

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 145 of 2017**

**STATE**

**V**

**ALFRED AJAY PALANI**

**Counsel** : Ms. L. Latu for the State.  
: Ms. A. Bilivalu for the Accused.

**Dates of Hearing** : 27, 28 and 29 July, 2020

**Closing Speeches** : 30 July, 2020

**Date of Summing Up** : 31 July, 2020

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**SUMMING UP**

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*(The name of the complainant is suppressed she will be referred to as "AL".*

Ladies and Gentleman Assessors

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

**ROLE OF JUDGE AND ASSESSORS**

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters

entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

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

### **BURDEN OF PROOF AND STANDARD OF PROOF**

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy for either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

### **INFORMATION**

13. The accused is charged with one count of rape and one count of indecent assault (a copy of the information is with you).

### **FIRST COUNT**

#### *Statement of Offence*

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

#### *Particulars of Offence*

**ALFRED AJAY PALANI**, on the 31<sup>st</sup> day of March, 2015, at Toko, Tavua in the Western Division, had carnal knowledge of "AL" without the said "AL's" consent.

## SECOND COUNT

### *Statement of Offence*

**INDECENT ASSAULT:** Contrary to section 212(1) of the Crimes Act 2009.

### *Particulars of Offence*

**ALFRED AJAY PALANI** between the 1<sup>st</sup> day of December, 2014 and the 24<sup>th</sup> day of December, 2014 at Toko, Tavua in the Western Division, unlawfully and indecently touched the breasts of “AL” on top of her clothes, without the said “AL’s consent.

14. To prove count one the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Penetrated the vagina of the complainant “AL” with his penis;
  - (c) Without her consent;
  - (d) The accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.
  
15. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.
  
16. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
  
17. The second element is the act of penetration of the complainant’s vagina by the penis.

18. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
19. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
20. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
21. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
22. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty.
23. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
24. To prove count two the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
  - (a) The accused;

- (b) Unlawfully and indecently;
- (c) Assaulted the complainant "AL".

25. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence.
26. The words "unlawfully" and "indecently" in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
27. Assault is the unlawful use of force on the complainant "AL" by the act of touching her breasts.
28. In respect of the count of indecent assault the accused has denied all the elements of the offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant "AL" by touching her breasts.
29. If you are satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then you must find the accused guilty of the offence of indecent assault. However, if you have a reasonable doubt in respect of any elements of the offence of indecent assault then you must find the accused not guilty.
30. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
31. You must be satisfied that the prosecution has proved all the elements of both the offences beyond reasonable doubt in order for you to find the accused guilty of either or both the counts. If on the other hand, you have a

reasonable doubt with regard to any of those elements concerning either or both the offences, then you must find the accused not guilty.

32. In this case, the accused is charged with two offences, you should bear in mind that you are to consider the evidence in respect of each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

### **ADMITTED FACTS**

33. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.
34. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
35. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

### **PROSECUTION CASE**

36. The prosecution called five witnesses to prove the charges against the accused.
37. The complainant informed the court that on 31<sup>st</sup> March, 2015 she was staying at Toko, Tavua with her grandmother, younger brother Edward and the accused. Her mother had passed on when she was in class 3 and her father worked and stayed in Lautoka. The accused was her paternal uncle (father's younger brother).

38. The complainant was 14 years of age and a class 8 student. On 31<sup>st</sup> March, at around 5pm the complainant was at home cooking dinner when the accused sent Edward to the shop to buy some panadol. After Edward left the accused came to the complainant in the kitchen and told her to go and have her shower.
39. After shower when she was standing at the back of the house (since the bathroom and the kitchen were outside) she was wearing a long towel the accused told her to change into a shorter towel which he gave to her. Upon hearing this, the complainant went back into the bathroom and changed into a shorter towel.
40. Thereafter the complainant went into her bedroom looking for her clothes to wear. The accused also followed the complainant into her bedroom, at this time the accused held her tightly from behind and then dragged her by her hand into his bedroom. When the complainant was taken into the accused bedroom she noticed that all the curtains were drawn.
41. The accused was wearing a towel as well, he made the complainant lie down on his bed and then told her *"if you tell anyone I would kill you"* after this the accused started kissing the complainant's neck then her breast and then her vagina. He then forcefully tried to insert his penis into her vagina for about 5 minutes, the complainant was frightened and scared. After sometime the accused was able to penetrate her vagina with his penis, the complainant felt the accused penis in her vagina. The accused then told the complainant *"if you tell anyone or if you report this, I will kill you"*.
42. Thereafter, the accused told the complainant to go into her bedroom and wear her clothes. The complainant went into her bedroom put on a T-shirt and sulu, without wearing a panty she went straight to her uncle Viliame Dalituicama's house next door.



43. She told her uncle about what the accused had done to her, the complainant's grandmother was not at home since she was attending a funeral at Tavualevu Village.
44. Upon hearing this, the complainant's uncle Dalituicama told the complainant to wait till her grandmother and her aunties returned from the village. It was late in the afternoon the complainant told her grandmother about what the accused had done to her. According to the complainant her grandmother had scolded the accused.
45. According to the complainant she did not allow the accused to do what he had done to her. Next morning when the complainant was in the classroom she felt pain in her whole body and her stomach. The complainant then went to see her teacher Ms. Alena and told her what the accused had done to her because she trusted her teacher.
46. The matter was then reported to the police. The complainant also recalled another incident that had happened when she was in class 7 in the year 2014. On one occasion the complainant went with the accused to the river at Toko to do her washing. After washing the complainant had her bath at this time the accused touched her breasts from on top of her clothes, she did not allow the accused to do this to her.
47. When the complainant came home she told her grandmother about this incident but this matter was not reported to the police. After reporting the second incident the complainant was taken by the police to the Tavua Hospital and then referred to the Lautoka Hospital for medical examination.
48. In cross examination the complainant was referred to her police statement dated 2<sup>nd</sup> April, 2015, line 22 (second last sentence on page 1) read as:

*“When my grandmother left my uncle was sleeping in his bedroom. After a while I went to have my shower in the bathroom which is situated outside our house”.*

49. The complainant agreed she did not tell the police that she was cooking dinner when her uncle came into the kitchen and had told her to go and have her shower that afternoon.

50. Again the complainant was referred to line 26, page 1 of her police statement which was read as:

*“I can’t recall what time it was whilst I was having my shower I heard my uncle sending my brother to the shop to buy panadol”.*

51. The complainant agreed that she told the police what had happened at that time and not what she told the court when she stated that the accused came into the kitchen and told her to have her shower.

#### Ladies and Gentleman Assessors

52. The learned counsel for the accused in this regard was cross examining the complainant about some inconsistencies in the statement she gave to the police when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant with her evidence given in court. You are allowed to take into consideration the inconsistency in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.

53. It is obvious that passage of time can affect one’s accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.

54. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.

55. In further cross examination the complainant was referred to line 31 of her police statement which was read as follows:

*"When I came out of the bathroom wearing my long towel he was outside and he gave me my brother's towel which was smaller in size for me to wear and change out of my towel".*

56. The complainant agreed that when she told the police her uncle was outside she had meant her uncle was outside the bathroom. The reason why the complainant had taken the smaller towel and changed her towels was because the accused had spoken to her in a loud tone which made her afraid and also the accused was drunk.

57. When the accused was dragging the complainant from her bedroom to his bedroom by pulling her hand he did not block her mouth. She did not scream because the accused had told her if she screams he will kill her. The complainant agreed the threats of the accused did not stop her from going to her uncle Dalituicama's house. When she went to her uncle's house she had worn her clothes without her panty. When it was suggested that going to her uncle's house meant she was not afraid of the accused, the complainant disagreed.

58. The complainant denied the accused was drunk and shouting at her so she went and told her uncle Dalituicama that the accused had raped her. The

complainant agreed that the accused scolded her for hanging out at the shop and sometimes he scolded both her brother and her.

59. The complainant agreed that she could have screamed when she was dragged from one bedroom to another, when the accused was licking her neck down to her vagina, and immediately after the incident but she did not. The complainant did not agree that she did not scream because nothing had happened. She stated that she did not scream because the accused had told her if she screamed he will kill her.
60. The complainant maintained the allegations she made against the accused did happen.
61. In respect of the incident at the river the complainant stated that she had told her grandmother that the accused had touched her breasts. This incident had happened during the Christmas school break. The complainant maintained that there was no one else apart from the accused and herself at the river.
62. The complainant denied that she had made up the allegations against the accused because the accused used to scream or shout or embarrass her in front of her brother and her cousins or used to speak harshly to her.
63. In re-examination the complainant clarified that when she went to uncle Dalituicama's house she did not wear her panty because her vagina was very painful. The complainant also stated that she did not scream at any time to what the accused was doing to her because he had told her if she screamed he will kill her.
64. Viliame Dalituicama the uncle of the complainant informed the court that the accused was his younger brother. The accused lived next door with his mother, the complainant and her brother Edward.

65. On 31<sup>st</sup> March, 2015 at about 7pm the witness was at home when the complainant came crying into his house. When he first asked her what happened she did not respond. On the second occasion the complainant told the witness that the accused had touched her. After sometime the mother of the witness came and he told his mother what the complainant had told him.
66. In cross examination the witness stated that the accused house would be about 10 steps away from his house and that the bathroom at his mother's house could not be seen from his house. The witness knew the accused was at home that afternoon since the accused had asked his son and Edward to go to the shop to buy panadol. The witness stated that the complainant had told him the accused only touched her and nothing else.
67. Alena Vodivodi in 2015 was a teacher at Tavua Primary School. On 1<sup>st</sup> April, 2015 at 8.30am the witness was told by a student that the complainant who was a class 8 student wanted to see her in respect of a problem.
68. The witness taught vernacular and was the school counselor as well. The witness met the complainant and both went to her office. When the witness asked the complainant about her problem the complainant cried for a while and then told the witness that her uncle Ajay had raped her the previous evening that is on 31<sup>st</sup> March.
69. The complainant continued to cry when she was relating her problem. The head teacher was informed and the matter was reported to the police.
70. In cross examination the witness stated that the complainant had only told her that she had been raped by her uncle but did not give any other details.

Ladies and Gentleman Assessors

71. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first

person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

72. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant told her uncle Dalituicama immediately after the alleged incident that the accused had touched her and the next day she told her teacher Ms. Vodivodi in school that the accused had raped her.
73. This is commonly known as recent complaint evidence. The evidence given by Viliame Dalituicama and Alena Vodivodi is not evidence of what actually happened between the complainant and the accused since Viliame Dalituicama and Alena Vodivodi were not present and did not see what had happened between the complainant and the accused.
74. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant who was 14 years of age told her uncle Viliame Dalituicama immediately after the alleged incident by running from her house to the house of her uncle telling him that the accused had touched her and thereafter in school the next day she told her teacher the accused had raped her.
75. The complainant opened up to Ms. Vodivodi because she had trusted her teacher. Furthermore, the prosecution says the complainant was of an age that she would be uncomfortable in talking about sexual matters to her elder uncle particularly when the complaint was against her uncle's younger brother.

76. The prosecution also says that the complainant gave a more specific account of what had happened to her to Ms. Vodivodi who was an independent person. Even though she did not talk about the specific incident of rape to her uncle she did relay relevant and important information to Dalituicama to alert him of what had happened to her and therefore she is more likely to be truthful.
77. On the other hand, defence says the complainant had made up a story against the accused if what she told the court was the truth she would have informed her uncle Dalituicama about what had happened to her in detail so that her uncle would have immediately helped her. Defence further says the complainant waited till the next day to tell her teacher so that she could think of a story against the accused therefore she should not be believed.
78. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
79. Edward Palani the younger brother of the complainant informed the court that on 31<sup>st</sup> March he was playing with a cousin when the accused called him to go to the shop and buy panadol. The witness went with his cousin Dela to the shop.
80. After 20 to 30 minutes the witness left the shop for home, on the way he saw his grandmother and aunty getting off the bus so everyone came home together. At home the witness saw the complainant crying.
81. In cross examination the witness said that his uncle came home from work at about 6 to 7pm and when he was sent to the shop the complainant was

having her shower. The accused was wearing a towel when he was sent to the shop. He returned from the shop at around 7.15 to 7.30pm.

82. In re-examination the witness clarified the accused had come home from work after 5 or 6pm and after 5pm the witness was sent to the shop.
83. The final witness was Dr, Jimi Taria who graduated from the Fiji School of Medicine in 1989 with MBBS degree, the doctor completed his internship in 1990 at Lautoka Hospital. In 1992 he returned from his rural attachment to join Lautoka Hospital where he is currently based as a Consultant at the Gynaecology Department.
84. The witness has worked with Dr. Virisila Sema the doctor who had examined the complainant on 1<sup>st</sup> April, 2015 at the Lautoka Hospital. This witness also worked with Dr. Sema from 2011 to 2017 when he was the Head of Department until Dr. Sema resigned in 2019. The witness is familiar with Dr. Sema's hand writing as well.
85. The witness was able to identify the hand writing and signature of Dr. Sema in the Fiji Police Medical Examination Form of the complainant dated 1<sup>st</sup> April, 2015 which was marked and tendered as prosecution exhibit no.1.
86. According to Dr. Taria the specific medical findings noted by Dr. Sema in the medical form were:
  - a) *slight bruise at 7 o'clock and also at 5 o'clock ;*
  - b) *vaginal opening (orifice) pea size bruise measuring 0.5cm by 0.5cm;*
  - c) *no tears, no active bleeding, and no discharge.*

*Difficult to comment on hymen therefore cannot comment on whether intact hymen or perforated (inconclusive examination). The patient was seen more than 24 hours after the event.*



87. The doctor explained for bruising to occur there has to be some form of trauma causing the blood vessel underneath the skin to bleed. Furthermore no active bleeding meant there was no injury. Dr. Sema had mentioned that her examination was inconclusive meant it was difficult for her to draw any conclusion on what had happened to the patient although there was sign of some trauma to the outer lower part of the vagina.
88. According to the doctor the place where the bruise was seen was the perineum which is well protected and it was difficult to be bruised unless some force is intentionally directed towards it such as directly or indirectly falling from a tree or falling from a bicycle directly injuring that particular area. The doctor also stated that the absence of a tear as mentioned by the examining doctor did not rule out penetration.
89. In cross examination the doctor stated that the gist of Dr. Sema's inconclusive outcome was that the hymen was intact. The doctor agreed it was not recorded on the medical examination form whether the bruise was fresh or old by the examining doctor.

#### Ladies and Gentleman Assessors

90. You have heard the evidence of Dr. Jimi Taria who was called as an expert witness on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called. The medical folders of the deceased are before you and what the doctor said in his evidence as a whole is to assist you.
91. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. At this point I would like to caution you about the Fiji Police Medical Examination Form of the complainant (prosecution exhibit no. 1).

92. Dr. Taria was not the author of the notes contained in this folder accordingly he had only read the notes made by Dr. Sema to explain the specific medical findings of Dr. Sema who had examined the complainant at the Lautoka Hospital when she was referred by the Tavua Hospital.
93. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
94. You should remember that the evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your opinions, you must reach your opinion having considered the whole of the evidence.
95. This was the prosecution case.

Ladies and Gentleman Assessors

96. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.
97. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination.

**DEFENCE CASE**

98. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath

which you must take into account when considering the issues of fact which you are determining.

99. The accused informed the court that in 2015 he was living with his mother, the complainant who was his niece and Edward his nephew at Toko, Tavua. The complainant is also known as Meme. The accused with his mother was taking care of the complainant and her brother for 8 years after their mother had passed on and their father was working somewhere in Lautoka or Nadi who used to visit his children in two to three months. In April 2015 his mother had also passed on.
100. On 31<sup>st</sup> March, 2015 in the morning the accused went to work after he knocked off from work he met one of his friends so they had about 7 mugs of beer he reached home at 6.30pm. The complainant was alone at home since Edward was at his brother Viliame's home. After about 5 minutes the accused sent Edward and Dela to the shop to buy panadol since he was having a headache.
101. After this, the accused told the complainant to go and have her shower by this time it was night fall the complainant was lying down in the house. Edward returned after 15 minutes but in the meantime the accused had already had his shower and was waiting for Edward. During this time the complainant was lying on her bed in her bedroom and the accused's mother was at Tavualevu Village for a function.
102. When Edward brought the panadol the complainant was still inside the house till his mother returned home around 6.30pm to 7pm. It was after his mother had come home that the complainant went to Viliame's house.
103. When the mother of the accused came home she did not discuss anything with the accused that night. Also when he told the complainant to go and have her shower he was wearing his work clothes.

104. The accused also denied that he had threatened the complainant that afternoon and it was a lie that he had dragged her, kissed from her neck to her vagina or had forcefully tried to insert his penis into her vagina and had managed to do so. The accused further stated that he was not wearing his towel but his work clothes.
105. The accused also denied the allegation that in December, 2014 he had touched the breasts of the complainant from on top of her clothes at Toko, river. At the river he was bathing while the complainant was washing the clothes there were other children swimming nearby. Both were at the river for less than an hour, nothing happened and both came back home.
106. His relationship with the complainant was like father and daughter whereby he had provided her with food, education and clothes. The accused does not scold the complainant but explains what is to be done and what not to be done. However, the complainant does not listen to him and that she was waiting for something to happen so she can leave the house.
107. In cross examination the accused agreed that in his caution interview his date of birth was recorded as 4<sup>th</sup> September, 1974 when in actual fact he was born in the year 1976 and not 1974 he did not lie to the police but he was in shock and confused.
108. The accused agreed that he told the court that when he had sent his nephew to the shop he was wearing his work clothes, however, when he was referred to his caution interview he agreed that he told the police officer he was wearing his towel. The accused also agreed that when he told the court he was wearing his work clothes that was not true. The accused also agreed that when he told the complainant to go and have her shower and for his nephews to go to the shop he was wearing his towel.
109. The accused agreed that he told the court that the complainant did not listen to him so both were not in good terms, however when he was referred

to his caution interview the accused agreed that he had told the police in 2015 that he was in good terms with the complainant.

Ladies and Gentleman Assessors

110. The learned state counsel was cross examining the accused about some inconsistencies in his caution interview he gave to the police when facts were fresh in his mind in 2015 with his evidence in court. Please consider the same principles I had mentioned to you earlier when some inconsistencies were brought about by the defence counsel when cross examining the complainant in respect of her police statement and her evidence in court (see paragraphs 52 to 54 above).
111. The accused agreed that his mother had returned from a funeral at Tavualevu, Village, however, he could not recall if he had told the police his mother had asked him why the complainant was crying.
112. The accused agreed that the complainant had run to Viliame's house to complain about something but he denied threatening the complainant and committing the offences alleged.
113. In re-examination the accused stated that he told the police his date of birth was 4<sup>th</sup> September, 1974 because he was afraid when the police officers were questioning him. When his nephew had left for the shop he was wearing a towel he was not thinking properly when he told the court that he was wearing his work clothes. The accused and the complainant were in good terms and when he talks to her sometimes she listens and sometimes she doesn't. He came to know the complainant had complained to Viliame after his mother had returned home.
114. This was the defence case.

## **ANALYSIS**

115. The prosecution alleges that the complainant was sexually assaulted on two occasions by the accused her paternal uncle who was living with the complainant. The first incident happened in late 2014 when the complainant was in class 7 at the Toko river, the accused had accompanied the complainant to the river for washing of clothes.
116. After the complainant finished her washing and bathing in the river the accused touched her breasts from on top of her clothes. The complainant did not consent to the accused to touch her breasts. When the complainant came home she informed her grandmother about this incident but the incident was not reported to the police.
117. The second incident was on the 31<sup>st</sup> of March, 2015 in the afternoon when the complainant was in the house with the accused who was drunk. The accused had sent the brother of the complainant to the shop to buy some panadol and had told the complainant to have her shower.
118. When the complainant came out of the bathroom she was wearing a long towel the accused gave her a small towel to change. The complainant was scared of the accused so she changed into a small towel. The accused was also wearing a towel when the complainant went into her room to look for her clothes the accused came from behind and held her tightly and dragged her to his bedroom.
119. The accused made her lie on his bed after kissing her he had forceful sexual intercourse the complainant did not consent to have sexual intercourse with the accused. The complainant was crying when she complained to her uncle Dalituicama, her teacher Ms. Vodivodi and seen by Edward when he came back from the shop.
120. On the other hand, the defence says the complainant did not tell the truth in court she made up a story against the accused. The accused denies all

the allegations made against him. The incident at the Toko river cannot be the truth because it is a public place where the other children were also around so it is not possible for the accused to touch the breasts of the complainant as stated by her.

121. As for the allegation of rape it is again another made up story the complainant did not like the accused who was strict on her but he treated the complainant like his own daughter. When she went to uncle Dalituicama's house she did not say anything about being raped because nothing had happened.
122. The complainant made up a story overnight to tell her teacher the next day and as a matter of fact the defence also says that the complainant could have screamed, yelled and shouted but she did not. The house of her uncle Dalituicama was only 10 steps away so a shout or a scream or a yell would have alerted her uncle who was at his home at the time. The complainant did not because nothing had happened. At no time had the accused mother scolded him for doing anything to the complainant.
123. The defence also says the medical report is inconclusive since the examining doctor did not make any conclusive findings of any forceful penetration. The slight bruise found on the perineum was in a protected area which could be caused by other causes. The accused denied the allegations saying it was a lie and he did not do it.

#### Ladies and Gentleman Assessors

124. You have seen all the witnesses give evidence keep in mind that some witnesses react differently when giving evidence.
125. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving

evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

126. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what 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 is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
127. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
128. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
129. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt for both the counts. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.



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

131. In this case, the accused is charged with one count of rape and one count of indecent assault, as mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

132. Your possible opinions are:-

Count One:           **RAPE**: GUILTY OR NOT GUILTY

Count Two:           **INDECENT ASSAULT**: GUILTY OR NOT GUILTY


Ladies and Gentleman Assessors

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

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



**At Lautoka**  
31 July, 2020

  
**Sunil Sharma**  
**Judge**

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**