

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 111 of 2017

STATE

V

NACANIELI RAIDA CAGIMAICAMA

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

Dates of Hearing : 12, 13 and 14 August, 2020
Closing Speeches : 17 August, 2020
Date of Summing Up : 18 August, 2020

SUMMING UP

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

Madam and Gentlemen 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 sexual assault and one count of rape (a copy of the information is with you).

FIRST COUNT

Statement of Offence

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

Particulars of Offence

NACANIELI RAIDA CAGIMAICAMA, between the 01st day of January, 2016 and the 31st day of December, 2016 at Vatudua Settlement,

Rakiraki, Ra in the Western Division, unlawfully and indecently assaulted “**UT**”, by licking her vagina.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

NACANIELI RAIDA CAGIMAICAMA, between the 01st day of April, 2017 and the 30th day of April, 2017 at Vatudua Settlement, Rakiraki, Ra in the Western Division, penetrated the vagina of “**UT**”, with his penis, without the consent of the said “**UT**”.

14. To prove count one the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
 - a) The accused;
 - b) Unlawfully and indecently;
 - c) Assaulted the complainant “**UT**” by licking her vagina.

15. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offence.

16. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.

17. The final element of assault is the unlawful use of force on the complainant by licking her vagina. You should ask yourself:

- a) whether you consider the force which was used in licking her vagina was sexual in nature; and
 - b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
18. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then you must find the accused person guilty of the offence of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused person not guilty.
19. In this trial the accused person has denied committing the offence of sexual assault as alleged. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently licked the vagina of the complainant.
20. To prove count two 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 "UT" 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.
21. 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.

22. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
23. The second element is the act of penetration of the complainant's vagina by the penis.
24. 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.
25. 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.
26. 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.
27. 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.
28. 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.

29. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
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. As a matter of caution, I direct you to disregard any evidence you have heard in this court for which the accused has not been charged with such as the complainant telling the court that the accused had assaulted her. You are to only concentrate on the evidence in respect of the two counts the accused is charged with.

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 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 complainant informed the court that the accused is her stepfather. In the year 2016 she was living at Nakorokula, Rakiraki with the accused, her mother and her two siblings. The complainant was a High School student and at that time she was 17 years of age the accused was not working but her mother was working as a Housemaid.

37. On 29th May, 2016 after her mother had left for work the accused told the complainant and her siblings not to go to school. The accused sent both her siblings to get water from the village which was about 15 minutes walk from her home.

38. The complainant was inside the house, the accused came and closed the door, she was shocked when she saw this. The accused came and forcefully started removing the complainant's clothes, as she tried to stop him she got pushed on the floor lying face up on her back.

39. When the complainant was on the floor the accused with one hand started removing her singlet and skirt and with the other hand he held her on the floor. The complainant tried to push the accused away but she could not. The accused was able to remove both her clothes, after this, the accused forcefully sucked her breast and then licked her vagina for about 5 minutes.

40. The accused threatened her not to tell anyone otherwise he will use a knife on her or her mum. The accused then told the complainant to wear her

clothes when her siblings returned home she did not tell them about what had happened to her because her siblings and her mum including the complainant were all scared of the accused. The complainant's mother is also sickly who suffers from epilepsy.

41. After this incident, in April, 2017 without telling anyone at home the complainant went to her mother's village at Dobuilevu, the complainant stayed with her aunt Meiva Loga for one week but she did not tell her aunt anything about what the accused had done to her because she thought of her mother who was staying with the accused.
42. The complainant did not want to spend her holidays at home because of what the accused had done to her. After the holidays ended the complainant went to school and then went home. At home the accused scolded and swore at the complainant for going to her mother's village.
43. When the complainant went inside the house she cried she was alone since her mother had not come back from work and her siblings had gone to get water from the village. Next morning the complainant's mother went to work, the complainant and her siblings were getting ready to go to school, her siblings took the lead to school. On this day the complainant was planning to leave her home for good.
44. As the complainant was about to leave the house with her bag the accused saw her he once again scolded her and told her to open her bag. When the accused saw her clothes he took the school bag and burnt it outside the house and told the complainant not to go to school and stay at home.
45. The complainant went in the house crying and sat in the sitting room the accused came and closed the door. At this time, the accused asked the complainant if she wanted to go to school when she said "yes" the accused told her to have sex with him before going to school.

46. The complainant pushed the accused and she saw some cane knives in the sitting room where she used to sleep. The accused forced her to lie down by pushing her with his hands he then came on top of her removed his clothes and then removed her clothes.
47. The complainant was facing up so the accused pressed her breast, licked her vagina and then forcefully penetrated his penis into her vagina, it was painful she tried to push him but could not. There was a cane knife beside the accused he threatened the complainant by saying that he will cut her neck if she moved. The accused had sex with the complainant for about 5 minutes.
48. After the accused had finished he went outside, the complainant was tired so she slept. The complainant did not tell her mother about what the accused had done to her, after a few days, the complainant's mother was going to her village and the complainant went with her.
49. At her mother's village she told her aunt Meiva Loga about what the accused had done to her she was taken to the Dobuilevu Police Post to report the incidents. The reason why she told her aunt was because she was away from the accused with her mother in her mother's village so she felt comfortable in telling her aunt.
50. The complainant did not tell her mother because her mother was sickly she also did not tell her teacher or her friends because the accused had threatened her if she told anyone he will harm her and her mother. The complainant was medically examined at the Rakiraki Hospital.
51. In cross examination the complainant agreed that the 2016 incident happened on a school day and it was the accused who had sent both her siblings to get water from the village. The complainant hated the accused for being strict on her.

52. In May, 2017 she told her aunt about what the accused had done to her when she had gone to her mother's village for a function and from there the matter was reported to the police.

53. The complainant was referred to her police statement dated 28th May, 2017 to line 16 on page 1, which was read as:

"I can clearly recall sometimes on Saturday last year I could not recall the exact date and time. I was at home with my step father and my brother and sister, my mum went to work, whilst we were at home he sent my small brother and sister to go and get some water from the village because we don't have tap."

54. The complainant agreed that she had told the court that the first incident happened on 29th May, 2016 which was a school day but in her statement it was mentioned that the incident happened on a Saturday in 2016.

55. She explained that the first time the incident happened was on a school day but the second time it happened was on a Saturday. When it was suggested that nothing happened on the school day the complainant responded by saying the incident happened on a school day and on a Saturday as well.

56. The complainant denied that her siblings did not go and get water from the village in respect of the 2016 incident. She agreed with the suggestion that she had told her aunt Meiva that the incident happened on a Saturday in 2016. The complainant went to lodge the report at Dobuilevu Police Post with her aunt and mum but she did not tell her mother about her problems, reason being if her mother heard such news she will be affected.

57. The complainant was again referred to her police statement line 36 on page 2 which was read as:

"It took him nearly five minutes to lick my vagina after he did this to me he stood up and went away."

58. The complainant agreed that she did not inform the police about the accused threatening her with a knife if she told anyone. When the complainant stated that she told her aunt who told the police the complainant agreed this version was also not in her police statement but her aunt was present with her at the police post.
59. The complainant did not tell her aunt about the 2016 incident because of the threat by the accused that he will do something to her mother. When it was put to the complainant that she did not tell her aunt during the one week of school break because nothing had happened, the complainant said she was planning to tell her aunt but then she thought of her mother who was with the accused.
60. The complainant denied that she made up the allegations against the accused because she did not want to go back home from her mother's village. In respect of the second incident in April, 2017 the complainant stated that she told her aunt that the accused had threatened her to cut her neck if she moved during the time he was having sexual intercourse with her.
61. The complainant was referred to her police statement line 31 on page 4 which was read as:
- "I was very frightened then he told me to get up and dressed myself."*
62. The complainant could not recall telling the police about the threat because when her statement was recorded she did not tell everything that happened because she was in a shock.

Madam and Gentlemen Assessors

63. 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 inconsistencies in such a statement when you consider whether the complainant is believable and credible. However, the police statement itself is not evidence of the truth of its contents.

64. 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.
65. 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 complainant.
66. The complainant agreed she told everything that happened to her aunt Meiva including the fact that the accused had threatened her that he will cut her neck if she moved.
67. The complainant maintained she was threatened by the accused and that although she was scared of the accused she did not hate him. It was at the hospital she told her aunt exactly what she told the court. In respect of the first incident she had told her aunt when they were on their way to the hospital that the accused used to harass her but never told her the details of what happened she only told about some things to her aunt.
68. In respect of the second incident in 2017 the complainant agreed that she did not tell her aunt that the accused had forceful sexual intercourse with her before the report was made.

69. The complainant maintained that the accused had on 29th May, 2016 forcefully licked her vagina and also in April, 2017 the accused had forceful sexual intercourse with her by threatening her with a cane knife.
70. The complainant also maintained that she did not make up the allegations although she disliked the accused.
71. In re-examination the complainant could not recall telling her aunt the accused had sexual intercourse with her in 2017 but she did tell her aunt about the accused licking her vagina in 2016. In respect of the 2017 incident she told the doctor.
72. The second witness Dr. Tevita Tamani informed the court that he graduated with an MBBS degree from the Fiji School of Medicine in the year 2015 he has 5 years of experience as a Medical Practitioner.
73. In 2017 the doctor was based at the Rakiraki Hospital on 28th May, 2017 he had examined the complainant. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.
74. Upon vaginal examination of the complainant the doctor noted that the hymen was not intact or torn and also there was a whitish vaginal discharge present. The doctor explained the hymen is a mucosa covering or a tissue covering the inside of the vagina.
75. The doctor further stated for hymen not to be intact or torn could be caused by a lot of things for example by penetration, during a trauma or strenuous exercise was some of the common ones. In this case vaginal penetration was high on the list which was consistent with the history given to him and his medical findings.
76. According to the doctor the whitish discharge was consistent with sexual assault and the first medical thought was that the infection was sexually transmitted.
77. In cross examination the doctor stated that the history was relayed to him by one Meiva Loga and he was also advised that Meiva was the mother of

the complainant. The complainant was unable to talk she was very emotional and most of the time crying.

78. The doctor maintained from the history relayed to him it was a sexual assault case. When the doctor was asked how certain he was that penetration caused the hymen not to be intact he responded by saying that his opinion was based on the history given and the appearance of the patient. The doctor was, however, not certain when the penetration had taken place which was not just in April, 2017 but it could have been any time before his examination as well.

Madam and Gentlemen Assessors

79. You have heard the evidence of Dr. Tamani 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 report of the complainant is before you and what the doctor said in his evidence as a whole is to assist you.
80. 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.
81. 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.
82. 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.

83. The final witness Meiva Loga informed the court that on 28th May, 2017 she was staying at Dobuilevu, at about 9am the complainant and her mother came home. After returning from Dobuilevu Police Post (for an unrelated matter) on their way home the complainant told the witness who was the aunt of the complainant “*mum dad harassed me*”. The witness asked her how? The complainant said by touching her breast.
84. When the witness asked the complainant whether they had sexual intercourse the complainant said “yes”. The witness was touched by this response because the complainant was her niece and she had brought her up since she was born until the complainant was 5 years when she left with her mother to stay with the accused.
85. In cross examination the witness stated that she had gone with the complainant and her mother to the Dobuilevu Police Post. The witness stated that the complainant had told her about what the accused had done to her before they reached the hospital. The witness was referred to her police statement dated 29th May, 2017 line 35 which was read as:
- “Then the doctor told Unaisi to tell me the story. At Rakiraki Hospital Unaisi told me that she cannot recall the month and the date but she can only remember one Saturday morning that was on the first term of school when her mother went to work.”*
86. The witness agreed that the complainant had relayed to her about the second incident at the Rakiraki Hospital. When it was suggested that the complainant never told her anything on her way back home from Dobuilevu Police Post the witness replied the story was not complete when they had come back from the police post.

Madam and Gentlemen Assessors

87. The learned defence counsel was cross examining this witness about some inconsistency in her police statement when facts were fresh in her mind with her evidence in court. Please consider the same principles that I had

mentioned to you earlier in my summing up when some inconsistencies were brought about by the defence counsel when cross examining the complainant.

88. The witness also stated that the complainant had not come to stay with her for one week in April, 2017 during the school break but had stayed with her elder sister. The witness confirmed that the complainant told her the accused had harassed her from 2016.
89. The witness denied the complainant had told her the accused had sexual intercourse with her in 2016 she stated the complainant did not mention the year the sexual intercourse had taken place. The witness stated that the complainant did not tell her that the accused had licked her vagina.

Madam and Gentlemen Assessors

90. 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.
91. 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 aunt Meiva on 28th May, 2017 after returning from Dobuilevu Police Post (for an unrelated matter) on their way home the complainant told the witness the accused had harassed her by touching her breast and they had sexual intercourse.
92. This is commonly known as recent complaint evidence. The evidence given by Meiva Loga is not evidence of what actually happened between the

complainant and the accused since Meiva was not present and did not see what had happened between the complainant and the accused.

93. 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 17 years of age in May, 2017 told her aunt Meiva about what the accused had done to her after she had left the accused house with her mother to go to her mother's village.
94. The complainant opened up to Meiva because she had nothing to fear the accused was not around and the complainant was safe at her mother's village. Furthermore, the prosecution says although the complainant did not tell everything in detail to her aunt but she did relay crucial information about what had happened to her which prompted her aunt to take the complainant to the Dobuilevu Police Post to lodge the police complaint and therefore she should be believed.
95. On the other hand, the 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 aunt after the first incident when she had gone for a week to her mother's village. The complainant who was a High School student is late by one year in respect of the offence of sexual assault which is highly suspicious. The fact that the complainant did not tell anyone at her mother's village also shows that nothing had happened between the accused and the complainant. The defence also says that the complainant had told the court that she feared for the safety of her mother and herself should not be believed.
96. In respect of the second incident the defence says that the complainant did not volunteer the information that the accused had sexual intercourse with her it was when the complainant was questioned by the witness that she told the witness that there was sexual intercourse between the accused and

her. The complainant made up both allegations against the accused therefore she should not be believed.

97. 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.
98. The witness disliked the accused because he had stopped the complainant and her mother from visiting her village and also he stopped her from visiting them and also that he was strict on the complainant and her mother.
99. The witness denied that because of her dislike and her hatred she had pressured the complainant and coached her to report the matter to the police.
100. In re-examination the witness stated that she was told about the intercourse before going to the hospital.
101. This was the prosecution case.

DEFENCE CASE

Madam and Gentlemen Assessors

102. At the end of the prosecution case you heard me explain options to the accused he has those options because he does not have to prove anything. The burden of proving the accused guilt beyond reasonable doubt remains on the prosecution at all times.

103. The accused chose to remain silent and did not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent and not call any witness.
104. From the line of cross examination the defence takes the position that the accused did not commit the offences as alleged. The accused did not lick the vagina of the complainant on 29th May, 2016 and he also did not forcefully penetrate her vagina with his penis in April, 2017.
105. The defence says that the evidence of the complainant is not possible in the circumstances as narrated by her and therefore she should not be believed. The complainant had made up a story to implicate the accused since she was coached and /or forced by her aunt Meiva Loga to report the matter to the police.
106. Furthermore, if the complainant was indeed sexually assaulted and raped by the accused she would have told her aunt everything at her mother's village. The accused did not do anything to the complainant as alleged she hated the accused because he was strict on her since he did not allow the complainant and her mother to go to her maternal village hence the complainant made the false allegations against the accused.
107. The aunt of the complainant Meiva Loga also did not tell the truth because like the complainant Meiva did not like the accused because he had stopped the complainant and her mother from visiting Meiva and her family and he had also stopped Meiva from coming to his house.
108. The medical report of the complainant is not conclusive since the doctor could not be sure how the hymen of the complainant got torn or was not intact since there are other causes by which a hymen may not become intact or get torn.
109. This was the defence case.

ANALYSIS

110. The prosecution alleges that the accused had sexually assaulted and raped the complainant. On 29th May, 2016 the accused told the complainant and her siblings not to go to school thereafter he sent both her siblings to get water from the village which was about 15 minutes walk from her home.
111. The complainant was inside the house, the accused came and closed the door and forcefully removed the complainant's clothes, she tried to stop him but she was pushed on the floor lying face up on her back.
112. When the complainant was on the floor she tried to push the accused away but could not. The accused forcefully sucked her breast and then licked her vagina for about 5 minutes. The accused also threatened the complainant not to tell anyone about what he had done to her otherwise he will harm her or her mother with a knife.
113. In April, 2017 after the school holidays ended the complainant went to school from her mother's village where she had spent her school holidays and then went to home. At home the accused scolded and swore at her for going to her mother's village.
114. The next morning as the complainant was about to leave the house with her bag which she had packed with her clothes the accused told the complainant not to go to school and stay home and if she wanted to go to school she should have sex with him.
115. The accused forced the complainant to lie down by pushing her with his hands thereafter he went on top of her, removed his clothes and then removed her clothes and forcefully penetrated her vagina with his penis, according to the complainant it was painful she tried to push him but could not.

116. There was a cane knife beside the accused, he threatened the complainant by saying that he will cut her neck if she moved. The accused had sex with her for about 5 minutes.
117. The complainant did not consent to what the accused had done. The accused also exercised his authority over the complainant because it was his house and the complainant was scared of him. When the complainant got the chance to leave the accused house with her mother she did so. At her mother's village the complainant told her aunt Meiva Loga about what the accused had done to her since she was comfortable and away from the accused.
118. On the other hand, the defence takes the position that the accused did not commit the offences as alleged. The accused did not lick the vagina of the complainant on 29th May, 2016 and he also did not forcefully penetrate her vagina with his penis in April, 2017.
119. The defence also says that the evidence of the complainant is not possible in the circumstances as narrated by her. The complainant had made up a story to implicate the accused since she was coached and /or forced by her aunt Meiva Loga to report the matter to the police. The complainant had visited her mother's village in April, 2017 during the school break but she did not tell anyone there about being sexually assaulted by the accused because nothing had happened.
120. Finally the defence submits that the accused did not do anything to the complainant as alleged. The allegations are false and a made up story because the complainant hated the accused for being strict on her.
121. The aunt of the complainant Meiva Loga did not also tell the truth because like the complainant Meiva also did not like the accused so she forced the

complainant in reporting the false allegations against the accused. In respect of the medical report the defence says the medical findings are not conclusive there can be many causes for the hymen not to be intact.

Madam and Gentlemen Assessors

122. You have seen all the witnesses give evidence keep in mind that some witnesses react differently when giving evidence.
123. 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 give 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.
124. 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.
125. 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.

126. 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.
127. 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.
128. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
129. In this case, the accused is charged with one count of sexual assault and one count of rape, 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.

130. Your possible opinions are:-

Count One: **SEXUAL ASSAULT**: GUILTY OR NOT GUILTY

Count Two: **RAPE**: GUILTY OR NOT GUILTY

Madam and Gentlemen Assessors

131. 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.

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



Sunil Sharma
Judge

At Lautoka

18 August, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.