

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 161 OF 2013S

**STATE**

**VS**

**VICKY ANAND SAMI**

**Counsels** : **Mr. M. Vosawale for State**  
**Mr. J. Reddy for Accused**

**Hearings** : **31 March and 1 April, 2015**

**Summing Up** : **2 April, 2015**

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**SUMMING UP**

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**A. ROLE OF JUDGE AND ASSESSORS**

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my 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 fact.
2. State and Defence Counsels 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 Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest 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 is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that 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.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

**C. THE INFORMATION**

7. You have a copy of the information with you, and I will now read the same to you:

*"... [read from the information]...."*

**D. THE MAIN ISSUE**

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, on 20 March 2013, at Nasinu in the Central Division, rape the complainant?

**E. THE OFFENCE AND IT'S ELEMENTS**

- 9. Previously under the repealed Penal Code, the offence was classified as "indecent assault". Under the Crimes Decree 2009, it is classified as "rape". For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
  - (i) the accused penetrated the complainant's vagina with his finger;
  - (ii) without her consent; and
  - (iii) he knew the complainant was not consenting to (i) above, at the time.
- 10. In law, the slightest penetration of the complainant's vagina by the accused's finger, is sufficient to satisfy element no. (i), as described in paragraph 9(i) above.
- 11. Consent is 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 to herself, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all. For a girl under 13 years old, she is incapable, as a matter of law, to give consent to a person penetrating her vagina, with a finger.
- 12. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to her vagina been penetrated by his finger, at the time. You will have to look at the parties' conduct, at the time, and the surrounding circumstances, to decide this issue.
- 13. Remember, we are dealing here with a child complainant, who was aged 11 years 10 months 17 days, at the time of the alleged offence. Because she was under 13 years old at the time, as a matter of law, she is not capable of giving her consent to someone to penetrate her vagina with his finger. The prosecution need only prove element No. 1 in paragraph 9(i) hereof, to prove their case against the accused. Element No. 2 and 3, as described in paragraphs 9(ii) and 9(iii) hereof, are presumed in law to exist, because a child under 13 years is incapable of giving her consent,



and an accused is often presumed to know that an under 13 year old child cannot consent to penetration of her vagina, by his finger. Those are legal presumptions in law.

**F. THE PROSECUTION'S CASE**

14. The prosecution's case were as follows. On 20 March 2013, the female complainant (PW1) was aged 11 years 10 months 17 days. The accused (DW1) was aged 25 years. The accused's and complainant's family were neighbours. The complainant lived with her mother, a twin sister, and two younger brothers. The accused lived with his wife, parents, an elder brother, and other relatives. The families are somewhat on friendly terms with each other, until the alleged incident.
15. According to the prosecution, on 20 March 2013 after 8pm, the complainant was left alone at home with her twin sister and two younger brothers. Their mother (PW3) had gone out to attend a bible study. The accused was at his house alone, and had some left over curry food in their pot. He called PW1 to collect the pot of curry and take the same to her house. PW1 came to his house. She went to the kitchen as directed by the accused to get the pot of curry. While holding the pot of curry, the accused moved towards her from the back. They were alone in the kitchen.
16. According to the prosecution, the accused lifted up her skirt. He then pulled down her panty. He then touched her vagina. He then inserted his finger into her vagina. PW1 said she felt his finger in her vagina. She said it was painful. She was so scared to do anything. Later she went home. At home, she was scared to tell her mother (PW2) about the incident. However, PW2 came to know about the incident, in a diluted form, from the accused. She reported the matter to police.
17. An investigation was carried out. The complainant was medically examined on 28 March 2013. The accused was formally charged with raping PW1. He appeared in the Nasinu Magistrate Court on 2 April 2013. Because of the above, the prosecution is asking you, to find the accused guilty as charged. That was the case for the prosecution.

**G. THE ACCUSED'S CASE**

18. On 31 March 2015, the first day of the trial, the information was put to the accused in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the rape allegation

against him. When a prima facie case was found against him, at the end of the prosecution's case, he choose to give sworn evidence, and called two witnesses, in his defence. That was his right.

19. The accused's case was very simple. He said, on oath that, he did not penetrate the complainant's vagina, at anytime whatsoever. He said, he did not insert his finger into the complainant's vagina on 20 March, 2013. He admitted, he called the complainant to his house, at the material time, but he said, he only smacked her "bum" jokingly. He said, the allegation against him, was unfounded. Because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the defence.

#### **H. ANALYSIS OF THE EVIDENCE**

##### **(a) Agreed Facts:**

20. You have a copy of the parties' "Agreed Facts". There are two paragraphs of "Agreed Facts". You may take those two paragraphs of "Agreed Facts" as established facts, because the parties are not disputing the same.

##### **(b) Case Against the Accused:**

21. The State's case against the accused is fundamentally based on the complainant's (PW1) and Doctor Elvina Ongbit's (PW2) evidence. When the defence called Doctor Nikotimo Bakani (DW3), his evidence appear to further strengthen PW2's evidence. We will discuss the above in detail later.

##### **(c) Complainant's (PW1) Evidence:**

22. On oath, the complainant said, the accused called her on 20 March 2013, after 8pm to get a pot of curry (leftover) from his house, to take to her home. She obliged accordingly. Previously, the accused's family had often gave them leftover food. She said, she went to his kitchen to get the pot of curry. While holding the pot of curry, the accused approached her from the back, lifted up her skirt, pulled down her panty, and inserted his finger into her vagina. She said, it was painful. She later returned to her house. She said, she was so scared to tell her mum about the incident.

##### **(d) Doctor Elvira Ongbit's (PW2) Evidence:**



23. The incident was reported to police, and on 28 March 2013, Doctor Ongbit (PW2) medically examined the complainant. She submitted the complainant's medical report as Prosecution Exhibit No. 1. You must carefully read and understand this report, because its effect is important in this case. In D(10) of the report, the doctor recorded the complainant's history as follows, **"...Patient claimed that an Indian neighbor, a male person called her to his house to get some food. She went to his house to get the food. When she went back to his house to return the empty plate, the Indian man suddenly embraced her to hold her still, then he inserted his hand inside the panty, and inserted his finger inside the vagina. The client struggle then ran away..."**
24. In D(12) of the report, she recorded the result of her medical examination as follows, **"...Vaginal examination: Hymen – complete healed laceration at 1 o'clock position..."** In her evidence, the doctor said, **"...The larceration is on the hymen. I opened her vagina with my fingers, without any instrument. There was a larceration at 1 o'clock. Anything going through the vaginal opening by force will cause the larceration. Scratching will cause abrasion, not laceration. Putting a finger into the vagina by force can cause the larceration..."** In her evidence, the doctor said her medical findings were consistent with the patient's history.

**(e) Doctor Nikotimo Bakani's (DW3) Evidence:**

25. The defence called Doctor Bakani as their witness. The doctor was called to comment on Doctor Ongbit's medical report, that is, Prosecution Exhibit No. 1. He said, **"...it is possible to penetrate the vagina while standing up. If standing from the back and poking the vagina, it is possible to have a 12 o'clock larceration (mostly) on the hymen. Injury could be at 9 o'clock or 3 o'clock....There needs to be some exertion of force – I cannot discredit doctor Ongbit's conclusion..."**

**(f) The Accused's (DW1) Evidence:**

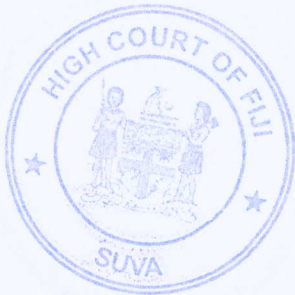
26. The accused denied inserting his finger into the complainant's vagina, at the material time. He admitted been present at the crime scene, at the material time. He said, he only smacked the complainant's "bum", at the time.

**(g) Considering All the Evidence Together:**

27. You will have to consider all the evidence together. You have watched and heard all the witnesses give evidence in the courtroom. The complainant's version of events is different from the accused's version of events. Who appears to you to be the credible witness? Who appears to you to be forthright and not evasive? Who appears to you to be telling the truth? If you think the complainant was the credible witness, you will have to find the accused guilty as charged. If you think the accused was the credible witness, you will have to find the accused not guilty as charged.

**I. SUMMARY**

28. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.
29. Your possible opinions are as follows:  
(i) Rape : Accused : Guilty or Not Guilty
30. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.



  
**Salesi Temo**  
**JUDGE**

**Solicitor for the State** : **Office of the Director of Public Prosecution, Suva.**  
**Solicitor for the Accused** : **J. Reddy, Barrister and Solicitor, Suva.**