

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 172 of 2019**

**STATE**

**V**

**THOMAS PEARSON**

**Counsel** : Ms. Swastika Sharma with Ms. Nimisha Shankar for the State  
Mr. Nemani Tuifagalele for the Accused

**Dates of Trial** : 26-28 May 2020

**Summing Up** : 29 May 2020

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

### **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 opinions. You must take all evidence into consideration, before you proceed to form your opinions. 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 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 Defence Counsel and closing submissions made by both 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, APLT, was 5 and a half years old at the time of the alleged incident, and was 7 years old when she testified in Court (Her date of birth being 13 May 2013). 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 perceive (or know) in any other way 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 could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [18]** A statement made to the Police by a witness can only be used during cross-examination to highlight inconsistencies or omissions. That is, to show that the relevant witness on a previous occasion had said something different to what he or she said in Court (which would be an inconsistency) or to show that what the witness said in Court was not stated previously in the statement made to the Police (which would be an omission). You have to bear in mind that a statement made by a witness out of Court is not evidence. However, if a witness admits that a certain portion in the statement made to the Police is true, then that portion of the statement becomes part of the evidence.
- [19]** 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.
- [20]** 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.

- [21] Madam Assessors 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.
- [22] 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.
- [23] 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.
- [24] 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.
- [25] 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.
- [26] 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. This is also referred to as circumstantial 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.

- [27] 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 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.
- [28] I must emphasize, it does not matter whether that evidence was called for by the prosecution or by the defense. You must apply the same standards, in evaluating them.
- [29] 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.
- [30] 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.
- [31] 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?
- [32] 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. The doubt must only be based on the evidence presented before this Court.
- [33] 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.
- [34] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant in this case 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 also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.

[35] 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.

[36] 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 the Fiji Women's Crisis Centre-FWCC) 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.

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

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

#### **COUNT ONE**

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

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

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

**THOMAS PEARSON**, between the 1<sup>st</sup> day of January 2019 and the 3<sup>rd</sup> day of May 2019, at Nasinu, in the Central Division, penetrated the vagina of APLT, a child under 13 years of age, with his finger.

#### **COUNT TWO**

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

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

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

**THOMAS PEARSON**, between the 1<sup>st</sup> day of January 2019 and the 3<sup>rd</sup> day of May 2019, at Nasinu, in the Central Division, penetrated the anus of APLT, a child under 13 years of age, with his finger.

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

[40] Let me now explain to you the elements of the charges.

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

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

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

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

*(a) ....*

*(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; or*

*(c) .....*

[43] 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.*

[44] 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 without the other person's consent.

[45] 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."*

[46] 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 2019 and 3 May 2019);
- (iii) At Nasinu, in the Central Division;
- (iv) Penetrated the complainant's vagina, with his finger; and
- (v) At the time the complainant was a child under the age of 13 years.

**[47]** Let me now elaborate on these elements in respect of the first count.

**[48]** 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.

**[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 finger. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This 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 vagina of the complainant with his finger to any extent.

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

**[52]** The issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As indicated earlier, the complainant in this case was 5 and a half years old at the time of the alleged incident, and therefore, she had no mental capacity to consent.

**[53]** In order for the prosecution to prove the second 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 2019 and 3 May 2019);
- (iii) At Nasinu, in the Central Division;
- (iv) Penetrated the complainant's anus, with his finger; and
- (v) At the time the complainant was a child under the age of 13 years.

**[54]** Let me now elaborate on these elements in respect of the second count.

- [55] 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.
- [56] 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.
- [57] The fourth element involves the penetration of the complainant's anus; with the accused's finger. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This 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 anus of the complainant with his finger to any extent.
- [58] The final element is that at the time of the incident the complainant was a child under 13 years of age.
- [59] As I informed you earlier, the issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As indicated earlier, the complainant in this case was 5 and a half years old at the time of the alleged incident, and therefore, she had no mental capacity to consent.
- [60] 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.
- [61] If you are satisfied beyond any reasonable doubt that the accused, between 1 January 2019 and 3 May 2019, penetrated the vagina of APLT with his finger, then you must find him guilty of the first count of Rape.
- [62] If you find that the prosecution has failed to establish any of these elements in relation to the first count, then you must find the accused not guilty of Rape.
- [63] If you are satisfied beyond any reasonable doubt that the accused, between 1 January 2019 and 3 May 2019, penetrated the anus of APLT with his finger, then you must find him guilty of the second count of Rape.
- [64] If you find that the prosecution has failed to establish any of these elements in relation to the second count, then you must find the accused not guilty of Rape.
- [65] However, in relation to the first count of Rape, if you find that the prosecution although failing to establish beyond any reasonable doubt that the accused, between

1 January 2019 and 3 May 2019, penetrated the complainant's vagina with his finger, has satisfied beyond any reasonable doubt that the accused, between 1 January 2019 and 3 May 2019, unlawfully and indecently assaulted the complainant by touching the area around the complainant's external genitalia without penetrating (touching her externally); as an alternative, you are then allowed to look at the lesser offence of Sexual Assault, though the accused is not formally charged in the information for that offence in count one.

**[66]** Similarly, in relation to the second count of Rape, if you find that the prosecution although failing to establish beyond any reasonable doubt that the accused, between 1 January 2019 and 3 May 2019, penetrated the complainant's anus with his finger, has satisfied beyond any reasonable doubt that the accused, between 1 January 2019 and 3 May 2019, unlawfully and indecently assaulted the complainant by touching of the complainant's anus without penetrating; as an alternative, you are then allowed to look at the lesser offence of Sexual Assault, though the accused is not formally charged in the information for that offence in count two.

**[67]** The offence of Sexual Assault is defined in Section 210 (1) of the Crimes Act as follows:

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

(a) unlawfully and indecently assaults another person; or

(b) .....

**[68]** Therefore, in order for the prosecution to prove the charge of Sexual Assault, against the accused in respect of Count One, they must establish beyond any reasonable doubt that;

(i) The accused;

(ii) During the specified period (in this case between 1 January 2019 and 3 May 2019);

(iii) At Nasinu, in the Central Division;

(iv) Unlawfully and indecently assaulted APLT, the complainant.

**[69]** 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.

**[70]** 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.

**[71]** 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 touching of the area around the complainant’s external genitalia by the accused, without penetrating, is an indecent act and thereby amounts to Sexual Assault.

**[72]** Therefore, in order for the prosecution to prove the charge of Sexual Assault, against the accused in respect of Count Two, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this case between 1 January 2019 and 3 May 2019);
- (iii) At Nasinu, in the Central Division;
- (iv) Unlawfully and indecently assaulted APLT, the complainant.

**[73]** 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.

**[74]** 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.

**[75]** 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 touching of the area around the complainant’s anus by the accused, without penetrating, is an indecent act and thereby amounts to Sexual Assault.

**[76]** I wish to remind you once again that you need to go in this direction ONLY if you find that the prosecution has failed to establish any of elements constituting the offence of Rape beyond reasonable doubt in Counts One and Two. If you are satisfied that the prosecution has established all the elements constituting the offences of Rape beyond reasonable doubt, then you must find the accused guilty of Rape as charged in respect of Counts One and Two.

**[77]** These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

**[78]** 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 “*Amended Admitted Facts*” without placing necessary evidence to prove them:

1. APLT is the complainant in this matter.
2. The complainant resides at House 5 Kings Road, Centre Point.
3. The accused is Thomas Pearson.
4. The accused resides at Lot 5, Ambala Road, Centre Point.
5. The complainant resides with her guardian namely Frances Verma.
6. The complainant’s biological mother is Trevina Marama Tuivunilagi.
7. The accused is the complainant’s biological mother’s husband.
8. The accused is the complainant’s step-father.
9. The complainant and the accused live next to each other’s house.

**[79]** Since the prosecution and the defence have consented to treat the above facts as “*Amended 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**

**[80]** The prosecution, in support of their case, called the complainant (APLT), Frances Verma, her guardian, and Medical Officers, Dr. Mikaele Lutumailagi and Dr. Brian Guevara. The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit **PE1**- Birth Certificate of the complainant.

Prosecution Exhibit **PE2**- Medical Examination Report of the complainant.

### **[81] Evidence of the complainant APLT**

- (i) *The complainant testified that she is 7 years old. She currently lives at House 5, Kings Road, Centre Point (This is an Admitted Fact as well). She said she is attending School at Nabua.*
- (ii) *The witness confirmed that her guardian is Frances Verma. She calls Frances mum.*
- (iii) *It is an Admitted Fact that the complainant’s biological mother is Trevina Marama Tuivunilagi. It is also an Admitted Fact that the accused is the complainant’s biological mother’s husband.*

- (iv) *The witness testified that she calls her biological mother as Tee (Ti) or mummy Tee. She calls the accused Thomas as Tom or uncle Tom. Tee and Tom stay next door (she sometimes referred to this as “the other next door”).*
- (v) *The complainant said that she does not like Tom because he makes fun. She said: “When my mum goes to work, he always makes fun.”*
- (vi) *The witness said that her mum Frances was at work downstairs. She was busy on her phone. Her mummy Tee was next door. The witness had been with her cousins upstairs. Tom had been watching rugby player on TV next door. She said it was morning time and the sun was out.*
- (vii) *The complainant said that Tee had sent her to go and bring a diaper from next door. Later she explained that at the time Tee was cooking roti upstairs. She had gone next door to get the diaper. She had told Tom to get the diaper, because the diaper was up a shelf. Tom had said no.*
- (viii) *The witness then testified as follows:*

*Q. Then what happened?*

*A. He put his hand in my pants.*

*Q. And what else did he do?*

*A. He poked my butt.*

*Q. What else did he do?*

*A. He touched my muna.*

*Q. Which part of his hand did he use to touch you?*

*A. Witness showed the index finger of her right hand.*

*Q. What were you wearing when he touched your butt and muna?*

*A. I was wearing my underwear.*

*Q. And can you tell us, if he touched your butt and muna from outside your underwear or inside?*

*A. Inside.*

*Q. Can you tell us, how did you feel when he touched your muna?*

*A. Pain.*

*Q. How did you feel when he poked your butt?*

*A. Pain.*

*Q. What did you do when he poked your butt and touched your muna?*

*A. He put it in his nose and smelt it.*

- Q. *What did he put in his nose and smell?*  
A. *In his mouth.*
- Q. *What did he put in his nose?*  
A. *His smelt it. It was pain.*
- Q. *And what did you do?*  
A. *I went next door. I told Tee.*
- Q. *When did Tom go?*  
A. *He went to watch rugby play again.*
- Q. *When Tom poked your butt and touched your muna, was there anyone else?*  
A. *No.*
- Q. *You told us you felt pain – did you say or do something to Tom?*  
A. *I told Tee.*
- Q. *Can you show us where your muna is?*  
A. *The witness points her finger towards the front.*
- Q. *Can you show us where your butt is?*  
A. *The witness points her finger towards her back.*
- Q. *Can you stand up and show?*  
A. *The witness answered no.*
- Q. *When he touched your muna, did his hand go inside?*  
A. *Yes.*
- Q. *When he touched your muna, do you remember how far his hand go?*  
A. *Not long.*
- Q. *When he was touching your muna, were your standing or sitting down?*  
A. *I was standing.*
- Q. *Can you show us how he touched your muna?*  
A. *The witness showed her right index finger.*
- Q. *You told us that you told Tee – what did you tell her?*  
A. *I told Tee that Tom poked my butt.*
- Q. *What else did you tell Tee?*

A. *I told Tee that Tom poked my muna.*

Q. *Then what happened?*

A. *Tee was going to call the Police.*

Q. *Did you tell Tee the same day that Tom had touched your muna?*

A. *Yes.*

.....

Q. *You said Tom used his 'index finger' to touch your muna?*

A. *Yes.*

Q. *Can you describe how he did this?*

A. *The witness showed her index finger in her right hand and said "like this".*

Q. *When he touched your muna, how far inside did the finger go?*

A. *Not too far.*

Q. *Can you show with your finger how far it went?*

A. *Not too far.*

Q. *Will you be able to tell us how deep did you feel his finger?*

A. *It was paining.*

Q. *What were you doing when he touched your muna?*

A. *I tried to reach the diaper. I tell Tom and for him to wash his hands. And tried to reach the diaper. And put his hands in my pants.*

Q. *Can you describe how Tom poked your butt?*

A. *It was pain.*

Q. *How far inside did his finger go?*

A. *Not far.*

Q. *Will you be able to show using your hand how far did his finger go inside?*

A. *No.*

Q. *How deep did you feel his finger in your butt?*

A. *Yes.*



Q. How deep did you feel his finger in your butt?

A. It was pain.

- (ix) The complainant then testified as to how her mum Frances got to know about the incident. She said: "I went to have my bath. After bath I told mum to dry my muna. Mum dried my muna. Mum asked what happened. I told mum what Tom did". The witness said that she had told her mum that Tom poked her butt and also told her mum that Tom poked her muna.
- (x) When the witness was asked as to how long after that she told her mum Frances about the incident, the witness answered: "It was night time, my mum told to go and have my bath. Mum said to dry my muna. Told mum don't dry it. Mum said why? Because Tom's nail was sharp."
- (xi) When asked to look around the court room and points towards the accused, the complainant did not do so. However, when she was asked what colour shirt he was wearing, she said blue.
- (xii) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.
- (xiii) The Defence highlighted certain inconsistencies in the testimony given in Court by the witness vis a vis her statement made to the Police:

- i. In her testimony in Court, the witness said that she had informed (her biological mother) Tee about the incident. However, she did not say that Tee was angry when she informed her.

However, in her statement made to the Police, it is recorded as follows:

"Q. What did she do when you told her about uncle Tom?

A. She said she wants to stab him, but Tom run away and hid in the bush."

When asked to explain why in her evidence, she did not say that Tee was angry when she informed her, the witness said "because I can't remember."

- ii. In her testimony in Court, the witness said that the accused had used his right index finger to touch her muna and poke her bum bum.

However, in her statement made to the Police, it is recorded as follows:

"Q. Which finger?

A. *Showed the middle finger.*”

- iii. *In her testimony in Court, the witness said that at the time the accused had touched her butt and her muna she was wearing her underwear, and that the accused had touched her butt and her muna from inside her underwear.*

*However, in her statement made to the Police, it is recorded as follows:*

*“Q. When he poked your muna and bum, were you wearing any clothes?”*

*A. No, he removed my panty only.”*

- (xiv) *The Defence also highlighted an omission in the testimony given in Court by the witness vis a vis her statement made to the Police. In her testimony in Court, the witness testified that she does not like the accused Tom because he makes fun or always makes fun. However, the complainant had not made any reference to this in her statement made to the Police.*
- (xv) *In re-examination, the State Counsel clarified from the witness as to what finger the accused had used to touch her muna and poke her butt. The witness showed her right index finger.*

## **[82] Evidence of Frances Verma**

- (i) *She testified that she is working as a caregiver. Currently, she is working as a caregiver for her mother. She is her mother’s personal carer.*
- (ii) *The witness said that she is currently living at 5, Kings Road, Centre Point (downstairs), with her daughter, the complainant. Currently, she is separated from her husband.*
- (iii) *The complainant’s Date of Birth is 13 May 2013. A copy of her Birth Certificate was tendered to Court as Prosecution Exhibit PE1.*
- (iv) *As per the Birth Certificate, the name of the complainant’s biological mother is stated as Trevina Marama Tuivunilagi. Trevina is her niece. Trevina’s mother is the older sister of her mother.*
- (v) *The witness testified that she has been looking after the complainant since she was 4 days old. The complainant’s mother, Trevina, became pregnant when she was still in high school. At the time, the witness did not have biological children of her own. She still does not have biological children of her own. Seeing the circumstances, which Trevina was in at the time, she asked Trevina if she could take care of her child when the child was born.*
- (vi) *The witness Frances said that, even on 3 May 2019, she was living at the current address. It is a double story house. She occupies the flat downstairs. The flat upstairs has 3 bedrooms. Her mother and her three nieces, together*

*with the husband of one of the niece's, and their 4 children live upstairs. There is a studio cottage that is off the main house. Currently, the studio cottage is unoccupied. But previously it was occupied by Trevina and Thomas.*

- (vii) The witness then testified to the events which transpired on 3 May 2019. The complainant was upstairs playing with the other kids (her cousins). It was sometimes in the morning. Around 12 noon, she had called the complainant downstairs to have her shower. The complainant had come downstairs, had her shower, and then the witness had taken her to the room to dry her. When she tried to dry her private part, the complainant had complained to her. She had said: "That her muna, muna was sore."*
- (viii) Frances had then asked the complainant, if there was something wrong or if someone had touched her inappropriately. She had asked if someone had touched her muna, muna or if someone had touched her bum, bum. The complainant had said that Tom had poked her muna, muna and her bum bum. The complainant had kept repeating the same thing.*
- (ix) The witness testified that the complainant refers to her private part or her vagina as muna muna and she refers to her bottom as bum bum.*
- (x) The witness said that she was in shock and upset on hearing this. She said she didn't know what to think at first. She had then proceeded upstairs and spoken to her mother and asked her and her nieces if the complainant had complained to anyone or mentioned if something was wrong with her.*
- (xi) Her mother had then told her that her niece Martina had given the complainant a shower a few days before and that the complainant had complained that she was having pain in her vagina. The witness had spoken to Martina about this. Martina had said that the complainant may have had too many sweets to eat, "She thought it maybe what we call in Fijian Macake".*
- (xii) Frances had then waited for Trevina to return home. When Trevina returned, she had told Trevina exactly what the complainant had said. This was late in the afternoon, somewhere between 4.00–5.00 in the evening on Friday 3 May 2019.*
- (xiii) The witness said that on hearing this, Trevina became quite hostile towards her and had said that the complainant saw it in her dream.*
- (xiv) Thereafter, the witness said as to how she, the complainant and Trevina had gone by taxi to MIOT Hospital. From there they were referred to the Totogo Police Station and then referred to the Sexual Abuse Department of the Police. Thereafter, the complainant was taken to the Children's Ward of the CWM Hospital. This was on the evening of Friday 3 May 2019.*
- (xv) The witness identified Thomas as the accused in Court.*
- (xvi) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.*
- (xvii) The witness confirmed that the name of her husband is Daniel Civoniceva. She also said that her husband goes by the name Taniela Lomani. She also*

*confirmed that her husband was charged for the possession of illicit drug on 2 August 2019.*

- (xviii) It was suggested to the witness, that her husband was selling drugs from their residence at Lot 5, Kings Road, Centre Point, prior to 3 May 2019. It was also suggested to the witness that on the morning of 3 May 2019, she had a conversation with Trevina in relation to the complaint made that her husband was selling drugs at their residence. It was suggested that Trevina had confronted the witness and her husband, between 8.00 and 9.00 in the morning on 3 May 2019, regarding the sale of drugs by her husband from the compound of their residence. It was further suggested that the witness had responded by saying “that she will handle the matter.” It was suggested to the witness that Trevina and Thomas had gone to the Police Station that morning and complaint about the witness’s husband selling drugs in the compound of their house.*
- (xix) The defence suggested to the witness, that the report about the alleged rape of the complainant by Thomas was made due to the report made against her husband by Trevina and Thomas. That the report made against Thomas was made in revenge.*
- (xx) The witness said that this was not the first time that an incident of this nature had happened to the complainant. She said that previously, the complainant’s biological father, Eparama Tekei had been charged for sexually abusing the complainant. She said that the said Eparama Tekei is currently serving 3½ years in prison.*

**[83] Evidence of Dr. Mikaele Lutumailagi**

- (i) The doctor testified that he is currently based at the Paediatrics Department of the CWM Hospital.*
- (ii) He has been practising as a Medical Officer for 5 years, after having graduated from the University of Fiji with a MBBS Degree, in 2015.*
- (iii) The witness testified that the complainant had been produced before him on 4 May 2019, for examination. The Medical Examination Report of the complainant was tendered to Court as Prosecution Exhibit **PE2**.*
- (iv) The Doctor testified that he had filled in parts D8, D9, D10, D11, D14, D15 and D16 of the Medical Examination Report. However, the vaginal examination had been conducted by Doctor Brian Guevara.*

**[84] Evidence of Dr. Brian Guevera**

- (i) The doctor testified that he is currently serving at the Obstetrics and Gynaecology (O&G) Unit of the Labasa Hospital.*

- (ii) *He has been practising as a Medical Officer for 12 years, after having graduated from the Fiji School of Medicine, with a MBBS Degree, in 2008. He specialises in Obstetrics and Gynaecology (O&G).*
- (iii) *From 2013 to 2019, the witness was serving at the O & G Department of the CWM Hospital.*
- (iv) *The witness testified that he had conducted the vaginal examination of the complainant on 4 May 2019. The examination had been conducted under general anaesthesia.*
- (v) *The Doctor testified as to the specific medical findings as found in column D12. Under vaginal examination, it is stated:*
  - (a) *Irregularity of hymen at 7.00 o'clock region. No active bleeding or injury. Washout of vaginal canal done – no debris encountered.*
  - (b) *Vulva, perineum, anus have no bleeding or injuries.*
- (vi) *He explained that the hymen is a membrane that partially covers the entrance of vaginal canal. There is usually an opening in the hymen to allow menstruation to flow out. Hymens can be of different shapes. The hymen of the complainant, that he had examined, had a smooth contour except at the 7.00 o'clock region where it looked irregular. By irregular the Doctor explained that at the 7.00 o'clock region of the hymen it did not have the smooth contour that the rest of the hymen had.*
- (vii) *The witness provided the following as examples that could have caused this sort of irregularity or disruption in the hymen – inserting objects into the vagina such as tampons, or even fingers, masturbation, penetrative sexual intercourse and penetrative vaginal injuries.*

**[85]** That was the case for the prosecution. At the end of the prosecution case, this 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.

**[86]** In this case, the accused opted to offer evidence under oath and also called two other witnesses in support of his case: His wife, Trevina Marama Tuivunilagi, and his wife's younger sister, Martina Tora Tuivunilagi.

### **Case for the Defence**

**[87] Evidence of Thomas Pearson**

- (i) The accused testified that he is self-employed. He sells juice for a living. He has been in remand for this case for 1 year and 3 weeks up to now.*
- (ii) Prior to being remanded for this case, he was residing at Lot 5, Ambala Road, Centre Point. He had been residing there for about 1½ years – from October 2018 to 2019.*
- (iii) He is married to Trevina Marama Tuivunilagi. They have two kids. The eldest is Lily and she is 5 years old. Isaac is 2 years old. They live in the cottage which is separated from the main house.*
- (iv) The house at Lot 5, Ambala Road, Centre Point belongs to Robert Verma, his wife’s grandfather.*
- (v) He said that the complainant is his wife Trevina’s first daughter. The complainant is staying with her step-mother Frances Verma. Frances is his wife’s mother’s sister.*
- (vi) The witness totally denies the allegations of rape made against him by the complainant. He denies that he poked the complainant’s vagina with his finger and he also denies that he poked the complainant’s anus with his finger. He said: “I did not do that and I would not even do that”.*
- (vii) The witness said: “They are trying to frame me in this case”. When asked to explain, he said that he and his wife had lodged a report with the police against Taniela Lomani on 3 May 2019. He and his wife had reported Taniela Lomani, that he was selling drugs on the front porch whilst his kids were playing there.*
- (viii) The report had been made at the Valelevu Police Station, between 9.00-11.00 in the morning, on 3 May 2019.*
- (ix) The witness said: “They are trying to frame me for an incident I did not do”. When asked to explain as to whom he was referring to, he said it was Frances and Taniela Lomani.*

**[88] Evidence of Trevina Marama Tuivunilagi**

- (i) She is currently residing at Lot 6, Cakacaka Road, Caubati. She is employed as a Produce Sales Assistant at Max Value Plus in Vivrass, Laucala Beach.*
- (ii) She testified that the accused, Thomas is her husband and that they have been married for 5 years.*
- (iii) Prior to moving to her present residence, she had been living at her grandfather’s family home at Ambala Road, Centre Point. She had been*

*living there for about 3 years. She had been staying in the small maid's quarters together with Thomas and their two kids.*

- (iv) The complainant is her eldest daughter. She was very young when the complainant was born. So her grandparents had taken the complainant from her and given her to her aunt Frances.*
- (v) The witness testified as to the events which took place on Friday 3 May 2019. Around 8.00 in the morning she had confronted both Taniela Lomani and Frances Verma about the illegal business running on the property, which was drugs at the time. When the confrontation took place, Taniela had been furious and her aunt Frances had said that she will take care of it.*
- (vi) Later, around 10.00 she had gone to the Valelevu Police Station and made a verbal complaint against Taniela Lomani. Thereafter, she had gone to town.*
- (vii) She had been in town for about 5 hours. She had then gone with her younger sister Martina and her cousin brother for lunch. At the time, Frances had called her cousin brother. And her cousin had informed that they should immediately return home.*
- (viii) As soon as she reached home, everybody in the house had told her about what her aunt Frances had told them. She had told them that the complainant had told her that uncle Tom had poked her muna muna and her bum bum.*
- (ix) On hearing this, she said: "I was upset, I was shocked. I was surprised as well because I know my husband wouldn't do something like that." At the time, her husband Thomas was at Valalevu and from there he had proceeded to his family's place in Caubati.*
- (x) Thereafter, she had asked the complainant if she could speak to her alone. She had asked her younger sister Martina to be present. They had asked the complainant if the accused had really done what she had stated to her. The complainant had said no. "Then she told that mummy and daddy tell me to say it because uncle Tom was a bad man."*
- (xi) The witness said that the allegations made against Thomas is not true and that such a thing never happened.*

**[89] Evidence of Martina Tora Tuivunilagi**

- (i) She is currently residing at Ambala Road, Centre Point. She is a student. She is the younger sister of Trevina Marama Tuivunilagi.*
- (ii) She testified that the accused, Thomas is her sister Trevina's husband. They have two kids together.*

(iii) *When asked as to how she learnt about the allegations that was made against Thomas, she answered: "I am not quite sure of the day or date. But it started when I took her out of the shower. I dried her down. And as I was drying her vaginal area, she jerked. So I asked her, out of curiosity what was wrong. And she explained to me that it was sore. So my sister (my elder sister Roberta) and I thought that it could be too much sugar in the body and then when my aunt found out, she came upstairs and told us what APLT had told her. That's when I brought up the issue when I dried her with the towel."*

(iv) *The witness confirmed that her sister Trevina brought the complainant into her grandmother's room and asked her as to who told her to say Tom's name. The complainant had replied that it was her mummy and daddy in reference to Frances and Daniel.*

### **Analysis**

**[90]** The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, APLT, Frances Verma, her guardian, and Medical Officers, Dr. Mikaele Luthumailagi and Dr. Brian Guevara. The defence relied on the evidence of the accused himself. The accused also called in evidence his wife, Trevina Marama Tuivunilagi, and his wife's younger sister, Martina Tora Tuivunilagi, in support of his case.

**[91]** In this case, the complainant had been medically examined by two doctors namely Dr. Mikaele Lutumailagi and Dr. Brian Guevara. The initial examination had been conducted by Doctor Lutumailagi, while Doctor Guevara had conducted the vaginal examination of the complainant.

**[92]** 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.

**[93]** 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.

**[94]** As I have informed you earlier, the burden of proving each ingredient of the two charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.



- [95] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [96] 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.
- [97] I have already explained to you 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 given by the witness 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.
- [98] However, if there is no acceptable explanation given by the witness 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 inconsistencies and 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 evidence is inaccurate. In the alternative, you may accept the reason he provided for the inconsistency or omission and consider him or her to be reliable as a witness.
- [99] The accused has testified in Court and totally denies the two charges against him. He totally denies that he penetrated the complainant's vagina with his finger or that he penetrated the complainant's anus with his finger. He submitted that he would never do such a thing. He also said that he has been framed by Frances and her husband, Taniela Lomani as he and his wife Trevina had complained to the police about Taniela selling drugs in their front compound.
- [100] Trevina Marama, the biological mother of the complainant testified that she had a confrontation with Frances and Taniela on the morning of 3 May 2019, about Taniela selling drugs in their compound. Later, she confirmed that she and her husband Thomas had gone and made a verbal complaint at the Valelevu Police Station.
- [101] 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 element of the offences, beyond any reasonable doubt.

**[102]** 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 the defence 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.

**[103]** 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.

**[104]** 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.

**[105]** You must consider each count separately and you must not assume that because one count is proved, that the accused must also be guilty of the other count as well.

**[106]** 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 of Rape;*
- ii. *If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charges of Rape;*
- 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 of Rape;*
- 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 have been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
- vi. *As an alternative to the charges of Rape in the two counts, you may consider whether the accused is guilty or not guilty of Sexual Assault in respect of the said two counts.*

**[107]** Any re directions the parties may request?

[108] 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 two charges of Rape 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.

[109] Your possible opinions should be as follows:

**Count One**

Rape- Guilty or Not Guilty

If not guilty,

In the alternative

Sexual Assault- Guilty or Not Guilty

**Count Two**

Rape- Guilty or Not Guilty

If not guilty,

In the alternative

Sexual Assault- Guilty or Not Guilty

[110] I thank you for your patient hearing.



**Riyaz Hamza**

**JUDGE**

**HIGH COURT OF FIJI**

AT SUVA

Dated this 29<sup>th</sup> Day of May 2020

**Solicitors for the State** : **Office of the Director of Public Prosecutions, Suva.**  
**Solicitors for the Accused** : **Tuifagalele Legal, Barristers & Solicitors, Suva.**