

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 21 of 2017

STATE

V

S. T.

Counsel : Mr. T. Tuenuku for the State.
: Ms. A. Bilivalu for the Accused.

Dates of Hearing : 09 and 10 June, 2020
Closing Speeches : 11 June, 2020
Date of Summing Up : 12 June, 2020

SUMMING UP

(The name of the complainant is suppressed she will be referred to as "LT" the name of the accused is also suppressed and he will be referred to as "ST")

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.
3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused person is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused person. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
8. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
9. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this court room.
10. You must decide the facts without prejudice or sympathy for either the accused person or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

12. The accused is charged with the following offences: (a copy of the amended information is with you).

COUNT ONE
[REPRESENTATIVE COUNT]

Statement of Offence

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

Particulars of Offence

S. T. between the 1st day of October, 2012 and the 31st day of October, 2012 at Maururu, Ba in the Western Division, had carnal knowledge of “LT”, a child under the age of 13 years.

COUNT TWO
[REPRESENTATIVE COUNT]

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (a) of the Crimes Act 2009.

Particulars of Offence

S. T. between the 1st day of March, 2013 and the 31st day of March, 2013 at Vutuni, Ba in the Western Division, had carnal knowledge of “LT”, without her consent.

COUNT THREE
[REPRESENTATIVE COUNT]

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

S. T. between the 1st day of February, 2014 and the 31st day of October, 2014 at Vutuni, Ba in the Western Division, had carnal knowledge of “LT”, without her consent.

COUNT FOUR
Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

S. T. on the 6th day of February, 2015 at Vutuni, Ba in the Western Division, had carnal knowledge of “LT”, without her consent.

REPRESENTATIVE COUNTS

Ladies and Gentleman Assessors

13. You will note that the first three counts are representative counts, which covers a period between the 1st day of October, 2012 and the 31th day of October, 2014. By a representative count the prosecution alleges that more than one offence as described in the information was committed during the period specified in the counts. The law says that it shall be sufficient for the prosecution to prove that between the specified dates in the counts at least one offence was committed.
14. Furthermore, as you are aware, after the prosecution closed its case, this court had ruled that the accused had a case to answer in respect of the first count of rape, second count was reduced to lesser count of attempt to commit rape and the third count of rape only. This means you are not to consider count four as mentioned in the amended information.
15. To prove count one the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant “LT” with his penis;
 - (c) “LT” was below the age of 13 years.
16. The slightest of penetration of the complainant’s vagina by the accused’s penis is sufficient to satisfy the act of penetration. As a matter of law a

person under the age of 13 years does not have the capacity to consent. In this case the complainant was about 12 years at the time of the alleged offending. I therefore direct you that consent of the complainant is not an issue in regards to this count.

17. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
18. The second element is the act of penetration of the complainant's vagina by the accused with his penis.
19. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was 12 years in 2012 which establishes that she was below the age of 13 years at the time of the alleged incident.
20. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis then you must find the accused guilty of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape then you must find the accused not guilty of the offence of rape.
21. In this trial the accused has denied committing the offence of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis.
22. You must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for you to find the accused guilty of this count. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused not guilty.

23. To prove the offence of attempt to commit rape the prosecution must prove the following elements of this offence beyond reasonable doubt:
- (a) The accused;
 - (b) Attempted to penetrate the vagina of the complainant "LT" with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
24. In this trial the accused has denied committing the offence of attempt to commit rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had attempted to penetrate the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
25. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
26. The second element is the attempt to penetrate the complainant's vagina by the penis. This element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental.
27. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental. For the accused to be guilty of attempted rape, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.

28. This leaves you to consider the third element of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
29. If you are satisfied that the accused had attempted to penetrate the vagina of the complainant with his penis and she had not consented, you are then required to consider whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
30. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
31. Before you can find the accused guilty you must be satisfied beyond reasonable doubt of two things:-
- (a) Firstly that the accused intended to penetrate the vagina of the complainant with his penis.
 - (b) Secondly with that intention the accused did something which was more than mere preparation for committing that offence.
32. In this case the prosecution is alleging that the accused intended to penetrate the vagina of the complainant with his penis without her consent.

33. Furthermore, intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. You decide intention by considering what the accused did, you should look at his actions before, at the time of, and after the act.
34. The accused has denied committing the offence of attempted rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to penetrate the complainant's vagina with his penis and with that intention he did something which was more than merely preparatory.
35. The prosecution says at night the accused went to the bed of the complainant where she was sleeping, thereafter he removed her panty and started to lick her vagina and sucked her breast then tried to penetrate her vagina with his penis.
36. If you accept the accused did this, then it is for you to decide whether what he did went beyond mere preparation. In other words, did he actually intend to commit the offence of rape, in which case he is guilty of attempting to commit rape, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.
37. If you are satisfied that the prosecution has proved all the above elements beyond reasonable doubt then you must find the accused guilty of attempt to commit rape.

38. If on the other hand, you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused not guilty of attempt to commit rape.
39. To prove count three the offence of rape the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
- a) The accused person;
 - b) Penetrated the vagina of the complainant "LT" with his penis;
 - c) Without her consent;
 - d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
40. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused person who had penetrated the vagina of the complainant with his penis without her consent.
41. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
42. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
43. The second element is the act of penetration of the complainant's vagina by the penis.
44. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.

Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

45. If you are satisfied that the accused person had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
46. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
47. You must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for you to find the accused guilty of the offence of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused not guilty.
48. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
49. Moreover, you should bear in mind that you are to consider the evidence in respect of each count separately from the other. If you find the accused guilty of one count that does not automatically make him guilty for the remaining counts. You must not also assume that because the accused is guilty of one count he must be guilty of the other counts as well.

ADMITTED FACTS

50. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
51. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
52. I will now remind you of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. This was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

53. The prosecution called three witnesses to prove the charges against the accused.
54. The complainant informed the court that in the year 2012 she was 12 years of age and a class 5 student. The complainant, her mother and her siblings used to stay at Maururu, Ba with the accused who was her maternal uncle.
55. The house at Maururu was the complainant's mother's family house which was near her school. The accused has always been staying with the complainant and her family, in the absence of her father the accused was considered as the head of the family. The accused used to provide financial

support and also used to take the complainant and her younger siblings to school.

56. The complainant recalled the afternoon of 2nd October, 2012 she was at home with her mother, her siblings, and the accused, since she had come back from school she had her shower, did her homework and after dinner went to sleep in her bedroom.
57. There were two beds in the bedroom, on one bed the accused slept with the complainant's younger sister and on the other bed the complainant slept alone. Whilst sleeping the complainant felt that her panty was wet when she woke up she saw the accused removing her panty and then he started licking her vagina.
58. The complainant saw the accused because there was light in the room, when the complainant asked the accused what he was doing the accused blocked her mouth with one of his hand and with the other hand he took out his penis and then inserted his penis into her vagina. The complainant was sleeping face up and the accused was beside her. The accused was able to force himself on the complainant and inserted his penis into the complainant's vagina at this time the complainant felt pain this continued for 2 to 3 hours.
59. When the accused was having sexual intercourse the complainant was scared because it was her uncle who was doing such an act on her. The complainant's mother was at home sleeping in the living room, she did not tell her mother because her mother wouldn't believe her. The complainant stated that the accused continued to have sexual intercourse with her on five occasions in the month of October, 2012.
60. The complainant did not tell her parents because they wouldn't believe her she also did not tell anyone in school because she didn't trust anyone, she

was waiting for someone who would trust her so that she could tell that person.

61. In March, 2013 the complainant was staying at Maururu with her aunt (accused wife), the accused and her younger sister. The complainant's mother had gone to Natawarau to be with the complainant's father.
62. One night when the complainant was sleeping in the bedroom she felt her panty was being removed when she woke up she saw it was the accused. She told the accused not to do anything to her but the accused did not stop he licked her vagina, and sucked her breast and when the accused tried to take out his penis the complainant stopped the accused from doing anything further.
63. The accused responded by saying "*this is why girls are being raped.*" The accused tried to insert his penis into her vagina but could not. The complainant did not do anything because of the accused's age.
64. In February, 2014 the complainant and her younger sister were living with the accused and his wife at Vutuni since her mother and her brother had gone to Natawarau. In the night when the complainant was sleeping she felt someone lift her leg when she woke up she saw the accused she told the accused not to do anything to her after that he went to lie down and did not do anything else.
65. The birth certificate of the complainant was marked and tendered as prosecution exhibit no. 1. The complainant told her teacher about what her uncle was doing to her when questioned by her school teacher. The complainant did not tell anyone at home about what the accused had done to her since she was afraid to tell them.

66. In cross examination the complainant stated that in October, 2012 at night she was able to see the accused because the kerosene lamp in the bedroom was lit. The complainant had woken up when she felt her panty was wet she maintained the accused had touched her vagina and also licked her vagina after her panty was removed by the accused.
67. The complainant agreed that the accused had done to her what she had told the court on five occasions in October, 2012 and that the accused had inserted his penis into her vagina. She agreed that her hands were free she tried to push the accused away but she couldn't because the accused was heavy. She had tried to get out of the bed and go into the living room to her mother but could not. The complainant did not make any noise or scream on these occasions.
68. The accused had told the complainant not to tell anyone about what he was doing to her. Furthermore, she did not tell the accused wife about what the accused was doing to her because the accused wife would not have believed her.
69. The complainant disagreed with the suggestion that she did not tell anyone about what had happened to her because it did not happen. During further cross examination the complainant stated that in 2013 the accused had tried to penetrate her vagina with his penis on two occasions but in 2014 the accused had inserted his penis into her vagina once during the night when her aunt and her younger sister had gone to a cousin's house.
70. When the accused was having sexual intercourse with the complainant she did not scream for help or later tell her aunt (accused wife) about what the accused had done to her. The complainant tried to run outside the bedroom but the accused had pulled her hand. The complainant maintained that the incident did happen and that she did try to run away from the accused. The complainant disagreed with the suggestion that she did not tell her

aunt or shout or scream for help because the accused did not do anything to her.

71. In re-examination the complainant stated that in 2014 the accused had penetrated her vagina with his penis.
72. The second prosecution witness Amalaini Vakatale informed the court that in the year 2014 she was a teacher at Namosau Methodist School and the complainant was one of her students.
73. The witness also stated that the complainant was not focused in learning during teaching time who would be day dreaming and not be attentive to what was taught. From her observations, the witness realised that something was wrong and that the complainant was also pale in her appearance. The witness noticed that the complainant was ignored by her peers and this got her concerned as well.
74. As time went by the witness was able to gain the trust of the complainant and on one occasion she asked the complainant if she has been harassed or whether her uncle had massaged her stomach. The complainant started to cry and relayed to her that in February 2015 the accused had pulled up her top and was massaging her stomach and had also made love to her when she was staying with the accused at Vutuni.
75. The witness further stated that the complainant had relayed to her what the accused was saying to her when he was doing these acts:

“There are so many things happening to girls right now like teenage pregnancies so it is better for me to do this to you.”
76. The witness consoled the complainant because she was crying and then reported the matter to the Head Teacher.

Ladies and Gentleman Assessors

77. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
78. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant told her teacher Amalaini Vakatale after about three years from the first incident in 2012 that her uncle the accused had made love to her.
79. This is commonly known as recent complaint evidence. The evidence given by Amalaini is not evidence of what actually happened between the complainant and the accused since Amalaini was not present and did not see what had happened between the complainant and the accused.
80. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says that although the complainant told Amalaini about what the accused had done to her after about three years from the first alleged incident should not be taken against her because she was a child of about 12 years of age at the time when the sexual abuse started. The complainant had also considered the accused as the head of the family so she did not raise any alarm and she was afraid that no one would believe her. Furthermore, the complainant did not trust anyone at school since she was ignored by her peers as a result she did not have anyone close to her.

81. The complainant opened up to Amalaini because Amalaini had noticed the behaviour of the complainant and had established a personal relationship of trust which encouraged the complainant to speak out her problems when questioned. Furthermore, the prosecution says the complainant was of such an age that she would be uncomfortable in talking about sexual matters to anyone. The prosecution is asking you to consider that the complainant did relay relevant and important information to Amalaini about what the accused had done to her and therefore she is more likely to be truthful.
82. On the other hand, defence says the complainant had made up a story against the accused if what she told the court was the truth she would have informed her mother or the accused wife about what was happening to her and since she was going to school she could have told her teacher or her best friend or any student but she did not because nothing had happened. Defence further says the complainant delayed her complaint for a considerable time so she should not be believed.
83. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
84. In cross examination, the witness stated that the complainant told her on 6th March, 2015 about what the accused had done to her. The witness was referred to her police statement dated 25th March, 2015 and questioned whether she had told the police officer writing her statement about what she had attributed to the accused as told to her by the complainant. The witness stated that she had told the police officer but it was not mentioned in her statement. When it was put to the witness that the complainant did

not tell her those exact words as quoted by her the witness stated that the complainant did tell her.

85. Again this witness was referred to her statement and questioned whether she had told the police that the complainant had told her that the accused had made love to her. The witness agreed that it was not mentioned in her police statement. When it was put to the witness that the complainant had never told her that the accused had made love to her the witness stated that the complainant had told her that she was sexually abused from 2012.

Ladies and Gentleman Assessors

86. The learned counsel for the accused in this regard was cross examining this witness about an inconsistency in the statement she gave to the police when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the witness with her evidence given in court. You are allowed to take into consideration the inconsistency in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
87. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
88. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so

fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.

89. In re-examination the witness explained that it was the first time for her to meet a police officer in such a case and whatever she had relayed on that particular moment that is what was written, at that time she was concentrating on what the complainant was going through and it just skipped her mind not to say these things. However, she confirmed the complainant told her what she told the court.
90. The final witness was Dr. Sapeta Taito who had graduated with an MBBS degree from the Fiji School of Medicine in 2013. In the year 2019 she also graduated with a Post Graduate Diploma in Non-Communicable Diseases from the Fiji National University. For the past 6 years the doctor is based at the Ba Mission Hospital.
91. On 9th March, 2015 the doctor had examined the complainant at the Ba Mission Hospital. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no.2.
92. The specific medical findings of the doctor were:
- (a) No lacerations or bruises were seen around the genital area;
 - (b) White thick PV discharge seen around vaginal area which was due to a bacterial infection;
 - (c) Hymen not intact (no reflection with light and no resistance on vaginal examination).
93. In the opinion of the doctor she did not see any hymen and therefore she cannot determine onset of assault which meant she could not tell why there was no hymen.

94. In cross examination, the doctor agreed there could be many reasons why the hymen was not intact such as playing contact sports. According to the doctor the last assault mentioned by the complainant was 5 weeks prior to her examination.

Ladies and Gentleman Assessors

95. You have heard the evidence of Dr. Taito who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.
96. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
97. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
98. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

99. At the end of the prosecution case you heard me explain options to the accused he has those options because he does not have to prove anything. The burden of proving the accused guilt beyond reasonable doubt remains on the prosecution at all times.
100. The accused chose to remain silent and did not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent and not call any witness.
101. From the line of cross examination the defence takes the position that the accused did not commit the offences as alleged. The accused did not rape the complainant by penetrating the vagina of the complainant with his penis in 2012 and 2014 or had attempted to rape the complainant in 2013.
102. The defence is also saying that the evidence of the complainant is not probable in the circumstances as narrated by her and therefore she should not be believed. The accused was an elderly person who was considered as the head of the family who had looked after and maintained the complainant throughout the time they were living under one roof. The medical report also does not connect the accused to the allegations since there are many reasons why the hymen of the complainant was not intact.
103. This was the defence case.

ANALYSIS

104. The prosecution alleges that the accused was living with the complainant and her family in Maururu and Vutuni in Ba and on numerous occasions

from 2012 till 2014 he has either raped or attempted to rape the complainant. The complainant was 12 years of age when the sexual abuse started she did not tell anyone particularly her parents or the wife of the accused because she was afraid that no one would believe her and also she did not trust people.

105. At school the complainant was ignored by her peers and therefore she had no friends or anyone who she could confide in. As time went by her school teacher was able to gain her trust and this led to the complainant telling her teacher what she was going through. By this time about three years had lapsed but the complainant did make a complaint which was acted upon by her school teacher promptly.
106. On the other hand, the defence says nothing had happened if anything had happened the complainant would have yelled or shouted to grab the attention of her sister who was sleeping nearby. In respect of the first incident if indeed the alleged sexual intercourse had lasted between 2 to 3 hours the complainant would have done something to wake her younger sister who was sleeping about 2 ½ metres away from where the alleged rape took place.
107. Also her mother and on another occasion the accused wife were sleeping in the living room the complainant would have alerted them and would have told them about what had happened to her or would have screamed to get their attention. The complainant was going to school and she could have told someone in her school about what was happening to her. The defence is asking you not to believe the complainant and disregard her evidence since nothing had happened.

Ladies and Gentleman Assessors

108. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide whether the prosecution witnesses were reliable or not. You observed the witnesses give evidence in court. You decide if the witnesses were forthright and truthful or not. You may use your common sense when deciding on the facts. Assess the evidence of the witnesses and their demeanour in arriving at your opinions.
109. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what the witnesses said, 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 the witnesses told the truth and was correctly recalling the facts about which she has testified. You can accept part of witness evidence and reject other parts. A witness may tell the truth about one matter and lie about another or be accurate in saying one thing and not be accurate in another.
110. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused person have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with the previously made statement or with the other witnesses.
111. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
112. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to

prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.

113. The accused person is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

114. In this case the accused faces two counts of rape and one count of attempt to commit rape. As I have mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count separately from the other. If you find the accused guilty of one count that does not automatically make him guilty for the remaining counts. You must not assume if the accused is guilty of one count that he must be guilty of the other counts as well.

115. Your possible opinions are:-

- | | | |
|----|------------------------------------------|---------------------------------|
| 1. | COUNT ONE – <u>RAPE:</u> | Accused - GUILTY OR NOT GUILTY. |
| 2. | COUNT TWO- <u>ATTEMPTED RAPE:</u> | Accused - GUILTY OR NOT GUILTY. |
| 3. | COUNT THREE - <u>RAPE:</u> | Accused - GUILTY OR NOT GUILTY. |

Ladies and Gentleman Assessors

116. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.

117. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



Sunil Sharma
Judge

At Lautoka

12 June, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.