

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 206 of 2019

[CRIMINAL JURISDICTION]

STATE

V

VILIKESA RAWAMILA

Counsel : Ms. W. Elo for State
Mr. K. Chang for Accused

Hearing on : 13 - 15 October 2020

Summing up on : 16 October 2020

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "SS". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should 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 you agree with that opinion. You are the judges of facts.

2. As I have told 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.
3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room and the admitted facts. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. You have to bear in mind that a statement made by a witness out of court is not evidence. Therefore, a statement made to the police by a witness can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. However, if a witness admits that a certain statement in such police statement was made by that witness and that it is true, then that portion of the police statement becomes part of that witness' evidence.
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 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 the complainant. No such emotion should 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 behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience 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 all, part or none of any witness' evidence.
7. The complainant (PW1) said she is 18 years old and she gave evidence about incidents that had allegedly taken place in 2016 and in 2017. You may have come across children of her age. You will have an idea of the way a child of a particular age behave, think, talk and the way they describe things.
8. Children can be confused about what has happened to them. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time what they were doing was wrong.
9. I mention these possibilities because experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case however, is a decision for you to make.
10. 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 you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.

11. 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. Inconsistencies may lead you to question the reliability of the evidence given by a witness.
12. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should see whether there is any acceptable explanation for it. In this regard, you may bear in mind that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail given by a witness to be the same from one account to the next.
13. Accordingly, if there is a significant inconsistency in the evidence given by a witness, it might lead you to conclude that the witness is generally not to be relied upon and reject the entire evidence of that witness; or, you may reject the part of that witness' evidence that you may find unreliable given the inconsistency and accept the part of the evidence you consider reliable; or if you find that the inconsistency has been duly explained you may disregard the inconsistency and accept the entire evidence of the witness as reliable.
14. 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 examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

15. 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 proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proven facts, then you should not draw the adverse inference.
16. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
17. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
18. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you have a reasonable doubt in respect of even one of those elements, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.
19. You are not required to decide every point the lawyers 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 those charges have been proved.

20. I must explain to you as to the reason for the use of the screen when the complainant gave evidence. It was a normal procedure adopted in courts on the request of the prosecution to make a particular witness relatively more comfortable when giving his/her evidence. You must not infer that such a protection to the witness was warranted due to the accused's behaviour and should not draw any adverse inference against him on that account.
21. Please remember that 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 necessary.
22. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

FIRST COUNT
(Representative Count)

Statement of Offence

Sexual Assault: contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

VILIKESA RAWAMILA, between the 1st of January 2016 to the 31st December 2016, at Vuisiga, Vunidawa, in the Eastern Division, unlawfully and indecently assaulted **SS** by touching her breasts and fondling her vagina.

SECOND COUNT
(Representative Count)

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

VILIKESA RAWAMILA, between the 1st of January 2016 to the 31st December 2016, at Vuisiga, Vunidawa, in the Eastern Division, had carnal knowledge of **SS**, without her consent.

THIRD COUNT
(Representative Count)

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

VILIKESA RAWAMILA, between the 1st of January 2016 to the 31st December 2016, at Vuisiga, Vunidawa, in the Eastern Division, on an occasion different from Count 2, had carnal knowledge of **SS**, without her consent.

**FOURTH COUNT
(Representative Count)**

Statement of Offence

Rape: contrary to Section 207 (1) & (2) (a) of the Crimes Act 2009.

Particulars of Offence

VILIKESA RAWAMILA, between the 1st of January 2017 to the 31st December 2017, at Vuisiga, Vunidawa, in the Eastern Division, had carnal knowledge of **SS**, without her consent.

23. Though the accused is charged with four counts, please remember that those charges should be considered separately. You should not find the accused guilty of another count simply because you would find him guilty of one count.
24. You would also notice that all the counts in the Information are representative counts. A representative count is a count where, the prosecution alleges that the accused had committed the relevant offence he is charged with on more than one occasion during the period specified in that count, but because it is not possible to ascertain the exact dates those alleged incidents had taken place, the prosecution has opted to frame a single charge. When it comes to a representative count, the law says that it shall be sufficient for the prosecution to prove that, between the dates specified in the charge at least one such offence was committed.
25. Let us now look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to

you. If I do not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

26. The first prosecution witness (“PW1”) said in her evidence that;

- a) *Her date of birth is 12/05/02. In 2016 she was living in Vunidawa with her grandfather, grandmother and her brother. The accused was also living with her. Her mother passed away in 2010. Her grandfather passed away in March 2016.*
- b) *One night in the first term of 2016 while she was sleeping in the living room with her grandmother and the brother, the accused came home after his drinking session and had dinner. Her grandfather was sleeping inside one of the two bedrooms. After having dinner the accused carried her to the other bedroom and laid her on the bed. When the accused reached the door of the bedroom she woke up and saw the accused’s face. Then the accused told her to shut up and not to say a word. There was light coming from outside to this bedroom.*
- c) *After the accused lay her on the bed, he took off her clothes. She did not do anything because she was scared as the accused who is her father was drunk. Then the accused started to touch her breasts. He used one hand to touch her breasts and with his other hand he touched her female private part. Later on she clarified that by the term ‘female private part’ she means her vagina. Then he inserted his hand inside her vagina. She said that she did not know what to do because it is her father. Thereafter, the accused inserted his ‘male private part’ which she later clarified as the ‘penis’ inside her vagina. She felt ashamed and also felt pain when he was doing that. After that the accused gave her clothes back for her to wear and told her to lie-down on the bed. While she lay on the bed, she cried because of what the accused did to her.*
- d) *The next morning when she went to the bathroom she saw blood stains in her vagina. At that time, her grandmother was at home but she did not tell the grandmother about what she saw because the accused told her not to tell anyone, otherwise he will be arrested.*
- e) *One evening during the third term in 2016 the accused went to drink. She was at home with the grandmother and her brother. After having dinner they went to sleep in the living room. She fell off to sleep and later, she heard the spoons and then she knew that the accused had come back after drinking and that he is having his dinner. She fell off to sleep again. Thereafter the accused woke her up by shaking her. When she woke up, the accused had gone to the room and he waved at her from that room, for her to come to him. There was a curtain at the entrance to the room and he drew the curtain before he waived at her. She saw her father, the accused, from the light that came into that room from the neighbour’s house.*

- f) *She did not go to him and remained where she was. Then the accused came to her and carried her to the room. She did not try to wake up the others when the accused, her father, came to take her. He had already told her not to tell anyone and he was drunk. She smelt beer from him. So, she was scared. After taking her to the room the accused lay her on the bed and took off his sarong. She felt ashamed and scared upon seeing this. Thereafter he removed her clothes and touched her breasts and then her vagina. Next, he inserted his penis into her vagina. Afterwards, he gave her the clothes. She got dressed and then she slept on the top bed and the accused slept on the bottom bed. This bed on which the incidents had allegedly taken place was a double bunk bed. When she woke up the next morning the accused was not there. She did not tell her grandmother because the accused had told her not to tell anyone.*
- g) *One night in the first school term of 2017, the accused called her into the room and asked her about an incident where her neck was bitten by one of her cousins. Her grandmother and the brother were awake and were sitting in the sitting room while she was called into the room. After that conversation, the accused left the house, to drink. She forgot to go back to the living room to sleep and fell off to sleep in the accused's room. Later she realized that the accused was in the room when the accused started undressing her.*
- h) *She wanted to shout, but the accused told her not to. After removing her clothes, the accused touched her breasts and licked her vagina. Thereafter the accused inserted his penis inside her vagina. After he did that, the accused gave her a blanket to cover herself. When she got up the next morning the accused had already left to the plantation.*
- i) *During the term one in 2017, the accused inserted his penis into her vagina again. When she was asked by the prosecutor, how many weeks are there for a school term, she said, 7 weeks. She said that the accused would do this only when the accused is drunk. This happened twice during that term. She did not tell anyone about what the accused was doing to her because the accused had told her that if she tells someone, he will cut off her ear.*
- j) *She said that the accused went to Vanua Levu in February 2016 and that was after the first incident and he did it again after he returned. She also said that from 2016 to 2017, the accused left for Vanua Levu only once.*
- k) *She said she moved to Lautoka in 2018 after her Aunt Losalini who was living in Lautoka called her to come there and go to school with her daughter. After she moved there, one evening, she was questioned by her uncle and aunt about her cousin biting her neck. Then she was asked who was the first person to have sex with her and she revealed that it was her father, the accused. Thereafter she told them what exactly the accused had done to her.*

- l) *During cross-examination, she agreed that the house in which the incidents took place was made of corrugated iron and timber and it was not that big. She agreed that the bedrooms did not have doors. She agreed that all those who were in the house would be able to hear the noise being made from the bed or the movements inside the house and any noise being made in one of the bedrooms could be heard in the living room.*
- m) *Being shown her statement made to police, she agreed that she had not told the police that the accused told her to shut up and not to say anything, in relation to the first incident. She agreed that she told the police that she thought to herself, if the police take the accused away then there is no one to look after her education and that is the reason she did not tell anyone. She agreed that she had not told the police about the accused touching her breasts in relation to the second incident. She agreed that she had not told the police about the accused waiving at her. She agreed that she did not tell the police about the accused questioning her regarding her neck being bitten in relation to the third incident she described. She agreed that she did not mention to the police about touching her breasts and licking her private part.*
- n) *She agreed with the suggestion that the accused left to Vanua Levu to attend a funeral in 2016 and returned in 2017. She said that it was in March 2017. However, she denied the suggestion that the accused spent a period of 1 year and 02 months consecutively from 2016 in Vanua Levu.*
- o) *During re-examination she said that when she was giving her police statement, Barbera, the lady who took her statement raised her voice on her, and because of that she cried and she did not mention all that she could remember.*

27. The second witness for the prosecution ("PW2") was PW1's uncle in whose house PW1 was residing. He said that;

- a) *His wife and the accused are siblings. PW1 came to live in his house in December 2017 to attend school with his elder daughter. He said that PW1 is currently attending a special school and it was him and his wife who decided to send her there for PW1 to have a better life in the future.*
- b) *He said that in December 2017 when PW1 first came to his house, his wife was told about a rumour where a 'love-bite' was found on PW1's neck. Both him and his wife questioned PW1 on several occasions regarding same and it seemed to him that PW1 was hiding something. Finally, when he got an opportunity to speak to her one-on-one, he asked her 'who is the first guy that had touched you?'. He was shocked to hear from her that it was her father. Then he also asked her 'who is the first guy that did it to you?', and again, PW1 said that it was her father.*

- c) *Two days after, he went to the police station with PW1 to report the matter and they were referred to one 'Barbera'.*
 - d) *During cross-examination, he agreed that the accused went to Vanua Levu in 2016, but he did not know when the accused returned.*
28. After the conclusion of the prosecution case, you heard this court explain certain rights to the accused. The accused opted to give evidence and call witnesses.
29. The accused said in his evidence that;
- a) *His wife passed away on 05/07/2010. In 2016, he was living with his parents and two children, PW1 and his son. He is currently living in the same village and he had lived in this village for the past 50 years. His house is 30m x 18m. He said he left the village on 03/04/16 and stayed at one of his uncle's house, and then left for Vanua Levu on 11/04/16 to attend a funeral. He said he came back to the village only in July 2017.*
 - b) *He said that, during the period from 11/04/16 to July 2017, he lived with his cousin Marika and did not live with anyone else. He said that he spent so long in Labasa because there were lot of sources of income there. He worked as a cane cutter and also he did diving. He said he also sent some money to his village.*
 - c) *He denied the allegations and he said that it was PW2 who had framed him.*
 - d) *During cross-examination he said that his son was 11 years old in 2016. He agreed that the house he lived in 2016 belongs to his parents. He agreed that his father passed away in March 2016.*
30. The second witness for the defence was one Marika N. ("DW2"). He said that;
- a) *He worked in the Ministry of Agriculture in 2016 and was based in Labasa. He said that he came to Viti Levu for a burial and then returned to Labasa on 12/04/16. He said that the accused came with him to Labasa on the same day to attend a funeral of one of the accused's uncles in Drua drua. He said that the accused was in Labasa from 12/04/16 to middle of July 2017 and the accused lived with him.*
 - b) *He also said that the accused used to sometimes travel to Drua drua and spend about 1 week with his elderly aunt and uncle and then come back.*
 - c) *When the accused was about to return (to Viti Levu) the accused went to cut sugar cane to collect funds for his return. To his knowledge the accused did not leave Vanua Levu between 12/04/16 and July 2017.*

31. The third defence witness was Ranuku V. ("DW3"). He said that;
- a) *He is residing in the same village as the accused and the accused is a neighbor. The accused is his cousin. He said that in 2016 the accused was living with the brother, brother's wife, brother's two children and the accused's two children.*
 - b) *He said that the accused left the village in April 2016 and he saw the accused back in the village only in July 2017. To his knowledge the accused did not return to the village during that period.*
 - c) *During cross-examination he said he cannot recall when the accused's father passed away. He agreed that he told the police when he gave his police statement that the accused did not stay with him (in the village) from 02/01/16 to December 2017.*
 - d) *During re-examination he said that he cannot explain the difference between the period he mentioned to police as the time the accused was not in the village and then that period he mentioned in court.*
32. The fourth defence witness was Jale U. ("DW4"). He said that;
- a) *He said that he is a Pastor and he lives in the same village as the accused. The accused is his cousin as well. The accused's house is located close to his house. He said that the accused left the village on 04/04/16 for Druadrua to attend a funeral after informing him. The accused was a member of his church too. He said that the accused returned only in July 2017 and he was in the village when the accused came back.*
 - b) *During cross-examination he agreed that he told the police when he gave his statement in 2019 that the accused returned to the village between May and June 2017.*
33. That was the evidence led in this case. Additionally, both parties have admitted the certain facts and you should consider those facts as being proved beyond reasonable doubt.

Analysis

34. In this case PW1 did not complain to anyone and only came out with the allegations when PW2 questioned her in March 2018. Defence pointed out that she had the opportunity to complain to her grandmother or the brother, but she didn't. Since she was schooling at the time of the alleged incidents, she had the opportunity complain to someone at school, but she didn't.

35. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, if there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. You should therefore consider whether there is a reasonable explanation for PW1 not to complain about the incidents on her own and for the delay in reporting this matter. However, remember that your task is to decide whether you are sure that PW1 has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

36. Counsel for the defence also pointed out to certain inconsistencies. That is, as PW1 agreed, certain facts she came out in court were not there in her statement recorded by the police. PW1 said that the lady who recorded the statement, Barbera, raised the voice to her and that is the reason she did not relay everything she could remember to that police officer. You should first consider whether these inconsistencies pointed out by the defence counsel were significant, and if you think they are, then whether the explanation given by PW1 is reasonable and acceptable. You should follow the directions I have already given you when you deal with those inconsistencies or any other inconsistency you may come across.

37. The defence also says that PW1's story is improbable because, if something like PW1 described happened in the relevant bedroom, the others in the house would have heard it. Applying your life experience and your common sense, you have to decide whether PW1's story is probable or not. According to PW1, these alleged incidents happened in the night while the others were sleeping. During the first incident she described, it was the accused's grandparents and 11 year old son (PW1's younger

brother) who were at home. Given these circumstances would you find it improbable for the alleged incidents to take place inside the relevant bedroom?

38. May I now direct you on the defence of *alibi*. When an accused takes up the position that he was not there at the time and the place a particular offence was committed, that is called the defence of *alibi*. If the accused was not there, he could not have committed the offence. Please remember that there is no burden on the accused to prove an *alibi* or that he was not there at the time and the place the offence was committed. An accused simply needs to raise that fact or take up that position in evidence. When an accused does that, it is for the prosecution to prove beyond reasonable doubt that it was the accused who committed the offence and therefore the *alibi* is not true.
39. According to the accused's evidence and the evidence given by his witnesses, the accused was not in the village from April 2016 to July 2017 and that he was in Vanua Levu. There were certain inconsistencies in the evidence adduced by the defence regarding the date the accused left the village and the month he came back. However, please remember what I said before. There is no burden for the accused to prove an *alibi*.
40. Moreover, PW1 also admitted that the accused went to Vanua Levu and according to her, the accused left in February 2016 and returned in March 2017. According to PW1, the first alleged incident which is relevant to counts one and two took place during the first term of school before the accused left for Vanua Levu (and before her grandfather died in March 2016) and he did it again after he returned. She also said that, during that period, the accused left for Vanua Levu only once, though she denied the suggestion by the defence counsel that the accused was absent from the

village throughout the relevant period. All in all, you may find that the defence of *alibi* as it was raised is relevant to counts three and four.

41. With regard to count three where PW1's evidence was that the relevant incident took place in the third school term in 2016; given her evidence that the accused left the village for Vanua Levu only once, and her evidence during cross-examination that the accused returned in March 2017, and because the prosecutor did not further clarify why PW1 denied the suggestion that the accused was absent from the village throughout that period, you may conclude that the accused was not there in the village in the third school term of 2016 based on PW1's evidence alone. If that is the case you may conclude that the accused could not have committed the offence as per count three and find the accused not guilty of the third count on that basis.
42. In relation to the fourth count, PW1's evidence was that the relevant alleged incident took place in the first school term of 2017. The accused says that he returned to the village in July 2017. PW1 said that the accused returned in March 2017.
43. When you consider the evidence of the accused regarding his *alibi*, if you think that the version of the accused is true or it may be true, then you must find the accused not guilty of the relevant offence.
44. However, you should also bear in mind that you should not assume that the accused is guilty of the offence merely because you decide not to accept his *alibi*. You should remember that sometimes an accused may invent an *alibi* just because it is easier to do so rather than telling the truth. The main question remains the same. That is, whether you are sure that it was the accused who committed the relevant offence.
45. Now let us look at the charges.

46. To prove the offence of sexual assault, the offence the accused is charged with on the first count, the prosecution should prove the following elements beyond reasonable doubt.
- a) the accused;
 - b) unlawfully assaulted PW1; and
 - c) the said assault is indecent and sexual.
47. In relation to the first count, the prosecution is relying on the first incident PW1 described in her evidence and where she said the accused touched her breasts and the vagina and then inserted his hand in her vagina after removing her clothes. According to PW1 this incident took place in the first term of school in 2016 before her grandfather died in March 2016. She also said that the accused went to Vanua Levu in February and that was after the said first incident.
48. The accused said that he left the village to go to Vanua Levu in April 2016, but he totally denies the allegation. According to him PW1 is lying and it was PW2 who had framed him.
49. To prove the first element of the offence, the prosecution should prove beyond reasonable doubt that it was the accused who committed the offence. This element involves the identity of the offender. The accused in this case is PW1's father. Experience shows that there is a possibility to be mistaken about the identity even with close relatives. You should assess the evidence in relation to the first incident and decide whether you are satisfied beyond reasonable doubt on PW1's evidence on the identification of the accused.
50. Assault is the use of unlawful force. A touch constitutes an assault if it is done without the consent of another or without a lawful excuse.

51. PW1 was a 14 year old girl during the time relevant to the first count and the accused is her father. If you believe PW1's evidence in relation to the first count, you have to decide whether the touching of PW1's breasts, then the vagina and then inserting the hand in the vagina amounts to an assault.
52. The accused totally denies this allegation and according to him, this allegation is fabricated. It was also pointed out by the defence that PW1's evidence in relation to all the allegations are not probable.
53. The word "unlawfully" simply means without a lawful excuse. As the accused denies carrying out the assault as claimed by PW1, he is not claiming in this case that he had a lawful excuse.
54. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. You should also ask yourself, firstly, whether you consider that indecent assault could also have been sexual because of its nature; and if the answer is 'yes', whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.
55. In relation to this element, you have to consider whether the assault (if you are satisfied beyond reasonable doubt that there was an assault) was indecent and also whether that assault was sexual in nature. That is, if you find that PW1's version is true, you have to think whether, a right minded person would consider the touching of the complainant's breasts, the vagina and then inserting the hand in the vagina in the circumstances explained by PW1 was indecent and it was also sexual in nature. You should take into account the manner the accused engaged in the alleged conduct and what he did before and after that conduct. Again, remember that the accused denies PW1's version altogether.

56. On counts two, three and four the accused is charged with the offence of rape. To prove the offence of rape in this case, the prosecution should prove the following elements beyond reasonable doubt.
- a) the accused;
 - b) penetrated the vagina of PW1 with his penis;
 - c) without the consent of PW1; and
 - d) the accused;
 - (i) knew or believed that PW1 was not consenting; or
 - (ii) was reckless as to whether or not she was consenting.
57. In relation to count two, the prosecution is relying on PW1's evidence on the first incident where PW1 said that the accused penetrated her vagina with his penis. In relation to count three the prosecution is relying on the incident PW1 described that took place in the third term of 2016 where she said that the accused penetrated her vagina with his penis. In relation to count four the prosecution is relying on the incident according to PW1 that took place in the first school term in 2017 where she said that the accused penetrated her vagina with his penis.
58. As I have explained before the accused totally denies the allegation relevant to all counts. He says that the allegations are fabricated and that PW1's version is improbable. Apart from that, the accused says that he was in Vanua Levu from 11/04/16 to July 2017, so he could not have committed the offences in relation to counts three and four.
59. The first element of the offence of rape again involves the identity of the offender. The prosecution should prove beyond reasonable doubt that the accused committed the offence. You need to assess PW1's evidence regarding identification in relation to each count, as I have explained in relation to the first count.

60. The second element involves penetration. The law says that this element is complete on penetration to any extent. Therefore, it is not necessary to have evidence of full penetration or ejaculation. A slightest penetration is sufficient to satisfy this element.
61. In relation to each count (counts two, three and four) PW1 had said that the accused penetrated her vagina with his penis. The accused denies these allegations and says that the allegations are fabricated.
62. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated PW1's vagina without her consent in relation to each rape charge. The defence counsel pointed out that PW1 did not expressly say that she did not consent when she described the three alleged incidents relevant to the three rape charges. The prosecution says the fact that PW1 did not consent could be inferred from the evidence.
63. 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;
 - a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
64. However, as I have already highlighted, the accused denies penetrating PW1's vagina altogether in relation to the three rape charges.

65. Apart from proving that PW1 did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove in relation to each count (counts two, three and four) that, either the accused knew or believed that PW1 was not consenting; or the accused was reckless as to whether or not PW1 was consenting. This is the fourth element of the offence of rape.
66. It is not difficult to understand what is meant by “the accused knew or believed that PW1 was not consenting”. But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that PW1 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 PW1’s vagina, you may find that the accused was reckless as to whether or not PW1 was consenting. Simply put, you have to see whether the accused did not care whether PW1 was consenting or not.
67. You should also 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.
68. Accordingly, considering the facts and circumstances you would consider as proved beyond reasonable doubt, you have to decide whether it has been established that, either the accused knew or believed that PW1 was not consenting for him to penetrate her vagina or he did not care whether PW1 consented or not. Remember that the accused’s version is that he did not penetrate PW1’s vagina at all.


69. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
70. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
71. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in relation to each count;
- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him or his witnesses, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

72. Any re-directions?

73. Madam and Gentlemen 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 separate opinion.
74. Your opinion should be whether the accused is guilty or not guilty on each count.




Vincent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused**