

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 304 of 2018

STATE

V

SEGRAN CHANDAR

Counsel : Ms. Swastika Sharma for the State
Mr. Ashneel Nand for the Accused

Dates of Trial : 21-23 and 27-28 January 2020

Summing Up : 30 January 2020

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

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 document tendered as a defence exhibit and any admissions made by the parties by way of admitted facts and additional admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submissions made by the State Counsel and closing submissions made by both Defence Counsel and State 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 his or 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, ST, was 15 years of age at the time of the alleged incidents, and was 16 years old when he testified in Court [His date of birth is 16 May 2003]. 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 his experience concerning the offences the accused is charged with.

- [16]** You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [17]** You heard in this case the evidence of Mereseini Vuniwaqa, the mother of the complainant. She testified that on the night of 7 June 2018, the complainant had related to her the alleged acts which the accused had committed on him, on 6 June and 7 June 2018. You should consider whether this could be regarded as a complaint made by the complainant of the alleged incidents. If so you should also consider whether he made that complaint without delay and whether he sufficiently complained of the offences the accused is charged with.
- [18]** The complainant need not specifically disclose all of the ingredients of the offences and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that the complainant made a prompt and a proper complaint, then you may consider that his credibility is strengthened in view of that recent complaint.
- [19]** It must be borne in mind that the complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with his evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [20]** In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [21]** However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability

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

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

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

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

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

[36] I must also explain to you as to the reason for permitting a closed court proceedings 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 it is closed court proceedings, the complainant is relieved of any mental pressure or any form of embarrassment he may have to describe the often unpleasant incidents which he alleged happened to him. However, please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

[37] The same applies for permitting a support person from the Fiji Women's Crisis Centre (Mrs. Elina Qeranatabua) to sit beside the complainant when he testified in Court. Again please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

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

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

COUNT ONE

Statement of Offence

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

Particulars of Offence

SEGRAN CHANDAR, on the 6th day of June 2018, at Suva, in the Central Division, penetrated the mouth of **ST** with his penis, without his consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SEGRAN CHANDAR, on the 6th day of June 2018, at Suva, in the Central Division, unlawfully and indecently assaulted **ST**, by sucking his penis.

COUNT THREE

Statement of Offence

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

Particulars of Offence

SEGRAN CHANDAR, on the 7th day of June 2018, at Suva, in the Central Division, penetrated the mouth of **ST** with his penis, without his consent.

COUNT FOUR

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (b) (i) of the Crimes Act 2009.

Particulars of Offence

SEGRAN CHANDAR, on the 7th day of June 2018, at Suva, in the Central Division, procured **ST** to commit an act of gross indecency.

[40] As you would notice the accused has been charged with two counts of Rape, contrary to Section 207 (1) and (2) (c) of the Crimes Act No. 44 of 2009 (Crimes Act) (Counts 1 and 3); one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act (Count 2); and one count of Sexual Assault, contrary to Section 210 (1) (b) (i) of the Crimes Act (Count 4).

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

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

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

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

(2) A person rapes another person if —

(a).....;

(b).....;

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

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

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

(2) A person rapes another person if —

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

[45] 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) On the specified day (in this instance 6 June 2018);
- (iii) At Suva, in the Central Division;
- (iv) Penetrated the mouth of complainant, ST, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not he was consenting.

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

- (i) The accused;
- (ii) On the specified day (in this instance 7 June 2018);
- (iii) At Suva, in the Central Division;
- (iv) Penetrated the mouth of complainant, ST, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not he was consenting.

[47] Let me now elaborate on these elements together in respect of the said two counts.

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

[49] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

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

[51] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's mouth, with his penis, without his consent.

[52] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[53] Apart from proving that the complainant did not consent for the accused to penetrate his mouth, with the accused's penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not he consented. The accused was reckless, if the accused realised there was a risk that he was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[54] A child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 15 years of age at the time of the alleged incidents, and therefore, he had the mental capacity to consent.

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

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

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

(a) unlawfully and indecently assaults another person;

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

- (i) The accused;
- (ii) On the specified period (in this instance 6 June 2018);
- (iii) At Suva, in the Central Division;
- (iv) Unlawfully and indecently assaulted ST, by sucking his penis.

[58] 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.

[59] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

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

[61] Let me now explain the elements of Count 4, Sexual Assault contrary to Section 210 (1) (b) (i) of the Crimes Act.

[62] Section 210 (1) (b) of the Crimes Act reads as follows:

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

(b) procures another person, without the person's consent—

(i) to commit an act of gross indecency; or

(ii) to witness an act of gross indecency by the person or any other person.

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

- (i) The accused;
- (ii) On the specified date (in this instance 7 June 2018);
- (iii) At Suva, in the Central Division;
- (iv) Procured ST to commit an act of gross indecency, without the consent of the complainant.

[64] 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.

[65] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[66] The accused would be guilty of Sexual Assault, if he procured the complainant to commit an act of gross indecency, without the consent of the complainant. The term gross indecency has not been specifically defined. However, an act is an indecent act if right-minded persons would consider the act indecent. Thus, a grossly indecent act would be one more serious in nature. As such, it is for you as Assessors to consider and decide whether procuring of the complainant by the accused to suck the accused's breast or nipples of his breast, is a grossly indecent act and thereby amounts to Sexual Assault.

[67] As I have stated before, you must bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

- (a) by force; or
- (b) by threat or intimidation; or

- (c) by fear of bodily harm; or
- (d) by exercise of authority; or
- (e) by false and fraudulent representations about the nature or purpose of the act; or
- (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

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

[69] If you are satisfied beyond any reasonable doubt that the accused, on 6 June 2018, at Suva, penetrated the complainant's mouth with his penis, without the consent of the complainant and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not he was consenting, then you must find him guilty of the first count of Rape.

[70] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the first count of Rape.

[71] If you are satisfied beyond any reasonable doubt that the accused, on 6 June 2018, at Suva, unlawfully and indecently assaulted the complainant, by sucking his penis, then you must find him guilty of the second count of Sexual Assault.

[72] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the second count of Sexual Assault.

[73] If you are satisfied beyond any reasonable doubt that the accused, on 7 June 2018, at Suva, penetrated the complainant's mouth with his penis, without the consent of the complainant and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not he was consenting, then you must find him guilty of the third count of Rape.

[74] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the third count of Rape.

[75] If you are satisfied beyond any reasonable doubt that the accused, on 7 June 2018, at Suva, procured the complainant to commit an act of gross indecency, without the

consent of the complainant, then you must find him guilty of the fourth count of Sexual Assault.

[76] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the fourth count of Sexual Assault.

[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 "*Admitted Facts*" without placing necessary evidence to prove them:

1. The complainant in this matter is ST.
2. The complainant is 15 years old and his date of birth is 16th May 2003.
3. The complainant resides at Lot 48 Cunningham Old Road with his mother namely Mereseini Vuniwaqa and his brother namely Jekope.
4. The complainant is staying home.
5. The accused in this matter is Chandar Segran.
6. The accused is 52 years old.
7. The accused is an electrician.
8. The alleged incident occurred on the 6th and 7th of June 2018.
9. Prior to the alleged incident, the complainant knew the accused for 2 weeks.
10. The complainant knew the accused as the accused was doing wiring and electrical works at the complainant's residence.
11. On 6th June 2018, the accused with his wife picked the complainant at 8.30 a.m. in his blue car from the complainant's residence.
12. The accused first dropped his wife at her work place and then they went to Annandale Apartment where the accused was doing wiring works.
13. They both went to room 305 where the accused was wiring lights and the complainant was assisting him.
14. The accused and the complainant finished work and then they both went to pick up the accused's wife from her work place at Kontai Plaza situated at Mark Street, Suva.

15. On 7th June 2018, at about 8.30 a.m., the accused together with his wife went to the complainant's residence to pick the complainant.
16. The accused and the complainant first dropped the accused's wife at her work place, then they went to Annandale Apartment for work.
17. They were doing electrical repairing in room 303 at Annandale Apartment before lunch.
18. At 3.00 p.m., the accused and the complainant finished work after which they both went together to pick the accused's wife from her work place at Mark Street, Suva after which they dropped the complainant at his residence.
19. The complainant was medically examined on 8th June 2018.

[79] Furthermore, in terms of the provisions of Section 135 of the Criminal Procedure Act, the prosecution and the defence have consented to treat the following facts as "*Additional Admitted Facts*" without placing necessary evidence to prove them:

1. The admissibility of the following document and its contents are not contested and the same will be tendered during trial by consent:
 - Photographs of Room 305 at Annandale Apartment.

[80] Since the prosecution and the defence have consented to treat the above facts as "*Admitted Facts*" and "*Additional 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

[81] The prosecution, in support of their case, called the complainant (ST), and his mother Mereseini Vuniwaqa.

[82] Evidence of the complainant ST

- (i) *The complainant stated that he is now 17 years of age. It is an admitted fact that his date of birth is 16 May 2003. That would mean that he is currently 16 years of age.*
- (ii) *He testified that he currently lives at Valelevu, with his father.*
- (iii) *He is not attending school. He testified that he does not wish to attend school. He had attended school from Class 1 to 8, but did not finish Class 8. After he stopped going to school, which he said was in June 2018, he was staying at home.*
- (iv) *It is an agreed fact, that in 2018, the complainant was residing at Lot 48, Cunningham Old Road, with his mother, Mereseini Vuniwaqa and his younger brother, Jekope.*

- (v) *It is also an agreed fact, that the complainant knew the accused, Chandar Segran, who was an electrician, for two weeks prior to the dates of the alleged incident. It is also agreed that the complainant knew the accused as the accused was doing wiring and electrical works at the complainant's residence (the landlord's residence).*
- (vi) *The complainant testified that there was a conversation between him and the accused. The accused had asked him whether he was schooling and he had said no. The accused had also asked him with whom he was living. The complainant had said that he was living with his mother and his brother. Thereafter, the accused had told him to come and work with him and the complainant had said yes. The accused had also told him that he will pay him \$50 (per week).*
- (vii) *The witness testified that later the accused had spoken to his mother and obtained permission for the complainant to work with the accused.*
- (viii) *It is an agreed fact, that on 6 June 2018, the accused with his wife picked the complainant at 8.30 in the morning from his residence, in their blue car. It is also agreed that the accused first dropped his wife at her work place and then they went to Annandale Apartment, where the accused was doing wiring work. It is an agreed fact that they both went to room 305, where the accused was wiring lights and the complainant was assisting him.*
- (ix) *The 4 photographs taken of room 305 of the Annandale Apartment (the additional admitted facts) was shown to the complainant, who confirmed that the photos were of room 305.*
- (x) *The complainant testified that after assisting the accused with the wiring work, the complainant had sat on a chair to take a rest. At the time he said the accused was standing in front of him and was touching his balls (penis) with his right hand. Later, the witness said that he meant the accused's penis. At the time, the accused had been wearing a black shirt and black trousers. The accused had been touching his penis on top of his clothes.*
- (xi) *The complainant said that when he saw the accused doing this, he felt scared. The accused had told him thus: "He said for us to go and do something in the washroom." Thereafter, the accused had moved closer to the complainant and held his hand and pulled him up to stand and told him to go to the washroom. The witness demonstrated in Court how the accused had done so.*
- (xii) *Thereafter, the accused had gripped his wrist and taken the complainant to the washroom and locked the door. After locking the door, only the complainant and the accused were in the washroom. The complainant said that he had felt really scared at the time.*
- (xiii) *The accused had then made the complainant sit on the toilet pan. The accused had then taken off his trousers and also removed his underwear (up to the ankle). He had then told the complainant to put his penis into the complainant's mouth. The witness testified that with one hand, the accused*

- was holding his penis and with the other he was holding the complainant's head. Thereafter, the accused had pushed the complainant's head forward and put his penis into the complainant's mouth. The complainant said he had felt disgusted and was feeling scared. The complainant said that he did not agree or give his consent for the accused to put his penis in his mouth.*
- (xiv) *The complainant testified that the accused had put his penis in the complainant's mouth for about 1-2 minutes. The accused had been shaking his penis with his hand when it was inside the complainant's mouth.*
- (xv) *The witness said he wanted to shout but he thought of the things (tools) which were inside the room, like the hammer. The hammer he said was besides the bed.*
- (xvi) *Thereafter, the accused had told the complainant to stand up. The accused had then sat on the toilet pan. When the complainant stood up, the accused had taken off the complainant's trousers and underwear (the clothes were removed up to the ankle). The accused was touching the complainant's balls and had then put it into his mouth. The complainant said by balls, he meant his penis. The accused had put the complainant's penis in his mouth for not very long.*
- (xvii) *The complainant testified that he did not agree or give consent to the accused to put the complainant's penis into his mouth.*
- (xviii) *Thereafter, the accused had told the complainant to go to the bathroom. The two of them were standing in the bathroom. The accused had closed the bathroom door. Thereafter, the witness said that the accused had masturbated for about 5 minutes. Then the complainant had come out of the bathroom. The accused had come out of the bathroom thereafter.*
- (xix) *The accused had told the complainant not to tell his mother, brother or cousin of what had happened.*
- (xx) *Thereafter, the accused and the complainant had gone to Suva. The complainant testified that it was before noon.*
- (xxi) *It is an agreed fact that the accused and the complainant finished work and then they both went to pick up the accused's wife from her workplace at Kontai Plaza, situated at March Street, Suva.*
- (xxii) *The complainant testified that the accused and his wife had dropped him at home around 8.00 in the evening. When he reached home, he said he did not tell anybody about what happened. The reason he did not tell anybody was because he thought the accused would not do anything to him on the second day.*
- (xxiii) *It is an agreed fact that on 7 June 2018, at 8.30 in the morning, the accused together with wife went to the complainant's residence to pick him up. It is also agreed that the accused and the complainant first dropped the accused's wife at her workplace, and then went to Annandale Apartment for work. At Annandale Apartment they were doing electrical repairing in room*

303, before lunch. The complainant said that room 305 was bigger in size than room 303.

(xxiv) The witness testified that on the said day, they had done wiring in another room as well. This was after lunch. They had done the wiring for the television.

(xxv) The witness said that after finishing his work, he went and sat on a chair besides the window. The accused had then closed the door and stood in front of the complainant. Then the accused came and held the complainant's hand and wanted to go to the bathroom. The complainant had said "No – I don't want you to do what you did to me yesterday".

(xxvi) However, the accused had held the complainant by his hand and taken him to the bathroom. The witness again demonstrated as to how the accused had held him by his hand and taken him to the bathroom. The complainant said he felt scared.

(xxvii) Thereafter, the accused had made the complainant sit on the toilet pan. The accused had then removed his (accused's) trousers and underwear up to his ankle. He had then told the complainant to put his penis into the complainant's mouth. The complainant had said no. The accused had then put one hand on the complainant's head and the other on his penis. He had then pushed the complainant's head (forward) and forcefully put his penis into the complainant's mouth.

(xxviii) The witness was then asked the following questions:

Q. Did you agree for Segran to put his penis into your mouth?

A. When he said that I said yes.

Q. Why did you say yes?

A. When he told me to put his penis in my mouth, I just listened and agreed to do it.

Q. Why did you listen and agreed to put his penis in your mouth?

A. Because I was scared.

Q. For how long did he put his penis in your mouth?

A. It wasn't that long.

Q. Then what happened?

A. I wanted to shout from the bathroom, but I could not fearing that he will do something to me.

Q. What was the reason for you to fear?

A. I thought that he would do something to me.

Q. Was the bathroom and the washroom the same in that room?

A. It is different.

Q. What is the difference?

A. As we enter, first we enter into the washroom, beside it, is the bathroom.

Q. Did the bathroom and washroom have doors?

A. Yes.

Q. Are they separate doors?

A. Yes.

Q. When you were with Segran in the washroom, was the washroom door locked?

A. Yes.

Q. And who locked it?

A. Segran.

Q. Then what happened?

A. Then he said for us to go outside to the room. Then he said for us to lie down on the floor. Segran said so.

Q. When you and Segran came out of the washroom, did you have your trousers and underwear on?

A. No. When we came out, it was taken off.

Q. At what stage, was your trousers and underwear taken out fully?

A. When we were about to enter the room.

Q. When you were without your trousers and underwear, what were you wearing?

A. I was only wearing my t-shirt.

Q. Was Segran still wearing his trousers and underwear?

A. No.

Q. What was he wearing?

A. He wasn't wearing anything. He also removed his shirt.

Q. When did Segran remove his shirt?

A. When we entered the room.

Then I lied down on the floor. Then he told me to lie down on his right side. Segrán was lying down beside me. Then he told me to kiss his breast.

Q. What was the distance between you and Segrán when you were lying down?

A. We were lying next to each other.

Q. Did you do that (kiss his breast)?

A. Yes.

Q. Which breast did you kiss?

A. The one on the right side.

Q. Why did you kiss his right breast?

A. I was just listening to what he was saying.

Q. Why?

A. Because I was scared.

Q. Did you willingly kiss his breast?

A. No.

Q. For how long did this happen?

A. Not that long.

Q. How did you feel when you were sucking his breast?

A. Scared. He was also masturbating. It didn't take long. He told me to stand up and wear my clothes while he continued masturbating. After a while he got up, he wore his clothes, and he told me not tell my elder brother (his cousin brother) – because if I do, my brother will tell my mother about it and my mother will report it to the police.

(xxix) The complainant stated that what he meant by his elder brother was reference to his cousin brother Sakiusa.

(xxx) The complainant testified that thereafter, the accused had told him to pack the tools. That was about 3.00 p.m. It is an agreed fact that at 3.00 p.m., the accused and the complainant finished work after which they both went together to pick the accused's wife from her workplace at Mark Street, Suva, after which the complainant was dropped off at his residence. The complainant said that he had reached home at 8.00 in the evening.

(xxxi) On arriving home, the complainant had seen his mother talking on the phone to his stepfather. The complainant had told his mother that he

wanted to speak to his stepfather. His mother had given him the phone. He had then spoken to his stepfather. The complainant had told his stepfather that the accused had removed his pants. Since his stepfather could not hear him properly, he had wanted the complainant to give the phone back to his mother. Thereafter, his mother had asked him what had happened. The complainant had then told her what happened at the workplace and said that he does not want to go to work again tomorrow. The complainant had told his mother what the accused had done to him on the first day and also on the second day.

- (xxxii) The witness clearly identified Segran Chandar as the accused in this case.
- (xxxiii) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.
- (xxxiv) During the cross examination, the defence tendered (with the consent of both parties) the statement made to the police, on 8 June 2018, by the complainant, as Defence Exhibit **DE 1**.
- (xxxv) During the cross examination, certain omissions and inconsistencies, between the testimony given by the witness in court and the statement by him to the police [Defence Exhibit **DE 1**] were highlighted by the Defence. They were as follows:
 - (a) In page 2 of the statement, at lines 4 and 5 it is stated “After that he pulled his trousers and underwear down till his ankle and also pull my shorts and underwear till my ankle”. However, the Defence highlighted this as an inconsistency as the complainant while testifying in Court had stated that the accused had pulled his own trousers and underwear down prior to inserting his penis into the complainant’s mouth; and thereafter, had stood up and then taken pulled down the complainant’s shorts and underwear prior to putting the complainant’s penis into his mouth.
 - (b) In page 2 of the statement, at line 10 it is stated “And while he was doing that, I was trying to tell him to stop but he did not listen.” However, during the course of his evidence, the complainant had said that he had pushed the accused’s stomach in an attempt to stop the accused from putting his penis into the complainant’s mouth. The Defence highlighted this as an omission.
 - (c) In page 2 of the statement, at lines 11 and 12 it is stated “I was scared that if I shout for help he might do something to me as the hammer was beside him, so I kept quiet.” The Defence highlighted

this as an inconsistency as the complainant while testifying in Court had stated that the hammer was in the room, near the bed.

(d) In page 2 of the statement, at lines 28 and 29 and in page 3 of the statement, at lines 1 and 2, it is stated "We went to room 303 and he repaired the switch for the light and before lunch we went to room 306 and we did the wiring for the TV wire and after that I was sitting in the chair to rest as I finished my job." The Defence highlighted this as an inconsistency as the complainant while testifying in Court had stated that they had gone to room 306 (this was on 7 June 2018) after lunch.

(xxxvi) It was suggested to the complainant that the entire incident which he said occurred on 6 June 2018 was a lie. The complainant said it was the truth.

(xxxvii) It was suggested to the complainant that the entire incident which he said occurred on 7 June 2018 was a lie. The complainant said it was the truth.

[83] Evidence of Mereseini Vuniwaga

- (i) She is the mother of the complainant. Currently she is residing at Bagata village in Savusavu*
- (ii) She testified that the complainant is currently residing with his father at the Valelevu Police Barracks.*
- (iii) She describes the complainant as very quiet and very shy. He is very slow in school and he finds it hard to grasp what is said in school. He hardly talks.*
- (iv) The witness said that in 2018, the complainant was in Class 8 and was attending Tacirua Primary School. However, he only attended school for the first term. After that he started staying at home. He said he didn't want to go to school.*
- (v) In June 2018, the witness was residing at Lot 48 Cunningham with the complainant and her younger son Jekope.*
- (vi) The witness testified that on 5 June 2018, the accused had come and spoken to her and sought permission from her for the complainant to work with him. The witness said that she agreed for the complainant to work with the accused.*
- (vii) The witness confirmed that on 6th June 2018, the accused and his wife picked the complainant up from their residence at 8.30 in the morning. The complainant had returned home at around 9.00 in the evening that day.*
- (viii) When questioned as to how the complainant appeared to her when he came home, the witness said "He got home, he changed, sat down with his cousins and started conversing with them. He never told me anything."*

- (ix) *She also confirmed that on 7 June 2018, the accused and his wife picked the complainant up from their residence at 8.30 in the morning. The complainant had returned home around 7.00 in the evening that day.*
- (x) *The witness testified that the second day when he returned home, he had told her that he refused to work with the accused (any longer). The witness had asked him why this was so. Thereafter, the complainant had told her what the accused had done to him on both the 6 June and 7 June 2018.*

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

[85] In this case, the accused opted to offer evidence under oath in support of his case and also called two other witnesses: Malini Rina Roy (accused's wife) and Avinesh Chand, the Maintenance Supervisor at the Annandale Apartments. The defence also tendered (with the consent of both parties) the statement made to the police, on 8 June 2018, by the complainant. [Defence Exhibit **DE 1**].

Case for the Defence

[86] Evidence of Segrar Chandar

- (i) *The accused testified that he is residing at 269 Waimanu Road. He is a certified electrician by occupation. He has been an electrician for the past 30 years.*
- (ii) *He testified that prior to the alleged incidents, he had known the complainant for two weeks. This is because he was doing electrical work at the complainant's landlord's house. When he was doing the electrical work, the complainant had been helping him. He was passing tools and assisting the accused.*
- (iii) *The witness said that the complainant had been quite nice to him and he had asked if he could work with the witness. On getting to know that the complainant was not attending school, he had agreed for the complainant to work with him. The witness had also spoken to the complainant's mother and got her consent for the complainant to work with him.*
- (iv) *It is an agreed fact, that on 6 June 2018, the accused with his wife picked the complainant from the complainant's residence at 8.30 in the morning. It is also an agreed fact that the accused first dropped his wife at her workplace and then went to the Annandale Apartment where he was doing*

electrical work. It is also agreed that both the accused and the complainant went to room 305 where the accused was doing wiring work and the complainant was assisting him.

- (v) The accused said that on his arrival at Annandale Apartment, he had gone to the front office and met the Maintenance Supervisor. The Maintenance Supervisor had informed him that he had to do the wiring in room 305. Thereafter, he, the complainant and the Maintenance Supervisor had gone together to room 305. It was the Maintenance Supervisor who had opened the door to room 305. Once the door was opened, the Maintenance Supervisor told him to change the electrical wirings, the lights, and power point switches in the room.*
- (vi) Thereafter, he got his tools from the vehicle. The complainant had assisted him in doing so. Then he started the electrical work in room 305.*
- (vii) The accused testified that the key to room 305 was not handed over to him. The key was taken by the Maintenance Supervisor.*
- (viii) He had begun doing the wiring work in the room from around 10.30. He admitted that the complainant did take a break from work to sit and rest. Then the complainant sat on a chair and lit a smoke (cigarette). After finishing the first cigarette, he connected another cigarette.*
- (ix) The witness testified that he was quite surprised to see the complainant smoking. He asked the complainant why he was smoking at this age. The complainant said that his mother knows that he is smoking.*
- (x) After finishing the two cigarette rolls, the complainant took out from his bag a small paper and wrapped suki (Fijian tobacco). After wrapping the suki, the complainant had lit and smoked it.*
- (xi) The witness said that the door to room 305 was opened when he was working. The door had a round handle knob. While he was doing the wiring in room 305, the Maintenance Supervisor had come to check on his work.*
- (xii) The witness testified that he and the complainant took a lunch break. They went to an Indian Restaurant in Suva town for lunch. He testified that even his wife had joined them for lunch.*
- (xiii) After lunch, he had gone and bought two long trousers and a safety boot for the complainant.*
- (xiv) Thereafter, the witness and the complainant had returned and completed the work in room 305. When they finished working in room 305, it was 3.00 in the afternoon. After finishing the work, the Maintenance Supervisor had come to check on the work completed.*

- (xv) *It is an agreed fact, that the accused and the complainant had finished work and then they both went to pick up the accused's wife from her workplace at Kontai Plaza, situated at Mark Street, Suva.*
- (xvi) *The accused testified that he dropped the complainant at his residence around 7.30 in the evening.*
- (xvii) *The accused totally denies all the allegations made by the complainant for 6 June 2018.*
- (xviii) *It is an agreed fact, that on 7 June 2018, the accused with his wife picked the complainant from the complainant's residence at 8.30 in the morning. It is also an agreed fact that the accused and the complainant, first dropped the accused's wife at her workplace and then went to the Annandale Apartment for work. It is also agreed that both the accused and the complainant were doing electrical repairing in room 303 at Annandale Apartment before lunch.*
- (xix) *He testified that he dropped the complainant at his residence for lunch. Thereafter, he had picked the complainant up at 1.30 and gone back to the Annandale Apartment.*
- (xx) *On reaching the apartment, the Maintenance Supervisor had wanted the accused to check on the ceiling fan in room 306. He had checked on the fan and completed the repair (there was a loose connection in the wiring system).*
- (xxi) *It is an agreed fact that at 3.00 p.m., the accused and the complainant finished work after which they both went together to pick the accused's wife from her work place at Mark Street, Suva. Thereafter, the complainant was dropped at his residence at around 8.00 in the evening.*
- (xxii) *The witness testified that on the first day the complainant had asked him for \$10 which he had given. On the 7 June 2018, the complainant had asked him for \$100 and had said that on the next day he wanted to go to Labasa with his brother. However, the witness said that he had not given the complainant the \$100 as requested.*
- (xxiii) *The accused totally denies all the allegations made by the complainant for 7 June 2018.*

[87] Evidence of Malini Rina Roy

- (i) *She is the wife of the accused. She and the accused have been married for 19 years.*

- (ii) *She confirmed that on 6 June 2018, she had gone together with the accused to pick the complainant from his residence at 48, Cunningham Old Road. The reason they went to pick the complainant was because the complainant wanted to work with the accused.*
- (iii) *The witness said that when the complainant was picked up, he was happy/like he wanted to work with the accused.*
- (iv) *In the afternoon, she had gone with the accused, to drop the complainant back at his residence. She testified that the complainant looked happy.*
- (v) *The witness confirmed that on 7 June 2018, she had gone together with the accused to pick the complainant from his residence. She testified that the complainant was already waiting and was ready and he came and sat in the back seat of the car.*
- (vi) *After finishing work, the accused and the complainant came to pick her up from her work place at Kontai Plaza, in Mark Street, Suva. She testified that at the time, the complainant looked happy and excited. The complainant was dropped at his home at 7.30 in the evening.*

[88] Evidence of Avinesh Chand

- (i) *He testified that he is employed with Henry Satish Chand. His work place is at 265 Waimanu Road – at the Annandale Apartments. He has been working at the Annandale Apartments for 25 years. He has been Maintenance Supervisor for 15 years.*
- (ii) *He knows the accused as he does electrical work for the company.*
- (iii) *The witness testified to the electrical work carried out by the accused on 6 June 2018, in room 305; and on 7 June 2018, in rooms 303 and 306.*
- (iv) *He confirmed that at no time, did he give the keys of the rooms to the accused.*
- (v) *On 6 June 2018, he had gone to room 305 once before lunch to check on the work being done. At the time he had spoken to the accused and asked him at roughly what time the work will be completed. At the time he went to the room, the complainant was working with the accused. He confirms that the accused and the complainant went out during the lunch break and returned to complete the work in room 305. After lunch, he had gone twice to room 305 to check on the work being done.*
- (vi) *On 7 June 2018, the accused and the complainant had first carried out electrical work in room 303. Thereafter, the complainant and the accused, came to room 306 to check on the fan in the room. He testified that the*

repair of the fan took 20-25 minutes and that he had remained in the room throughout the said period.

Analysis

- [89] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, and his mother, Mereseini Vuniwaqa. The defence relied on the evidence of the accused himself and two other witnesses: Malini Rina Roy, the accused's wife and Avinesh Chand, the Maintenance Supervisor at the Annandale Apartments.
- [90] As I have informed you earlier, the burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [91] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [92] 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.
- [93] Based on the said agreed facts the identity of the accused is proved as it has been agreed that 'The accused in this matter is Chandar Segran'. The dates of offence and place of offence have also been agreed. However, all the other elements of the four charges must be proved by the prosecution beyond reasonable doubt.
- [94] The accused has testified in Court and totally denies all the allegations against him. In support of his case, he called two further witnesses: Malini Rina Roy, his wife and Avinesh Chand, the Maintenance Supervisor at the Annandale Apartments.
- [95] The defence also showed certain inconsistencies and omissions in the evidence given by the complainant during his testimony in Court. I have already directed you on how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected. However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question.
- [96] 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.

[97] The statement made to the police, on 8 June 2018, by the complainant has been tendered to Court as Defence Exhibit **DE 1**. The contents of the statement now forms part of the evidence in this case.

[98] During the course of his testimony the complainant made reference to certain uncharged acts (the fact that the accused masturbated in his presence). This is confirmed in the statement made to the Police by the complainant as well. Furthermore, in his statement reference is made to another act of oral penetration which the accused has not been charged for. I must direct you in relation to these uncharged acts. As you are aware the accused has not been charged for these acts. Therefore, you should totally disregard this from your consideration. No adverse inference should be drawn against the accused in respect of those uncharged acts. Your focus should only be in respect of the four charges against the accused which is found in the Amended Information.

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

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

[101] 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.

[102] 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.

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

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

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

[105] Any re directions the parties may request?

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

[107] Your possible opinions should be as follows:

Count One

Rape- Guilty or Not Guilty

Count Two

Sexual Assault- Guilty or Not Guilty

Count Three

Rape- Guilty or Not Guilty

Count Four

Sexual Assault- Guilty or Not Guilty

[108] I thank you for your patient hearing.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 30th Day of January 2020

Solicitors for the State : **Office of the Director of Public Prosecutions, Suva.**
Solicitors for the Accused : **Kohli & Singh, Barristers and Solicitors, Suva.**