

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 062 OF 2016

BETWEEN : **STATE**

AND : **NACAGILEVU NAULUMATUA**

Counsel : *Mr. Chand R. & Mr. Sing A. for the State*
Ms. Vulimainadave for the Accused

Hearing on : *17th of March 2020 – 19th of March 2020*

Summing up on : *18th of June 2020*

SUMMING UP

Ladies and gentleman assessors;

1. It is now my duty to sum up the case to you. Though I am not bound by your opinion, it is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.

2. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel during the examination of a witness is not evidence unless the witness accepted

that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the available evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe none, a part or all of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the

witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question of reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency 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 the witness' evidence is inaccurate; or you may accept the reason the witness provide for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only a few guidelines. It is up to you, how you assess the evidence and what weight you give to a witnesses' testimony.

12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there more than one reasonable inference to draw, against the accused, as well in his favor, based on the same set of proved facts, then you should not draw the adverse inference.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond a reasonable doubt, in order to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.
15. You are not required to decide on every point the Counsels in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges are proved against the accused.

16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not a must.
17. Let us look at the Information. The Director of Public Prosecutions has charged the accused of 10 counts, to wit two counts of Indecent Assault and 8 counts of Rape. They are;

COUNT 1

(Representative Count)

Statement of Offence

INDECENT ASSAULT: Contrary to 154 (1) of the Penal Code Cap 17.

Particulars of Offence

Nacagilevu Naulumatua, between the 01st day of January, 2005 and the 31st day of January, 2010 at Lautoka in the western division, unlawfully and indecently assaulted Raijieli Nabuka, on more than one occasion.

COUNT 2

(Representative Count)

Statement of Offence

INDECENT ASSAULT: Contrary to 212(1) of the Crimes decree No. 44 of 2009.

Particulars of Offence

Nacagilevu Naulumatua, between the 01st day of February, 2010 and the 31st day of December, 2011 at Lautoka in the western division, unlawfully and indecently assaulted Raijieli Nabuka, on more than one occasion.

COUNT 3

(Representative Count)

Statement of Offence

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

Particulars of Offence

Nacagilevu Naulumatua, between the 01st day of January, 2012 and the 31st day of December, 2012 at Lautoka in the western division, penetrated the vagina of

Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

COUNT 4

(Representative Count)

Statement of Offence

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

Particulars of Offence

Nacagilevu Naulumatua, between the 01st day of January, 2014 and the 31st day of January, 2014 at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

COUNT 5

(Representative Count)

Statement of Offence

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

Particulars of Offence

Nacagilevu Naulumatua, between the 01st day of February, 2014 and the 31st day of December, 2014 at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

COUNT 6

(Representative Count)

Statement of Offence

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

Particulars of Offence

Nacagilevu Naulumatua, between the 01st day of January, 2015 and the 31st day of January, 2015, at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

COUNT 7

(Representative Count)

Statement of Offence

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

Particulars of Offence

Nacagilevu Naulumatua, between the 01st day of February, 2015 and the 31st day of October, 2015, at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

COUNT 8

(Representative Count)

Statement of Offence

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

Particulars of Offence

Nacagilevu Naulumatua, between the 01st day of November, 2015 and the 30th day of November, 2015, at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

COUNT 9

(Representative Count)

Statement of Offence

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

Particulars of Offence

Nacagilevu Naulumatua, between the 01st day of January, 2016 and the 31st day of January, 2016, at Lautoka in the western division, penetrated the vagina of Raijieli Nabuka with his penis, without the consent of the said Raijieli Nabuka on more than one occasion.

COUNT 10

Statement of Offence

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

Particulars of Offence

Nacagilevu Naulumatua, on the 21st day of February, 2016 at Lautoka in the western division, penetrated the vagina of Raijeli Nabuka with his penis, without the consent of the said Raijeli Nabuka.

18. Now I will deal with the elements of these alleged offences, which the prosecution should prove and you will have to be satisfied on beyond a reasonable doubt in order for you to find the accused guilty.
19. The count 1 is the offence of Indecent assault contrary to section 154 of the Penal code. Accordingly;
154.- (1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony.....
(2) It is no defense to a charge for an indecent assault on a girl under the age of sixteen years to prove that she consented to the act of indecency.
20. The count 2 is the offence of Indecent Assault contrary to section 212 (1) of the Crimes Act, which states;
212. - (1) A person commits a summary offence if he or she unlawfully and indecently assaults any other person.
21. The elements of this offence remain the same under the penal Code as well as The Crimes Act. Therefore the elements of the offence of Indecent Assault are that:
 - [a]. The accused,
 - [b]. Unlawfully and Indecently
 - [c]. Assaulted the Complainant.
22. The Accused is guilty of Indecent Assault, if he unlawfully and indecently assaulted the victim. The word “unlawfully” simply means without lawful excuse.

An act is an indecent act if right-minded persons would consider the act indecent.
Assault can be defined as an application of unlawful force on another's body.

23. Now I will deal with the essential elements of the offence of Rape.

Section 207(1) of the Crimes Act reads as;

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

Section 207 (2) (a) of the Crimes Act reads as;

(2) A person rapes another person if —

(a) The person has carnal knowledge with or of the other person without the other person's consent;

24. Accordingly, in this case, to prove the offence of Rape as for the alleged 3rd to 10th counts, the prosecution must prove the following elements beyond a reasonable doubt.

(i) The accused;

(ii) Penetrated the vagina of Raijieli Nabuka with his penis; and

(iii) Without the consent of Raijieli Nabuka (the complainant); and

(iv) Either the accused;

Knew or believed that the complainant was not consenting; or

Was reckless as to whether or not she was consenting.

25. 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. Though there is no doubt that the accused is Nacagilevu Naulumatua and he is well known to the complainant, you should consider the evidence and conclude whether the accused is the one who committed the alleged act.

26. The second element 'carnal knowledge' means having sexual intercourse or the penetration of Raijieli Nabuka's vagina; 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. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of Raijieli Nabuka with his penis, to any extent.
27. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact, that there was no physical resistance alone, shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
- i) by force; or
 - ii) by threat or intimidation; or
 - iii) by fear of bodily harm; or
 - iv) by exercise of authority.
28. Apart from proving that the complainant did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
29. It is not difficult to understand what is meant by the words "the accused knew or believed". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to

those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.

30. Please remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
31. If you find a reasonable doubt in respect of any of the elements, in regards to any of the count of rape, you shall give the benefit of that doubt to the accused and find the accused not guilty of the alleged count of Rape.
32. The 1st to 9th counts are representative counts. The phrase 'representative count' simply means that during the period given, there alleges to be more than one incident and the described incident is only one of them. Therefore, unless at least one incident of the alleged offence is proved by the prosecution, you should not find the accused guilty of that count.
33. Now here we are not on the question of immorality, that is we are not here to punish for immoral acts, certain acts may be immoral but what we deal with here are illegal or crimes. If an act is immoral still it may not be illegal or a crime. So we are not here to punish for immoral acts but for the crimes.

Summary of evidence

34. The PW1, Raijieli Nabuka is the main witness for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. However, in analyzing her evidence, you should also be mindful that she would have been around 6 years old when the first incident alleged to have happened to her. Her evidence is that;
- i) She is presently 21 years old and resides at Rifle Range, Lautoka with her mother, Step-father and a younger sister.
 - ii) Her highest level of education was form 6 and has attended Tilak High School. Prior to that, she has attended the Gandhi Bhawan Primary school.
 - iii) She has attended the primary school till 2012 and thereafter having commenced her high school in 2013, has concluded her education in 2016, at form 6.
 - iv) In 2016, she was staying with aunty Seini and the family at Sukanaivalu Road, Kashmir in Lautoka. Her step-father, Mr. Nacagilevu Naulumatua the accused too stayed with them there.
 - v) On the 21st of February 2016, she has had dinner around 8.00pm and after dinner while watching a movie; the accused has called her to go to the shop.
 - vi) The shop was at about 10 minutes' walk from their house and she has gone with him to the shop. That was the time after the cyclone and there was no electricity. The accused has asked her to buy a Juice and has gone elsewhere. Having bought the juice, she has waited for him and when came has asked her to follow him. He has led her to a vacant house right opposite the shop.

- vii) At the said empty house, the accused has asked her to take her clothes off. She was wearing a T-shirt, pants and her undergarments, underneath. She has taken her clothes off and the accused has had sexual intercourse with her. By having sexual intercourse what she meant was that the accused has penetrated her vagina with his penis. When the accused did that she had been crying because she could not take in what the accused was doing to her. It has gone on for about 20 minutes and she has not liked it. But she has not done anything to stop him because he threatened her. Thereafter they have gone back to her aunt's place.
- viii) Thereafter she has complained to her aunt, informing her everything and the aunt has called her mother and gone to the police station. She has complained to her aunt because she could not take it anymore.
- ix) In the month of January 2016, she was with her aunty. During that month one day while she was in the sitting room, the accused has told her to ask her aunt's permission for her to go to the shop with him. Accordingly, having obtained the permission, they have gone to the shop and bought a bottle of juice. They have returned through the short cut. Along the short cut, there is a house and behind the said house there is a banana tree. Upon reaching the banana tree, the accused has told her to stop and to take off her clothes and to lie down. Then he has taken off his pants and has inserted his penis into her vagina. That has happened around 9.00pm that day. The accused has done that for about 5 minutes and thereafter has asked her to put on her clothes and they have gone home. Though she has not liked it, has not told so to the accused because she was afraid that he would do something to her.
- x) Again in the same month of January 2016, on another occasion around the same time, the accused has told her to come with him to go to the shop. On that day too, at the same place the accused had penetrated her vagina with his penis. She has not complained to anyone because the accused has threatened her.

- xi) During the month of January 2016, the accused has had sexual intercourse with her on 4 occasions.
- xii) Before that, during the year 2015 too, the accused has had sexual intercourse with her on many occasions. The accused has separated from her mother in the month of September in the year 2015. She was brought to stay with her aunty Seini by the accused then. The accused has had sexual intercourse with her before as well as after the said separation.
- xiii) Aunty Seini is a market vendor. In September 2015, when she was at the market with aunty Seini, the accused has come and told her to get aunt's permission to go to Buabua with him. At Buabua, in the accused's house, the accused has had sexual intercourse with her. Even thereafter in November 2015, too she has gone to Buabua with the accused. On those two occasions the accused has had sexual intercourse with her on about 8 occasions. She has not liked it. When she told him that, the accused has threatened her.
- xiv) In the year 2015, between the months of January to September, she was residing in Buabua with her mother and the accused. During that time the accused has had contact with her on 4-5 times when her mother was selling at the market.
- xv) In 2014, she was with her mother and the accused, at a different house in Buabua. In the month of January, 2014, the accused has had sexual intercourse with her on 4-5 times. Thereafter from February to December 2014, the accused has had sexual intercourse with her 4-5 times every month. She has not liked it and she has told the accused so. She has not complained to anyone because the accused has threatened her.
- xvi) In the year 2012, she was residing in Lautoka with her mother and the accused. One day the accused has called her into his room. Then the accused has asked her to remove her clothes and had sexual intercourse with her. That was the first time that he has had sexual intercourse with her. It was painful and she has not liked it. Though she tried to push him

away, he has been too heavy. Thereafter he has got up and gone and she has kept lying down and cried.

- xvii) Between the periods of February 2010 to December 2011, the accused used to touch/rub/massage her breasts buttocks and the vagina. He has done that over the clothes she was wearing.
- xviii) During the period from the 1st of January, 2005 to 31st of January 2010, the time she attended the primary school, too, the accused used to touch her breasts, buttocks and the vagina. In 2005, she was in class1 and she has not understood what the accused was doing.

35. This witness has been subjected to cross examination by the defense. Answering the cross examination, PW1 says that;

- i) She lives with her mother, small sister and step-father, Malakai since 2017.
- ii) She came to live with aunty Seini when her mother left her and before that they were living at Buabua with her step-father Nacagilevu, the accused.
- iii) She admits that she has not informed of the alleged incidents to her teachers or to her friends at school.
- iv) The witness denies the suggestions by the learned counsel in relation to the falsehood of the accusations.
- v) It is suggested on instructions that the accused started to have a sexual relationship with her only after the January 2016, with the consent of hers and the witness denies it.
- vi) She admits that her cousin Tasa asked her about the sexual relationship with the accused. However, she denies admitting of it to Tasa.
- vii) She has gone to the police station to lodge the complaint with her mother, when her aunt Seini called her mother to come and accordingly her mother has come over.

- viii) She reiterates that the accused verbally threatened to do something to her and her mother. But she has still stayed with the accused when her mother left because she wanted to live with her aunt, Seini.
 - ix) She concedes that it was the accused that introduced and arranged her to stay with her aunt, Seini and it was not her by herself.
 - x) She admits that the accused and her mother looked after her while they were together and while she was with aunty Seini, the accused assisted Aunty Seini, to provide for her.
36. In re-examination, the witness states that she wanted to stay with her aunt, Seini without going with her mother because she saw the way her aunt treats her children and she wanted to be treated that way.
37. The PW2 was Ms. Seini Nuku. She was the one, referred to as aunty Seini, by the earlier witness. Her evidence was that;
- i) In the years 2014 to 2019, she had been residing at Sukanaivalu Road, Kashmir in Lautoka.
 - ii) She was there with her husband and the children. The PW1 was brought to live with them around November 2015.
 - iii) PW1, Raijieli was a step-daughter of his first cousin Nacagilevu, the accused.
 - iv) She has met the PW1, her mother and the accused before, when they came to her house for a prayer meeting in April 2015.
 - v) In November 2015, the accused has come and asked her to keep the PW1 for a while since they are told to vacate the house they were living at the time. By that time PW1's mother was with her partner.
 - vi) PW1 has come to live with them around November 2015.
 - vii) Since then the accused used to visit them almost every fortnight on the pay day. Most of the time the accused when came, took out the PW1, to

buy things. Lately, around February 2016, the accused has started to stay at her place.

- viii) When asked of her knowledge of the reasons as to why the PW1 was not staying with the mother, she states that the PW1 told her that she just want to live with the father and she does not want to move in with the mother because of the mother's partner.
- ix) The accused used to take out the PW1 around 9.00 at night and return after the midnight. Once she has asked of the delay and was told that they have gone to the grandmother's place.
- x) The witness recalls the accused taking out the PW1 on the new-year's eve (31st December 2015) and returning on the following day (1st of January 2016).
- xi) During the PW1's stay with her the relationship between the PW1 and the accused has been normal as a father and the daughter. She has not noted anything unusual.
- xii) She has had a close relationship with the PW1. On the 25th of February 2016, around 3.00 O'clock in the morning, she has heard the PW1 crying and when asked, the PW1 has told her that "I am fed-up and I want to die".
- xiii) Having calmed her down the witness has asked the PW1, whether something is happening between her and her father and the PW1 has nodded. Then she has called the mother of the PW1 and told her to come and take the PW1 to the police.
- xiv) Accordingly the PW1 has gone to the police station with her mother and later having received a call from the police, the witness has gone to the police station and given a statement.

38. In answering the cross-examination posed on behalf of the accused, the witness states that;

- i) When asked whether the accused came to her house on every fortnight, on the pay day, she confirms so and states that most of the time it is so, but sometimes the accused used to just appear on the other days too.
 - ii) Though the accused came before, he actually started staying in their house in January 2016.
 - iii) The witness has spoken to the accused after been informed by the PW1 and chased the accused from her house.
39. With the leading of the above evidence, the prosecution closed their case and the Court being satisfied that on the face of it, the prosecution has adduced sufficient evidence covering the elements of the alleged 1st to 10th counts, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.
40. The accused having understood his rights elected to remain silent exercising his constitutional right. Further, he decided to close the defense case without calling any witnesses on his behalf. You should not draw any adverse inference from it as that is his constitutional right and he bears no burden to prove his innocence.
41. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
42. There are few important points which need your additional attention. As for the prosecution version, all the allegations of rape were alleged to have taken place when the PW1 is 13 years or over. Anyway the accused's stance, as apparent by

the cross examination posed on the instructions of the accused, is that sexual intercourse took place when the PW1 was over 16 years of age. This raises few issues.

Firstly, whether there had been sexual intercourse between the accused and the PW1 as for counts 3 to 6. That is an issue of fact which you should ponder upon and opine on. If you have any reasonable doubt on the allegation that they have had sexual intercourse, when PW1 was below the age of 16 years, you should find the accused not guilty to the counts 3 to 6.

Secondly, in case you decide to accept the evidence of the PW1 in relation to the allegation of sexual intercourse as reliable, you should consider whether the PW1 consented to such or not. As for the law, the prosecution should prove that the PW1 did not consent to such. The PW1 states that she was threatened by the accused. As I have explained to you before, the consent should be voluntary. The prosecution stance is that consent was obtained by the alleged threats and therefore involuntary. This brings you to analyze the credibility of the issue of alleged threats by the accused. It is admitted by the PW1 that when her mother left, she decided to stay with the accused because she wanted to be with the PW2. The PW1 further explains that she saw the way the PW2 treats her children and wanted to be with her. In absence of any evidence to the contrary, it could safely be assumed though the PW1 has visited the PW2's house once before, that until the PW1 came to stay with the PW2, she could not have realized the difference. Therefore, you should seriously consider whether the PW1 could be trusted on that issue in relation to the absence of consent in counts 3 to 6. If you have any doubt whether the PW1 consented or not to the alleged acts of sexual intercourse, then you should give the benefit of such to the accused and opine him not guilty of

the alleged 3 to 6 counts. But that brings you to consider the alternative counts of defilement instead.

The offence of defilement as set out in the section 215 of the Crimes Act states thus;

Defilement

215.- (1) A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years.

The PW1 was born on the 09th of March 1999. Therefore this alternative count would be applicable only to the representative counts from 3 to 6.

Fourthly, in consideration of counts 7 to 10, you should consider whether the prosecution has proved that the PW1 did not consent to such sexual intercourse. The prosecution through the PW1 alleges that she was scared of being removed from the custody of PW2 and therefore the alleged sexual intercourse was non-consensual. You should consider the evidence of the PW1 carefully and conclude whether that would be acceptable and also whether the accused knew or had reason to believe that she was not voluntarily consenting.

43. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offences have been proven beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

44. The Accused has indicated his stance through the cross examination of the PW1. His stance is that he has had sexual intercourse with the PW1 after November 2015. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.
45. With the submission of the accused's stance, one of the three situations given below would arise;
- (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged counts.
46. I will provide you with a basic summary for your convenience.
- (a) The first two count are of Indecent Assault. The accused denies the allegations. Therefore, first you should consider the evidence of the witnesses and decide whether there is any reasonable doubt as to the

commission of the alleged offences by the accused. If there is, you should give the benefit of such doubt to the accused. Only in case you have no reasonable doubt of the commission of the alleged two offences by the accused, should you opine the accused guilty of such.

- (b) Counts 3 to 6 are of rape. The accused denies the alleged incidents. Therefore, first you should analyze the evidence of the witnesses and decide whether you are convinced beyond a reasonable doubt as to the committal of the alleged incidents by the accused. If you are not convinced, you should give the benefit of such doubt to the accused and opine him to be not guilty.

If you are convinced beyond a reasonable doubt that the alleged incidents were committed by the accused, then secondly, you should consider whether they were done without the consent of the PW1. If you have any reasonable doubt as to the PW1's absence of consent to such, you should opine that the accused is not guilty of the alleged 3 to 6 counts of rape, but may find guilty of defilement, a lesser alternative offence to which the consent is immaterial.

- (c) Count 7 too is of Rape. The accused denies the allegation. Therefore, you should be convinced beyond a reasonable doubt as to the committal of the alleged act by the accused and also of the absence of the consent by the PW1. If you have any reasonable doubt as to any of the two, you should give the benefit of such to the accused and opine him to be not guilty.

- (d) Counts 8 to 10 are too of Rape. The accused admits of having sexual intercourse with the PW1. Therefore, you should consider whether that was committed without the consent of the PW1. If you have any reasonable doubt that they occurred without the consent of the PW1, you

should give the benefit of the said doubt to the accused and opine him not guilty of the alleged counts 8 to 10.

47. Any re-directions? *none*

48. Lady and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

49. Your opinion should be;

(1) In respect of each of the 10 counts, whether the accused is guilty or not guilty.

(2) In respect of counts 3 – 6 if you find him not guilty, then you should consider whether he is guilty or not guilty to the offence of Defilement instead.



Chamath S. Morais
JUDGE

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