

IN THE HIGH COURT OF FIJI

AT LABASA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 50 of 2019

STATE

V

JALE RASUSU

Counsel : Ms. Dharshani Rao for the State
Ms. Karen Boseiwaqa for the Accused

Dates of Trial : 16-18 March 2020

Summing Up : 20 March 2020

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

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 charge 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 charge 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 and the 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 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 primary 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, TR, was 9 years old at the time of the alleged incident, and was 10 years old when she testified in Court (It has been agreed that her date of birth is 26 May 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 offence 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]** 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.
- [18]** 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.
- [19]** Ladies and Gentleman Assessor, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [20]** 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.
- [21]** 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 charge. 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.

- [22] 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 offence charged.
- [23] 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.
- [24] 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.
- [25] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this morning, you saw a particular person seated on the back bench of this Court room. 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.
- [26] 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.
- [27] 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.

- [28] 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 offence 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.
- [29] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [30] 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 offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [31] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, 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.
- [32] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [33] 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 which she alleged took place. 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.
- [34] The same applies for permitting a closed court proceedings when the complainant gave evidence in this case; and also for permitting a support person (A Counsellor from Medical Services Pacific (MSP) Labasa Office) to sit beside her when she testified in Court. I wish to reiterate once again 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.
- [35] Let us now look at the charge contained in the Information.

[36] There is one charge preferred by the Director of Public Prosecutions (DPP), against the accused:

Statement of Offence

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

Particulars of Offence

JALE RASUSU, on the 17 January 2019, at Bua, in the Northern Division, penetrated the vagina of **TR**, a child below the age of 13 years, with his fingers.

[37] As you would observe the accused has been charged with one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act).

[38] Let me now explain to you the elements of the charge.

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

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

[40] 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.

[41] 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.

- [42] 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.
- [43] 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."*
- [44] Therefore, in order for the prosecution to prove the Count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified date (in this case the 17 January 2019);
 - (iii) At Bua, in the Northern Division;
 - (iv) Penetrated the vagina of TR, with his fingers; and
 - (v) At the time TR was a child under 13 years of age.
- [45] Let me now elaborate on these elements in respect of the charge of Rape.
- [46] 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.
- [47] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [48] The fourth element involves the penetration of the complainant's vagina, with his fingers. 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 fingers, to any extent.
- [49] The final element is that at the time of the incident TR was a child under 13 years of age.
- [50] 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 9 years of age at the time of the alleged incident, and therefore, she had no mental capacity to consent.

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

[52] However, consequent to hearing the testimony of the complainant in this case it was clear that the prosecution has failed to establish that the accused penetrated the vagina of TR, with his fingers. Therefore, in relation to the count of Rape the prosecution would fail to establish this charge beyond reasonable doubt. Therefore, the accused cannot be found guilty for the offence of Rape as charged.

[53] However, even though the prosecution has failed to establish beyond reasonable doubt that the accused penetrated the vagina of TR, with his fingers, but if you find from the available evidence that the accused unlawfully and indecently assaulted TR by pinching her vaginal area; as an alternative, you are then allowed to look at the lesser offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act, though the accused is not formally charged for that offence.

[54] 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;

[55] Therefore, in order for the prosecution to prove Sexual Assault they must establish beyond any reasonable doubt that;

(i) The accused;

(ii) On the specified day (in this case 17 January 2019);

(iii) At Bua, in the Northern Division;

(iv) Unlawfully and indecently assaulted TR, by pinching her vaginal area.

[56] 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.

- [57] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [58] 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 pinching the complainant’s vaginal area by the accused is an indecent act and thereby amounts to Sexual Assault.
- [59] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [60] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as “*Admitted Facts*” without placing necessary evidence to prove them:

1. Background

- 1.1** TR was a class 3 student, born on 26 May 2009, and the second eldest child of Makereta and Isimeli Matasere.
- 1.2** Jale Rasusu is 34 years, Farmer of Nawailevu, Bua.
- 1.3** In the month of January 2019, TR was 9 years of age. She lived in Navai Village, Bua.
- 1.4** On 17 January 2019, at around 3.00 p.m., she was in the kitchen having lunch with Meli, her younger brother, Jale Rasusu, her older half-sister Mere and cousin, Nani.
- 1.5** The kitchen referred to above in paragraph 1.4 is a building constructed out of corrugated iron and timber.
- 1.6** The kitchen referred to above is the same kitchen in the police photographic booklet photographed by Sergeant 3660 Gasio Rokodulu.
- 1.7** The Police photographic booklet is tendered as an agreed document.

2. Incident

2.1 On 17 January 2019, close to 4.00 p.m., whilst TR was in the kitchen having lunch with Meli, Mere and Nani, Jale Rasusu walked out and saw his flip flop missing and went to TR and enquired about his flip flop.

3. Caution Interview

3.1 On 5 February 2019, the accused was interviewed under caution at the Labasa Police Station.

3.2 On 18 September 2019, the accused was formally charged.

[61] 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

[62] The prosecution, in support of their case, called the complainant (TR) and her mother, Makereta Manuo.

[63] Evidence of the complainant TR

- (i) *It is an Admitted Fact that the complainant was 9 years of age at the time of the alleged incident. It is agreed that her date of birth is 26 May 2009.*
- (ii) *It also agreed that the complainant was a year 3 student and the second eldest child of Makereta and Isimeli Matasere. It is admitted that in January 2019 she lived at Navai Village in Bua.*
- (iii) *The complainant testified that she currently lives at Navai Village in Bua. She said that she is living with her mother and father. She has one brother and two sisters.*
- (iv) *She testified that she is attending Nawailevu Village School and that she travels to school by foot.*
- (v) *The complainant testified to the incident that took place on 17 January 2019.*
- (vi) *It is an Admitted Fact that on 17 January 2019, at around 3.00 p.m., the complainant was in the kitchen having lunch with Meli, her younger brother, Jale Rasusu, her older half-sister Mere and cousin, Nani. She said she was eating noodles for lunch.*
- (vii) *It is agreed that the kitchen referred to above is a building constructed out of corrugated iron and timber. It is also agreed that the kitchen referred to above is the same kitchen as in the police photographic booklet photographed by Sergeant 3660 Gasio Rokodulu. The police photographic booklet has been tendered as an agreed document.*

- (viii) *The complainant confirmed that she is the person standing in the kitchen in photo number 4.*
- (ix) *The complainant testified that Jale, the accused, had asked her about his shoes. Later the witness said that Jale had asked her about his flip-flops. It is an Admitted Fact that on 17 January 2019, close to 4.00 p.m., whilst TR was in the kitchen having lunch with Meli, Mere and Nani, Jale Rasusu walked out and saw his flip-flop missing and went to TR and enquired about his flip-flop.*
- (x) *The following questions were then asked from the witness and she answered as follows:*
- Q. *Then what happened after that?*
A. *He said that I was chubby chubby.*
- Q. *Then what happen?*
A. *He took off my pants. I was wearing a skirt too. And he lifted me up. He put me down again. He closed my mouth. I was crying. He lifted me and asked me for us to go and have a bath. And he was poking my thighs.*
- Q. *When did he take your pants off? Was it before lifting you or after lifting you?*
A. *Before he lifted me.*
- Q. *What happen to your skirt?*
A. *He also took off my skirt.*
- Q. *At that time what were you doing?*
A. *I hit him with the broom.*
- Q. *Had you finished eating when Jale took off your pants and skirt?*
A. *Yes. I had already finished eating.*
- Q. *What did you do when Jale pulled your pants and skirt off?*
A. *I cried.*
- Q. *How did he lift you?*
A. *He lifted me like carrying a baby. The witness demonstrated in Court how this was done.*
- Q. *What happen after this?*
A. *I went where my mother was at the shed.*
- Q. *While Jale was holding you did he say anything to you?*
A. *No. He didn't say anything.*

- Q. *Did you say anything to Jale?*
A. *Nothing, my Lord.*
- Q. *What was he doing while holding you in his arms?*
A. *While he was carrying me he told to ask others for us to go and have a bath.*
- Q. *While you were in his arms what about your clothes? Your pants and skirt?*
A. *It was on my legs.*
- Q. *Which part of your legs?*
A. *Witness demonstrated and showed the mid part of her thigh.*
- Q. *What happened to your pants and skirt after that?*
A. *He took off my skirt first, then my panty.*
- Q. *What all were you wearing (at the time)?*
A. *I was wearing a vest, a short skirt, a short tights.*
- Q. *Were you wearing any panties or not?*
A. *Yes.*
- Q. *Was it pants or short tights?*
A. *Short tights.*
- Q. *What happened after this?*
A. *Nothing happened.*
- Q. *You said you were crying?*
A. *Yes.*
- Q. *Why were you crying?*
A. *Because it was painful.*
- Q. *What was painful?*
A. *My thighs where Jale was poking.*
- Q. *What was he poking with?*
A. *The head of the umbrella.*
- Q. *Apart from your thighs did anywhere else hurt?*
A. *No. Only the thighs.*

- Q. *When Jale was holding you like a baby, did anything else hurt?*
A. *No.*
- Q. *You said Jale said you were chubby chubby (bani bani). What did you understand by that?*
A. *That I was chubby chubby.*
- Q. *What do you understand by that?*
A. *The private part (deladela).*
- Q. *You said Jale said you were chubby- what did you understand? What was he talking about?*
A. *I don't know.*
- Q. *Earlier you said private part (deladela). Why did you say deladela?*
A. *No answer.*
- Q. *Why did you cry? What happened?*
A. *He pinched.*
- Q. *Where did he pinch?*
A. *The witness answered bebeleni bukuqu (to mean edge/tip of the bum or back side or in some dialects the vaginal area).
When the witness was asked to show what area she was referring to she pointed towards her groin or private part.*
- Q. *How did he pinch?*
A. *The witness demonstrated as to how Jale had pinched her.*
- Q. *When Jale pinched you where was your panty at the time?*
A. *It was down.*
- Q. *What else did Jale do after that?*
A. *After that Jale went to eat.*
- Q. *What did you do?*
A. *I went to have a bath.*
- Q. *How did you feel about what Jale did to you?*
A. *It was painful to me.*
- Q. *You said you hit him with a broom?*
A. *Yes.*

Q. *When did you hit him?*

A. *When he pinched me.*

Q. *When did he put you down?*

A. *When Na Selai (aunty Selai) came.*

Q. *Where did you see aunty Selai?*

A. *At the shed.*

Q. *Where were you?*

A. *I was at the shed.*

Q. *You said Jale had pinched you in the kitchen?*

A. *Yes.*

Q. *And he put you down when aunty Selai came?*

A. *Yes.*

Q. *Where did she come from?*

A. *She came from the shed.*

Q. *Did you talk to aunty Selai?*

A. *Yes.*

Q. *What did you say?*

A. *I told her that Jale was doing something to me.*

Q. *Did you explain what this was?*

A. *Yes.*

Q. *What did you say?*

A. *I told her that Jale pinched me.*

Q. *Anything else you told aunty Selai?*

A. *No.*

Q. *What did you do after talking to aunty Selai?
When you were talking to aunty Selai where were you both?*

A. *In the kitchen.*

Q. *What did you do after that?*

A. *Aunty Selai told me to go to the shed.*

Q. *Did you go to the shed?*

A. *Yes.*

Q. *What happened at the shed?*

A. *Nothing happen.*

(xi) *The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.*

[64] Evidence of Makereta Manuo

(i) *She is the mother of TR. She resides at Navai, in Bua, together with her husband and 4 children.*

(ii) *The witness testified and explained the relationship between the complainant and the accused. She stated that the accused was an older cousin of the complainant.*

(iii) *The witness also explained details as to the function that was held in the village on 17 January 2019. She also explained the location of her house and kitchen (including the shed) by reference to the photographic booklet that is part of the Admitted Facts.*

[65] That was the case for the prosecution. At the end of the prosecution case, this Court decided that the accused has no case to answer in respect of the charge of Rape. However, this Court decided that the accused has a case to answer for the lesser or alternative offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act, though the accused is not formally charged for that offence. Thus Court decided to call for his defence for the lesser or alternative offence. 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.

Case for the Defence

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

[67] Evidence of Jale Rasusu

(i) *The accused testified that he is a farmer by occupation.*

- (ii) *On 17 January 2019 he was in the village at Navai, Nawailevu in Bua. He said he was resting because he had sustained some injuries. Therefore, he didn't attend to his farm.*
- (iii) *He testified that at 3.00 p.m., on 17 January 2019, he was lying down at his house. He had got hungry. So he went down to the place where the function was held to look for some food. It was a function – a farewell for a church elder. The function was held at the village hall, which was besides Makereta's house.*
- (iv) *When he had arrived at the place where the function was been held he had told his mother that he wanted to eat. His mother had then told two of his sisters (cousin sisters) – Mere and Nani – to cook some noodles.*
- (v) *After the noodles were cooked he had invited his cousins, namely TR and Meli to go and have lunch together. They had all sat down to eat inside the kitchen, which belonged to Makereta, where the cooking was done. In addition to him, Nani, Mere, Meli and TR were in the kitchen.*
- (vi) *After eating the witness said that he had left the kitchen and went to the shed (extension of the kitchen). He said that he had placed his shoes in front of the shed. When he came out he saw that his shoes were missing. Since Meli and TR were his cousins (cross-cousins) he believed that they might have hidden the shoes.*
- (vii) *He had then turned back to question them about the shoes. When he turned back to ask about the shoes TR came running from the kitchen into the shed. She ran towards the right hand corner of the shed. At that place there was a stack of firewood. On top of the firewood there was a sasa broom. TR ran to get hold of that broom.*
- (viii) *When TR got hold of the broom, the witness said he went straight towards the door, towards where Meli was, because he (Meli) had been laughing at him. This made the witness think that Meli had taken his shoes.*
- (ix) *At that time his back was against TR. TR had hit his leg from the right hand side. But the tip of the broom handle had hit his injuries on the left hand side (left leg).*
- (x) *At that time the witness said he felt pain and also felt angry. So he turned back and pulled the sasa from her hand. When he pulled the sasa the complainant had fallen towards him. Then he had held her up and carried her with one hand. The witness said with his other hand he had held the complainant's hand (the hand with which she was holding the broom). He had carried her. Then put her down. The he had pulled the sasa away from her hand and gone out.*
- (xi) *The witness further explained that he had carried the complainant with his right hand. When he had carried her he had then left her hand she was holding the broom. Then he had carried her with both hands. After that he had put her down to make her sit.*

- (xii) *After putting her down to make her sit, the witness had squeezed her hand with which she was holding the broom and with the other hand pulled the broom away. Then he had gone out.*
- (xiii) *The witness also explained as to where Meli had hidden his shoes (the witness showed the place where the shoes were hidden in reference to photo 1 of the photographic booklet).*
- (xiv) *The witness totally denied the allegations made against him by the complainant.*

Analysis

- [68]** The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant and her mother, Makereta Manuo. The defence relied on the evidence of the accused himself.
- [69]** As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [70]** In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [71]** 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 fact that Jale Rasusu is the accused is not disputed. Further the date of incident and the place of incident has been agreed upon. However, the prosecution has to prove beyond reasonable doubt that the accused unlawfully and indecently assaulted TR, by pinching her private part.
- [72]** The accused has testified in Court and totally denies that he removed any of the complainant's clothes or that he pinched the vaginal area of the complainant.
- [73]** I have already directed you on how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency is significant. That is, whether that inconsistency 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, you may conclude that the underlying reliability of the account is unaffected. However, if there is no acceptable explanation for the inconsistency, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question.
- [74]** To what extent such inconsistency 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.

- [75] 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 charge, 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 element of the offence, beyond any reasonable doubt.
- [76] 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 charge, since the prosecution has failed to prove its case.
- [77] 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 charge.
- [78] 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.
- [79] 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 charge of Sexual Assault;*
 - ii. *If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charge of Sexual Assault;*
 - 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 charge of Sexual Assault;*
 - v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of 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.*

[80] Any re directions the parties may request?

[81] 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 charge of Sexual Assault 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.

[82] Your possible opinions should be as follows:

Sexual Assault- Guilty or Not Guilty

[83] I thank you for your patient hearing.



A handwritten signature in black ink, appearing to read "Riyaz Hamza".

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LABASA

Dated this 20th Day of March 2020

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