time.*



*Q. Do you know how long one minute is?*

*A. No.*

*Q. At which point did you see that your mimi had bled - Was it when he put it inside or when he pulled his fingers out?*

*A. When he pulled his fingers out.*

*Q. What did Ratu Sela do after he pulled his fingers out of the hole of your mimi?*

*A. He told me not to tell anyone.*

*Q. How did you feel when he told you this?*

*A. I was scared.*

*Q. What did Ratu Sela do after he told you this?*

*A. He told me to go outside – out of the toilet.*

- (xiv) The complainant testified that thereafter she had returned home. Her mum had been at home. However, she had not told anything to her mum. She said she had not done so, because she was scared. When asked why she was scared, she replied “My mum will go to tell my father and my father will smack me”.*
- (xv) The witness said that the day this incident happened, it was a Saturday (in the month of June 2018). There was a netball and rugby tournament in the village which took place on Friday, the day before the incident happened to her. She had taken part in netball at this tournament.*
- (xvi) The witness next testified to an incident which took place in the Year 2017, when she was in Class 2. She said, she had gone to Tai Pata’s house to borrow a broom to sweep the house. Her mother had sent her to borrow the broom. This was in the morning.*
- (xvii) She had pushed the front door and entered Tai Pata’s house to get the broom. When she was just about to reach for the broom, Ratu Sela had grabbed her hand (he pulled her hand) from behind. He had then put her down on the floor (to lie down). She was facing upwards and lying on her back. At the time she had been wearing a skirt and a small shorts inside and a shirt on top (a vest).*
- (xviii) Ratu Sela had taken off her skirt and her shorts. Then he had put his private part into her private part. Later the complainant said by male private part she meant the ‘polo’ and by female private part she meant the ‘mimi’. The witness said that she didn’t do anything. It had been painful and she felt scared.*
- (xix) When asked as to where in her mimi did Ratu Sela put his polo into? She answered, “My small hole”, “the hole of my mimi”. Ratu Sela, the accused had*

*put his polo inside her mimi and after that he had pulled it out. The complainant testified that he had put his polo a bit inside but not right in. It was for a short time and it was painful. The accused had told her not to tell anyone. She had felt scared. She had then taken the broom and gone back home.*

- (xx) Again, she had not told her mother because she was scared. When asked why she was scared, she replied "If I tell my mum she will go to tell my father and he will smack me".*
- (xxi) When asked if Ratu Sela did anything else to her at the time, the complainant replied that he kissed her mouth and bit both her breasts. Ratu Sela had kissed her mouth and bit her breasts before he put his polo inside her mimi.*
- (xxii) The witness testified to another incident which took place in the Year 2017, when she was in Class 2. She had gone one day to get some kasikasi (small crabs) to use as bait. Her mother had sent her to get this from the sea in the village. This happened during lunch time.*
- (xxiii) The complainant had picked one small crab when Ratu Sela had pulled her hand. He had then laid her down where the stones were. She had been wearing a blue shorts that day and panty inside. On top she was wearing a white t-shirt. The accused had taken off her shorts and her panty and licked her female private part (her mimi). She said that the accused licked the inside of her mimi. It was painful. She said the accused licked her mimi many times. The witness said her mimi had bled a little. When she had removed her panty to go and have her bath at home, she had noticed blood on her panty.*
- (xxiv) After Ratu Sela had licked her mimi, he had told her not to tell anyone. She had felt scared and sad. She had put on her panty again, taken the bucket of crabs and went home.*
- (xxv) The witness said that there was no one around when the accused was licking her mimi at the time. She also said that she did not see the accused coming towards her. The accused had come from behind her and pulled her hand.*
- (xxvi) When she returned home, her mother had been at home. However, she had not told her mother anything as she was scared. Again she said "If I tell my mum she will go to tell my father and he will smack me".*
- (xxvii) The complainant said that she had told her Teacher, Ms Liku, about what Ratu Sela had done to her. Ms. Liku had taken her on the same day to the Head Teacher Mr.Vuloaloo. The complainant then relayed the incident to the Head Teacher. However, the witness said that she had only referred to the incident which happened in the toilet of the accused's house, where the accused had laid her down and used his two fingers to poke her mimi.*
- (xxviii) Thereafter, the Police had come and recorded her statement. The complainant had then been taken to a hospital in Vunisea for medical examination.*
- (xxix) The witness clearly identifies Ratu Sela as the accused in this case.*

- (xxx) *The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.*
- (xxxi) *The complainant agreed that she had told Ms. Liku only about the incident which happened in the toilet. She had not told Ms. Liku about the incident when she went to get the broom (from the accused's house), or about the incident which happened when she went to collect small crabs.*
- (xxxii) *The witness also agreed that when she had informed the incident to the Head Teacher, she had said that her mother knew about what happened (the incident). However, in her statement to the Police, the complainant had said that her mother did not know about the things that had happened to her.*
- (xxxiii) *The complainant also agreed that Tai Pata lives in Ratu Sela's house. In addition to the two of them, a man by the name of Tu Seru and another man by the name of Jojivini or Jio also stays there. Jio has three children – Tu Gudru, Tu Peni and Maluku – who also stays at Ratu Sela's house.*
- (xxxiv) *It was also suggested to the complainant that in the village of Kabariki, most villagers stay at home because they do not have regular jobs like in Suva. The witness replied "But on that day they went somewhere. Only Tu Sela was at home".*
- (xxxv) *It was also suggested to the witness, that in the Kabariki village, people usually go and fish or go to the plantations, except on Sundays. Therefore, since people fish every day, there would have been people (fishing) the day the complainant went to collect small crabs. The complainant said No.*
- (xxxvi) *It was suggested to the complainant that the accused never poked her mimi inside the toilet or that he never put his polo inside her mimi in his house or that he never licked her mimi when she went to collect small crabs. The witness replied "He really did it to me".*

**[91] Evidence of Iosefo Vulaloa Nabi**

- (i) *Currently he is serving as the Head Teacher at Levuka Primary School in Kadavu. He has been a teacher for 17 years. He has been the Head Teacher at Levuka Primary School for the past 3 years.*
- (ii) *The witness testified that in June 2018, he was serving as the Head Teacher at Levuka Primary School. He referred to an incident which happened on the 12 June 2018. Ms. Akesa Ratadina Liku brought the complainant over to him. This was around 8.10 in the morning. The complainant was in Class 3 at the time.*
- (iii) *When asked what kind of a student the complainant was, the witness replied "She was a kind of student that doesn't keep quiet in school. She is outspoken. Sometimes, when there is a game or a fight that happens in school, her name usually comes up."*
- (iv) *The witness testified that the complainant told him about the incidents.*

*Q. What did she tell you?*

*A. The first time it was inside a toilet.*

*Q. What did she tell you?*

*A. Tu Sela had used his finger and inserted it into her private part (of the small child).*

*Q. Did she tell you which private part?*

*A. Vagina.*

*Q. What word did she tell you in relation to vagina?*

*A. Mimi.*

*And in another time it was inside the house – inside Tu Sela's house?*

*Q. What did she tell you happened inside Tu Sela's house?*

*A. This is the place where Tu Sela had used his male private part – his penis (she said polo) – the actual penetration of his penis into her vagina.*

*Q. What were BVS's words when she told you this?*

*A. I know she was embarrassed to say it to me. She had said that Tu Sela had used his male private part to her private part.*

*And the third time, it was in the mangrove swamps. I cannot recall what she told me about what happened in the mangrove swamps.*

*Q. Did she tell you anything else?*

*A. I think that was it.*

*Q. How did BVS appear when she was telling you this?*

*A. I can tell she was confused, reserved, frightened.*

*Q. Would you recall which day in June that BVS had told you this?*

*A. It was on the 13<sup>th</sup> (later in evidence, the witness said it was on the 12<sup>th</sup>)*

*(v) Later, the witness testified as to how he had immediately summoned the complainant's parents and informed them about the incident. Later, he had called the District Office and spoken to the Divisional Education Officer and Senior Education Officer (Eastern) and informed about the incident. He had been instructed to fill up the Child Welfare Decree (CWD) Form.*

*(vi) Thereafter, the Police had come to the school and he had given a statement to the Police. He had recorded his own statement.*

- (vii) *In cross examination, the witness agreed that he had not referred to the accused by his name but merely as “perpetrator”.*
- (viii) *It was also put to the witness that in his statement to the Police, he had not made any specific mention to the incident which happened in the toilet of the accused’s house.*
- (ix) *It was also put to the witness that in his statement to the Police, he had not made any specific mention to the incident which happened in the mangrove swamps.*
- (x) *It was also put to the witness that in his statement to the Police, he had not made reference to the terms “polo” and “mimi” as stated by the complainant to him.*
- (xi) *The witness agreed that the complainant had told him that she had informed her mother about the alleged incidents.*

**[92] Evidence of Dr. Marshanell Veronica Leong**

- (i) *Currently she is serving as a Medical Officer at the Vunisea Rural Hospital in Kadavu. She has been based at the Vunisea Rural Hospital since February 2018. She has been practising as a Medical Officer since 2018.*
- (ii) *She had conducted a medical examination on the complainant, on 14 June 2018 at 18.40 hours. The Medical Examination Report was tendered to Court as Prosecution Exhibit **PE1**.*
- (iii) *The Doctor testified as to the specific medical findings as found in column D12:*
  - *Vaginal examination – hymen is not intact. No active bleeding. No laceration noted around vaginal walls. No vaginal discharge.*
  - *No signs of trauma (bruising/laceration) around perianal region.*
  - *Small bite mark (very faint) noted on the left breasts.*
- (iv) *Therefore, the doctor testified that the complainant’s hymen had been perforated.*
- (v) *The doctor testified that apart from the perforated hymen, there was no redness, no bruises or tear at the vaginal area. She said that since the vagina is made of very elastic tissues, which is why tears or laceration are not always found.*

**[93] Evidence of WPC 4632 Miliana**

- (i) Currently she is based at the Kadavu Police Station. She has served in the Fiji Police Force for 9 years. From 2016 till now, she is serving at the Kadavu Police Station.*
- (ii) She is the Investigating Officer in this case. She testified as to the investigations carried out in relation to this case.*
- (iii) The Birth Certificate of the complainant was tendered to Court thru this witness.*
- (iv) In cross examination, she was asked whether any other suspects, in addition to Ratu Sela, were taken into custody in relation to this case. She said Yes. She testified that the Police had apprehended another suspect, interviewed and formerly charged him in a separate case. However, the complainant in both cases is BVS, the complainant in this case.*

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

**Case for the Defence**

**[95]** The accused gave evidence in support of his case.

**[96] Evidence of Ratu Sela Dradra Matia**

- (i) The accused testified that he is from Kabariki, Nabukelevu, Kadavu. He has studied up to Class 5 at Levuka District School.*
- (ii) In 2017, he was living in Kabariki. His mother, Tu Seru, Josivini Yale, Tu Gudru, Maloku and Tu Veni, all live in the same house.*
- (iii) When Court inquired about this age, he said he is 60 years old. However, he does not remember his date of birth.*
- (iv) The accused testified that he knows the complainant. However, he totally denied all the allegations made against him by the complainant.*

- (v) *The accused was cross examined at length by the Prosecution. However, he continued to deny all the allegations against him.*

### **Analysis**

- [97] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, the Head Teacher of Levuka Primary School, Iosefo Vuloalua Nabi, a Medical Officer, Dr. Marshanell Veronica Leong and one police witness, WPC 4632 Miliana. The defence relied on the evidence of the accused himself.
- [98] The prosecution relies upon the evidence of the Medical Officer, Dr. Marshanell Veronica Leong. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [99] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [100] As I have informed you earlier, the burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [101] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [102] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt. Based on the said agreed facts the identity of the accused is proved as it has been agreed that 'The accused is Ratu Sela Dradra Matia'. All the other elements of the four offences must be proved by the prosecution beyond reasonable doubt.
- [103] In Count 4 it is stated that the date of offence is 9 June 2018. During her testimony the complainant did not make reference to a specific date of offence. She said the incident in Count 4 happened in the month of June 2018. Iosefo Vuloalua, the Head Teacher, said in evidence that the complainant informed him of the alleged incidents on 12 June 2018. Thereafter, he made his report to the police on 14 June 2018. The statement of the complainant was also recorded on 14 June 2018 and on the same day she was examined by Dr. Marshanell Veronica Leong.
- [104] From the above, it is clear that the incident referred to in Count 4 should have taken place on a day prior to the 12 June 2018 (the day on which the matter was reported to

Iosefo Vuloalooa). 9 June 2018, is three days prior to that. As I have explained to you before, a variance between the charge and the evidence produced in support of it with respect to the date or time at which the alleged offence was committed is not material.

**[105]** The accused has testified in Court and totally denies all the allegations against him.

**[106]** The defence also showed certain inconsistencies and omissions in the evidence given by the complainant and Iosefo Vuloalooa, the Head Teacher, during their testimony in Court. I have already directed you on how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected. However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question.

**[107]** To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.

**[108]** It was also revealed from the evidence of the Police witness, WPC 4632 Miliana that another suspect had been taken into custody and charged separately on the complaint made by BVS, the complainant in this case. I must emphasise that you should not be influenced or prejudiced by that testimony. Your entire focus should be on whether the prosecution has established beyond reasonable doubt that the accused in this case committed the acts he is charged with against the complainant.

**[109]** You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of four offences, beyond any reasonable doubt.

**[110]** It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider his evidence also for its consistency and also the probability of their version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case.



[111] If you neither believe the evidence adduced by the defence nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charges.

[112] However, I must caution you that even if you reject the evidence of the defence as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.

[113] You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the other counts as well.

[114] In summary and before I conclude my summing up let me repeat some important points in following form:

- i. *If you believe the evidence of the defence, then you must find the accused not guilty of the charges;*
- ii. *If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charges;*
- iii. *If you reject the version of the defence, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charges;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of rape and sexual assault have been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[115] Any re directions the parties may request?

[116] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately on the charges against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[117] Your possible opinions should be as follows:

**Count One**

Rape- Guilty or Not Guilty

**Count Two**

Sexual Assault- Guilty or Not Guilty

**Count Three**

Rape- Guilty or Not Guilty

**Count Four**

Rape- Guilty or Not Guilty

[118] I thank you for your patient hearing.



**Riyaz Hamza**

**JUDGE**

**HIGH COURT OF FIJI**

AT SUVA

Dated this 15<sup>th</sup> Day of July 2019

**Solicitors for the State : Office of the Director of Public Prosecutions, Suva.**  
**Solicitors for the Accused : Office of the Legal Aid Commission, Suva.**