

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

**Crim. Case No: HAC 350 of 2019**

**STATE**

**vs.**

**ID**

**Counsel:** Ms. U. Tamanikaiyaroi with Mr. U. Lal for the State  
Mr. J. Korotini for Accused

**Date of Hearing:** 24<sup>th</sup> November 2020 to 25<sup>th</sup> November 2020

**Date of Closing Submission:** 26<sup>th</sup> November 2020

**Date of Summing Up:** 27<sup>th</sup> November 2020

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**SUMMING UP**

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1. The name of the Complainant and the Accused are suppressed. Hereinafter the Complainant will be referred to as **TM** and the Accused will be referred to as **ID**.
2. The hearing of this case has now reached its conclusion. I have to sum up the case now. As I explained to 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 to 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 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. However, 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 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 exhibits tendered as evidence. This summing up, statements, arguments, questions, and comments made by the parties' counsel are not evidence. The purpose 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 consider when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, 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. Ensure that no external influence plays a part in your deliberation. 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 your opinion does not bind me, but I assure you that I will give the greatest possible weight to your opinions when I make my judgment.

7. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether sympathy for or prejudice against the accused, the Complainant, or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. It would be best if you approached your duty dispassionately, deciding the facts solely upon the whole of the evidence. You have 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 guilty of the offence.
9. The burden of proof of the charge against the accused is on the Prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words, there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
10. The standard of proof in a criminal trial is "proof beyond a 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 about the accused's guilt that means the Prosecution has failed to satisfy you the guilt of the accused beyond a reasonable doubt. If you find any reasonable doubt about the commission of the offence as charged or any other offence by the accused, such doubt should always favor the accused.

### **Information and elements of the offences**

11. The accused is being charged with one count of Rape, contrary to Section 207 (1) ,(2) (a) and (3) of the Crimes Act and one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are in the information. Hence, I do not wish to reproduce them in the summing up.

12. The main elements of the first count of Rape are that:

- (i) The accused,
- (ii) Penetrated the vagina of the Complainant with his penis.

13. The Complainant was below the age of thirteen years at the time of this alleged incident, pertaining to count one, took place. The Defence has not disputed the age of the victim. Hence, she is incapable of giving consent to any form of penetration of her vagina as defined under Section 207 of the Crimes Act.

14. The main elements of the second count of Rape are that:

- (i) The Accused,
- (ii) Penetrated the vagina of the Complainant with his penis,
- (iii) The Complainant did not consent to the accused to penetrate 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.

### **Representative Count**

15. You could see the count one and count two are named as representative counts. The Prosecution alleges that the accused had penetrated the vagina of the Complainant in the same way on multiple occasions during the period between the 1st of January 2018 and 31st of August 2018. Furthermore, the Prosecution alleges that the accused had again penetrated the vagina of the Complainant in the same manner on few occasions during the period between the 1st of May 2019 and 31st of August 2019. The Complainant could not remember when those incidents took place exactly, but could remember that few of them took place before her thirteen birthday in 2018 and some of them happened during the month of August 2019. When the Prosecution is not able to say exactly when or how

often the offences were committed, they can bring a charge which covers more than one incident. This is what the Prosecution has done here. The first count alleges that the accused had penetrated the vagina of the Complainant at least one occasion during the period between 1st of January 2018 and 31st of August 2018. In like manner, the Prosecution alleges the accused had penetrated the vagina of the Complainant at least one occasion between the 1st day of May 2019 and 31st of August 2019. Accordingly, if you are sure that the accused had penetrated the vagina of the Complainant at least one occasion during the period as stated in count one, you can find him guilty of first count of Rape. Likewise, if you find the accused had penetrated the vagina of the Complainant at least one occasion during the period as stated in the second count, you can find him guilty of second count of Rape.

### **Separate Consideration**

16. The accused is charged with two count of Rape. You have to consider each of these two counts separately. If you find the accused guilty of one count that does not automatically make him guilty of the remaining count. Likewise, if you find the accused not guilty of one count that does not automatically make him not guilty of the remaining of the counts.

### **Accused**

17. It is the onus of the Prosecution to prove beyond a reasonable doubt that it was the accused who committed these two offences to the Complainant.

### **Penetration**

18. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the accused is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

## Consent

19. You need to consider the element of consent in relation to the second count. Consent is a state of mind that can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely voluntarily. A consent obtained through fear, by threat, by the 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 a choice. It means that she must not be 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. It should not be an optional choice. The consent of a person should not be assumed.
21. If you are satisfied that the accused had penetrated the vagina of the Complainant with his penis 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 act. I must advise you that belief in consent is not the same thing as 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 the sexual act. Suppose you conclude that the accused believed or knew that the Complainant was consenting. In that case, you must then consider whether such a belief of the accused was reasonable under the circumstances that were prevailed at the time of the alleged incident.

## **Admitted Fact**

22. I now request you to draw your attention to the Agreed Facts, which are before you. They are the facts that the Prosecution and the Defence have agreed without dispute. Hence, you are allowed to consider them as proven facts by the Prosecution beyond a reasonable doubt.

## **Evidence of Corroboration**

23. 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.
24. 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 is being raped will do or say. Though such assumptions are natural in ordinary life, you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist, or a victim of Rape.
25. Offences of this nature can occur in any circumstance between any person who acts in various 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 hearing.
26. It is your duty to assess the evidence to determine whether the accused has committed this crime to the Complainant. In doing that, you must be mindful 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 victim's experience. Every person has his or her way of coping with such an incident. Some may display apparent signs of distress, and others may not. Demeanors of the Complainant in the court while giving evidence is not necessarily a clue to the truth of the Complainant's account.

## Evidence of the Prosecution

27. Let me now remind you of the evidence presented by the Prosecution and the Defence during the hearing. This is a very short hearing, where the Prosecution adduced the evidence of one witness and the Defence presented the evidence of two witnesses. I trust that you have heard those evidence and still could recall them.
28. The Complainant had been living with her father, the accused and her four siblings, (three sisters and the brother) since her mother left them in 2009. She was born on the 2nd of September 2005. The Complainant had been living at Nakavu Village with her father and siblings until she reached class 4. They then moved to Tadevo. The father had been teaching her and the siblings about good manners and looked after them well. They listen to their father and would do anything if he asked them to do it. According to the Complainant, the accused was a good father. She felt safe around her father. However, now she does not feel safe around her father as he had done something bad to her in 2018.
29. You could recall that the Complainant explained what were the bad things that the accused had inflicted on her. He had penetrated the vagina of the Complainant with his penis on several occasions. The first time the accused did such a bad things to the Complainant when they were renting a house in Wainividio. It was before her birthday in 2018 and she was in class seven. One of the nights, when she was reading in the room, the accused came and lied down beside her. The other siblings were not at home, as they have gone to her grandmother's place at Raiwaqa Hart. The accused didn't say anything. He came and removed his clothes and then removed the clothes of the Complainant, including her undergarment. He then lied on her stomach, facing downward and inserted his penis into her vagina. It only lasted for a short period. Afterwards, the accused got up and put on his clothes back. The Complainant then put on her clothes back too. The accused then threatened the Complainant saying that she must not tell anyone about this, if she does so, he would do something hurt to kill her. The Complainant said that she was scared and felt ashamed. She has not informed anyone about this incident because she was afraid of the threat of the accused and also felt ashamed.



30. The accused had done this again when they were staying at Tokotoko Highway. The second incident happened before her birthday in 2018. On that night, the accused had gone to work. The four female siblings were sleeping in the bed in the room. Miliana was closed to the wall, Sreana and then Lidia were lying next to each other's. The Complainant was at the other end of the bed. While she was lying on the bed, the accused came back from work. The light of the room was turned off, but she still could see him from the light at the living area. He came and removed his clothes and then the clothes of the Complainant. He then lied on her stomach and inserted his penis into her vagina. The complainant tried to shout but he covered her mouth with a pillow. She tried to move to alert her siblings, but none of them noticed it. It was also last only for short time, he then got off and went back, putting his clothes back. The Complainant was scared and did not tell anyone as she was scared of the accused.
31. The accused again had sexual intercourse with the Complainant sometimes in August 2019. They were renting a flat at Wainividio during that time. On that particular day, the siblings of the Complainant had gone to their grandmother's house. The Complainant was at home alone. When she was in the room, the accused came in. He then removed his clothes and then her clothes. The accused then penetrated the vagina of the Complainant with his penis. The accused said nothing, when he started to have sexual intercourse with her. The Complainant was scared and told the accused not to do this. However, the accused continued with his act. You may recall the Complainant said she agreed to what he has done, but she then explained that she didn't like what he did. This particular sexual intercourse lasted for a long time. After that, the accused got up and dressed up his clothes. The Complainant put her clothes on and went off to sleep. The Complainant explained that she did not tell anyone, because she was scared of the accused as he had threatened her not to tell anyone.
32. According to the Complainant, the accused again had sexual intercourse with her at the Old Hospital of Navua in August 2018. On that particular day, she went to meet the accused at the Old Hospital of Navua, with her elder sister Miliana. They went there to ask him his bus card. The accused gave Miliana the bus card and told her to go, asking the Complainant to stay with him. The Complainant then went to his office room to wait

for Miliana. The accused then came and locked the door. There was a bed in the room. He then removed his trousers and removed her clothes. The accused then penetrated the vagina of the Complainant with his penis. It lasted for a short period. The Complainant had told the accused not to do it, but he continued with his act without saying anything. She had slapped on his back, indicating her decent. He then dressed up and went out. The Complainant did not wait for Miliana and went to town and then home. The Complainant had to walk passed the Navua Police Station on route to her home. However, she had not made any complaint to the police as she was scared and ashamed of what her father did to her.

33. During the cross examination, the Complainant explained that she was staying with her grandmother after her mother left them. However, she visited her father and used to stay with him during those visits. She further said the father did not live alone at Wainividio as her siblings stayed with him. The Complainant reiterated her allegation of these forced sexual intercourse. In respect of the second incident that took place in 2018, the Complainant said the statement she made to the police is the true reflection of the events. According to the statement, the Complainant and her sister Sereana were at home with the accused on that particular night. The Complainant was in the room, while Sereana was sleeping in the living room. The Complainant reiterated that she visited the accused at Old Navua Hospital with her sister and the accused then had a forceful sexual intercourse with her.

### **Evidence of the Defence**

34. At the conclusion of the Prosecution's case, the accused was explained about his rights in defence. The accused opted to give evidence and also called one witness for his defence. I will now proceed to summarize the evidence presented by the Defence briefly.
35. The accused in his evidence denies these allegations, stating that he never penetrated the vagina of the Complainant with his penis as alleged by the Prosecution. The Complainant had been staying with her grandmother till 2019. She has never visited him in 2018. The accused had only met her at the school in 2018. The Complainant came home in August

2019. The accused further said that the Complainant never came to visit him at Old Hospital of Navua in 2019 with her sister Miliana.

36. During the cross examination, the accused said the Complainant is the quiet one out of his children. He had been looking after them since his wife left. He has been the father figure to the Complainant.

37. The second witness of the defence is Miliana. She is the eldest daughter of the accused and also the elder sister of the Complainant. According to her evidence, she had not gone to visit the accused at Old Navua Hospital with the Complainant in 2019. In 2019, she was at BMS boarding school and came home in August 2019.

38. During the cross examination, Miliana said that she is very much closed to the accused and had visited him in remand. She said that she is willing to save her father even if he had done something wrong. That is the reason, she came to court to give evidence.

39. I have summarized the evidence presented during this hearing. However, I might have missed some. It is not because they are not important. You have heard every item of evidence. I only wanted to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

### **Analysis and Directions**

40. The Prosecution alleges the accused had penetrated the vagina of the Complainant at least one occasion during the period stated in each count. The Defence claims that the accused had never done such an act to the Complainant.

41. Accordingly, you have to decide whether this alleged incident took place as claimed by the Prosecution. To do that, you have to determine the reliability and credibility of the Prosecution and the Defence's evidence.

## **Evaluation of the Evidence**

42. I now take your attention to the direction of evaluation of the evidence. The evolution of evidence consists of two main steps, the determination of the reliability and the credibility of the evidence.

### **Reliability of Evidence**

43. You must be satisfied that you can rely on the evidence as reliable evidence. 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 consider the evidence as reliable evidence.

### **Credibility of Evidence**

44. The assessment of the credibility of evidence does not concern the unintended inaccuracy, mistakes, or errors. It focuses on the lies or inaccurate facts that are intentional and motivated attempts to deceive.
45. Evaluation of the reliability and credibility of evidence will help you 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 decide whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
46. 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. It would be best if you then considered whether the witness's evidence is probable or improbable, considering the circumstances of the case. Apart from that, you are required to consider the witness's consistency not only with his or her evidence but also with other evidence presented in the case.

47. It is your duty to consider the witnesses' demeanour, how they react to being cross-examined, and re-examined and were they evasive to decide the witness's credibility.
48. Moreover, you must bear in 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.

### **Defence's Case**

49. Let me now take your attention to the defence of the accused.
50. The accused is 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 a witness to give evidence for the Defence. Therefore, you have to take into consideration the evidence adduced by the accused and his witness when you determine the issues of fact of this case.
51. Accordingly, it is for you to decide whether you believe the evidence given by the Defence. If you consider that the account given by the Defence is or may be true, you must find accused not guilty.
52. If you neither believe nor disbelieve the version of the Defence, yet, it creates a reasonable doubt in your mind about the Prosecution's case. You must find the accused not guilty.
53. Even if you reject the version of the Defence that does not mean that the Prosecution has established that the accused guilty to this offence. Still you have to satisfy that the Prosecution has established on its own evidence beyond reasonable doubt that the accused has committed these offences as charged in the information.

### **Presentation of the Evidence of the Child Complainant**

54. You saw that the Complainant gave evidence behind a screen. 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.

### **Evidence of the Child Complainant**

55. The most important part of your task is to judge whether the child witness has told the truth, and has given a reliable and credible account of the events that she was describing. Some of you may have children, grandchildren, nieces or relatives who are of a similar age to the complainant. If so, I think you will recognize the advice that I am going to offer you about your opinion of the evidence of the child complainant, 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.
56. Children do not have the same life experience as adults. They do not have the same standards of logic and consistency. Their ability to understand certain events may be severely limited for a number of reasons such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it. They might think that using of some words are naughty, and therefore find it difficult to speak.
57. Remember how you normally talk to children of this age. You should bear those difficulties in mind when you consider the answers given by the child Complainant. All decisions about the evidence are for you to make.

## Contradiction and Inconsistencies

58. You have heard that the Complainant said during the evidence in chief that her three siblings were sleeping in the bed when the accused approached her to commit the second alleged incident in 2018. However, the statement she made to the police states that she was at home only with Sereana and the accused on that particular night. Sereana was sleeping in the living room and she was in the bedroom. The Complainant said what she said in the police statement is the true events that happened in that night. It is important for you to take these contradictions into consideration when you evaluate the evidence given by the Complainant.
59. You are allowed to take into consideration about such inconsistencies when you consider the credibility and reliability of the evidence given by the Complainant. However, previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the Court.
60. 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.
61. 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.

### **Final Directions**

62. 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 accused has committed the offence of Rape as charged under count one, you can find the accused guilty of the said offence of Rape.
63. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count one, you must find the accused not guilty of the said count of Rape.
64. If you are satisfied that the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count two, you can find the accused guilty of the said offence of Rape.
65. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count two, you must find the accused not guilty of the said count of Rape.

### **Conclusion**

66. 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.



67. Learned counsel of the Prosecution and the accused, do you have any redirections to the assessors?



A handwritten signature in black ink, appearing to read 'R.D.R.T. Rajasinghe'.

.....  
**Hon. Mr. Justice R.D.R.T. Rajasinghe**

**At Suva**

27<sup>th</sup> November 2020

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.