

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 121 of 2017

STATE

V

EPARAMA TEKEI

Counsel : Ms. Lavenia Bogitini for the State
Mr. Aseri Vakaloloma for the Accused

Dates of Trial : 13, 15-17 and 21-22 November 2017

Summing Up : 27 November 2017

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "APLT also known as PV" or simply as "PV"

SUMMING UP

Madam Assessors and Gentleman Assessor,

- [1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.

- [8] In this case, the evidence is what the witnesses said from the witness box, the documents tendered as prosecution and defence exhibits and any admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by both the State Counsel and Defence Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. These were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11] As I already indicated to you, another matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and 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 correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to

giving evidence in a Court of law and may find Court environment stressful and distracting.

- [14] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15] According to the evidence you heard in this case, the complainant was 3 years old at the time of the alleged incident (3 years and 10 months to be precise), in March 2017, and was 4 years old when she testified in Court. 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 is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.
- [16] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [17] You heard in this case the evidence of Francis Tuivunilagi, an aunt of the complainant, who said that when she was towelling the complainant's female parts, PV had got a shock and closed her legs and told that her mimi was sore. When asked why her mimi was sore the complainant had said "Epa poked my mimi". You should consider whether this could be regarded as a complaint made by the complainant of the

alleged incident. If so you should also consider whether she made that complaint without delay and whether she sufficiently complained of the offences the accused is charged with.

- [18] The complainant need not specifically disclose all of the ingredients of the offence and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that she made a prompt and a proper complaint, then you may consider that her credibility is strengthened in view of that recent complaint, at least in respect of count one.
- [19] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
- [20] However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.
- [21] Ladies and Gentleman Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with

knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable,

- [22] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [23] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not guilty of the two charges. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [24] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [25] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [26] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw

reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.

- [27] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this morning, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [28] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating the said evidence.
- [29] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [30] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [31] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [32] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.

- [33] It is for you to decide whether you are satisfied beyond any reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [34] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [35] I must also explain to you as to the reason for the use of screen, when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when a screen is placed, the complainant is relieved of any mental pressure to describe the often unpleasant incidents. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [36] The same applies for permitting a closed court proceedings when the complainant gave evidence in this case and for allowing a support person (in this instance a Social Welfare Officer) to sit beside her while she gave evidence.
- [37] Let us now look at the charges contained in the Information.
- [38] There two charges preferred by DPP, against the accused:

COUNT ONE

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

EPARAMA TEKEI, on the 16th of March 2017, at Navua, in the Central Division, penetrated the vagina of **APLT also known as PV**, a child under the age of 13 years, with his finger.

COUNT TWO

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

EPARAMA TEKEI, on the 16th of March 2017, at Navua, in the Central Division, penetrated the anus of **APLT also known as PV**, a child under the age of 13 years, with his finger.

[39] Therefore, the Accused in this case has been charged with two counts of Rape. The two counts of Rape are contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act).

[40] Section 207(1) of the Crimes Act reads as follows:

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

[41] Section 207(2) (b) of the Crimes Act is reproduced below:

(2) A person rapes another person if —

(a) ...

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) ...

[42] Therefore, when Section 207(1) is read with Section 207(2)(b) it would read as follows:

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

(2) A person rapes another person if —

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

[43] Section 207(2)(b) refers to a person penetrating the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

[44] Section 207(3) of the Crimes Act provides that *"For this section, a child under the age of 13 years is incapable of giving consent."*

[45] Therefore, in order for the prosecution to prove count one, they must establish beyond any reasonable doubt that:

- (i) the accused;
- (ii) on the specified day (in this case the 16 March 2017);
- (iii) at Navua, in the Central Division;
- (iv) penetrated the vagina of APLT also known as PV with his finger; and
- (v) at the time APLT also known as PV was a child under 13 years of age.

[46] The first element is concerned with the identity of the person who committed the offence. The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[47] The fourth element involves the penetration of the vagina of the complainant with the accused's finger. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration.

- [48] The final element is that at the time of the incident APLT also known as PV was a child under 13 years of age.
- [49] The issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As indicted earlier, the complainant in this case was only 3 years and 10 months of age at the time of the alleged incident, and therefore, she had no mental capacity to consent.
- [50] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape is obviously considered a Sexual Offence. This is so even where the complainant has given unsworn testimony, as in this case.
- [51] Similarly, in order to prove the ingredients of count two, the prosecution has to establish that:
- (i) the accused;
 - (ii) on the specified day (in this case the 16 March 2017);
 - (iii) at Navua, in the Central Division;
 - (iv) penetrated the anus of APLT also known as PV with his finger; and
 - (v) at the time APLT also known as PV was a child under 13 years of age.
- [52] The first element is concerned with the identity of the person who committed the offence. The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [53] The fourth element involves the penetration of the anus of the complainant with the accused's finger. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration.
- [54] The final element is that at the time of the incident APLT also known as PV was a child under 13 years of age.
- [55] As I informed you earlier, the issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent.

- [56] As I informed you before, in our law, no corroboration is needed to prove an allegation of Rape. This is so even where the complainant has given unsworn testimony, as in this case.
- [57] If you are satisfied beyond any reasonable doubt that the accused, on 16 March 2017, penetrated the vagina of PV with his finger, then you must find him guilty of the first count of Rape.
- [58] If you find that the prosecution has failed to establish any of these elements in relation to the first count, then you must find the accused not guilty of Rape.
- [59] If you are satisfied beyond any reasonable doubt that the accused, on 16 March 2017, penetrated the anus of PV with his finger, then you must find him guilty of the second count of Rape.
- [60] If you find that the prosecution has failed to establish any of these elements in relation to the second count, then you must find the accused not guilty of Rape.
- [61] However, in relation to the first count of Rape, if you find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 16 March 2017, penetrated the complainant's vagina with his finger, has satisfied beyond any reasonable doubt that the accused, on 16 March 2017, unlawfully and indecently assaulted the complainant by touching of the complainant's vagina; as an alternative, you are then allowed to look at the lesser offence of Sexual Assault, though the accused is not formally charged in the information for that offence in count one.
- [62] Similarly, in relation to the second count of Rape, if you find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 16 March 2017, penetrated the complainant's anus with his finger, has satisfied beyond any reasonable doubt that the accused, on 16 March 2017, unlawfully and indecently assaulted the complainant by touching of the complainant's anus; as an alternative, you are then allowed to look at the lesser offence of Sexual Assault, though the accused is not formally charged in the information for that offence in count two.

[63] The offence of Sexual Assault is defined in Section 210 (1) of the Crimes Act as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person; or

(b)

[64] Therefore, in order for the prosecution to prove the charge of Sexual Assault, against the accused, they must establish beyond any reasonable doubt that;

(i) the accused;

(ii) on the specified day (in this case the 16 March 2017);

(iii) at Navua, in the Central Division;

(iv) unlawfully and indecently assaulted PV, the complainant.

[65] The first element is concerned with the identity of the person who committed the offence. The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[66] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of touching of the complainant’s vagina by the accused and touching of the complainant’s anus by the accused is an indecent act and thereby amounts to Sexual Assault.

[67] I wish to remind you once again that you need to go in this direction ONLY if you find that the prosecution has failed to establish any of elements constituting the offence of Rape beyond reasonable doubt in counts one and two. If you are satisfied that the prosecution has established all the elements constituting the offences of Rape beyond reasonable doubt, then you must find the accused guilty of Rape as charged in respect of counts one and two.

[68] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[69] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Amended Admitted Facts*" without placing necessary evidence to prove them:

1. The accused is Eparama Tekei, 32 years, of 373, Daniva Place, Pacific Harbour.
2. The victim in this matter is PV, 3 years of age [this is at the time of the alleged incident], residing at 373, Daniva Place, Pacific Harbour.
3. The victim was residing with the accused at the alleged time of the offence, as the accused and de factor partner namely Francis Verma are the intended adopted parents.
4. The victim's biological mother is Trevina Pierson, 22 years of Calia Road.
5. On the afternoon of 16th of March 2017, Francis Verma dropped off the victim at Francis Tuivunilagi's mother's home at Pacific Harbour.
6. Alisi Marama, 36 years of Calia, Navua is the house girl and nanny of the victim.
7. On the 16th of March 2017, Alisi Marama went to work at the accused residence. She did the housework and took the victim to school (kindergarten) at Pacific Harbour multicultural centre. She then picked up the victim from kindergarten at midday and took her home.

[70] Since the prosecution and the defence have consented to treat the above facts as "*Amended Admitted Facts*" without placing necessary evidence to prove them you must therefore, treat the above facts as proved.

Case for the Prosecution

[71] The prosecution, in support of their case, called the complainant PV, Alisi Marama, Francis Tuivunilagi and Trevina Marama Tuivunilagi (Trevina Pierson).

[72] The prosecution also tendered the following document as a prosecution exhibit:

Prosecution Exhibit P1 - The Birth Certificate of the complainant.

[73] Evidence of the complainant PV

- (i) *She said that she is 4 years old and staying at Pacific Harbour. She is attending school.*
- (ii) *When asked who she lives with, she said mummy and Epa. She continued that mummy is sitting down outside.*
- (iii) *Court observed that the witness is very good in identifying colors and identifying various parts of her body like, the eyes, nose, mouth, ears, legs and hands, etc.*
- (iv) *She testified that "Epa poked my mimi and bumbum" and she pointed the middle finger of her right hand. She said she was lying down (at the time), and Epa was standing up.*
- (v) *She stated that when he poked her mimi it was sore. Later she also stated that when Epa poked her bumbum it was sore.*
- (vi) *When told to explain what she meant by the word "poke" she demonstrated by poking on clay.*
- (vii) *The witness also explained, what she meant by the term "sore". The witness put a pencil on her hand and demonstrated what she meant by sore.*
- (viii) *When asked to show the mimi and the bumbum, the witness demonstrated by showing it on the doll that was with her, firstly with the leg of the doll and then with a building block.*
- (ix) *When asked where she wears her diaper, she showed underneath the doll's dress (by lifting the doll's dress).*
- (x) *Later, the witness lifted the dress she was wearing and showed where her mimi and bumbum were.*
- (xi) *In cross-examination she answered as follows to the questions put to her:*
 - *You said Epa poked your mimi? Was it in the night, in the day or the morning? The witness answered "in the night".*

- *You said Epa poked your mimi – was it after school? The witness said "after school" and nodded.*
- *When she was asked whether she told anyone about the incident, the witness answered, "I told my mummy".*
- *Do you know what were you doing? "Epa was poking my mimi and bumbum and me tell my mummy"*
- *Do you know the place Epa poked you? "At home. Epa poked my mimi and bumbum".*
- *Where is your mimi? The witness lifted up her dress and looked down.*
- *Where is your bumbum? She lifted up her dress and showed her bottom.*

[74] Evidence of Alisi Marama

- (i) *She was working as the nanny of the complainant. She had been working in that capacity for 2 years and 3 months.*
- (ii) *She testified to the events that transpired on 16 March 2017. She had come to work at 8.00 am in the morning that day.*
- (iii) *She took PV to school at Pacific Harbour Multicultural Centre at 12.30 pm and picked her up 1.30 pm and took her home.*
- (iv) *When she arrived home with PV, her step father (the accused, Eparama) was inside the house, having lunch. He had just returned from work.*
- (v) *She had changed PV into her swimming suit and then PV had gone to the swimming pool. The witness had continued with the house work.*
- (vi) *Around 4.00 pm she had taken PV out of the pool and given her a bath. She had changed her and then given her a bottle of milk. She had then put her on the bed and PV went off to sleep.*
- (vii) *She has left Villa 373, Daniva Place, Pacific Harbour, at 5.00 in the evening. The complainant was sleeping at the time. The accused and Christopher Danlan were at home when she left.*
- (viii) *At around 7.30 pm, she had received a phone call from Francis Verma. Francis Verma asked her as to where she was when this thing*

happened. She had asked what happened. Francis Verma said, "did you know that Eparama molested PV?"

- (ix) She testified that Francis Verma was working at Natadola that day. When she received the call from Francis Verma, she believed that Francis Verma was on her way back home.*
- (x) The witness testified that Francis Verma had called her twice that evening. During the second call, she could hear PV crying in the background.*
- (xi) The next morning she had gone to the Villa around 8.00 am. Francis Verma and PV were having breakfast. As she entered the house, PV had greeted her by saying "Hi Nau." PV had then said "Epa poked my mimi and my bumbum." And told her to call the Police, PV had also been showing her middle finger.*
- (xii) When questioned as to what PV's behaviour was like at the time, the witness testified that she was naughty. PV had stood up on the counter, and pulled down her pants/shorts she had been wearing at the time. She had been wearing a diaper inside. She had pulled the diaper on one side and with her middle finger she had showed what happened. Later the witness said that PV was using her middle finger and pointing towards her private parts or her mimi.*
- (xiii) Francis Verma had said "well the child has talked-we can't do anything."*
- (xiv) The witness testified that Epa was a good father to PV. He used to take her around, bath her, change her and do things she wants.*
- (xv) In cross-examination, inter alia, the following questions were put to her:*
 - When PV said this, how did you feel? "I don't believe what she said. That her step father poked her mimi."*
 - How did you feel when PV said what she did (what she said)? "I didn't know what to say. I feel down. I don't believe what she was saying and I don't believe those words were coming out of her".*
 - When you questioned, Francis Verma, were you trying to tell her that you don't believe what the child was saying? "Yes"*

[75] Evidence of Francis Tuivunilagi

- (i) She is an aunt of PV and the sister of PV's biological mother, Trevina Marama Tuivunilagi.*
- (ii) Around 6.00-6.30 in the evening of 16 March 2017, her aunt Francis had brought PV to their house.*
- (iii) About 20 or 30 minutes later, PV had pooped and her mother had called her to change PV.*
- (iv) She had then taken PV to the changing room and was changing her. She had given her a shower, and started drying her with the towel. When she was towelling her female parts, PV had got a shock and closed her legs. She had then told that her mimi was sore.*
- (v) When asked as to why her mimi was sore PV had said "Epa poked my mimi."*
- (vi) The witness said she had been shocked and upset on hearing this. So she had called her younger sister, Martina. PV had repeated the same thing to her younger sister as well. PV kept repeating herself and started crying. Thereafter, the witness, had called her mother and informed her about what PV had said.*
- (vii) Later her mother had called Francis Verma and informed her about what PV had stated. Francis Verma is her mother's younger sister.*
- (viii) When asked as to what she meant by female parts/lady parts, the witness said that she meant "the vagina".*
- (ix) The witness testified that at the time she had observed a slight swelling on the upper lips of PV's vagina and slight swelling above her clitoris.*

[76] Evidence of Trevina Marama Tuivunilagi

- (i) She is the biological mother of PV. She confirmed that PV was born on 13 May 2013. The Birth Certificate of the complainant was tendered to Court as Prosecution Exhibit P1.*
- (ii) She testified that at the time PV was born, she was only 17 years of age. Her aunt, Francis Verma, had asked her whether she could adopt PV as she could not have any children herself. She had agreed to give PV to her aunt for adoption.*

- (iii) *She testified that on the 24 March 2017, she had received a phone call from Francis Verma, informing her of the alleged incident. She had told the witness that PV had said that Epa had poked her mimi and her bumbum and she also said that we needed to report the matter for the wellbeing of PV.*
- (iv) *Since her aunt had not reported the matter up to that point in time, Trevina had reported the matter to the police in the first week of April 2017.*
- (v) *She testified that prior to that date, (24 March 2017), she had not known anything about the incident.*
- (vi) *The witness stated that PV had used the terms "mimi", "bumbum", and "poke" prior to the incident as well and she testified as to the context in which PV had used those terms in the past.*

[77] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could give sworn evidence from the witness box and/or call witnesses on his behalf. He could also address Court by himself or through his counsel. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to give evidence on oath, and also called witnesses on his behalf.

Case for the Defence

[78] The defence, in support of their case, called the accused, PC 5169 Lui, WDC 4082 Ilisabeta Ilina, Francis Verma, Dr. Selena Kuruleca, and Dr. Oripa Bune.

[79] The defence also tendered the following document as a defence exhibit:

Defence Exhibit P1 - The Medical Examination Report of the complainant.

[80] Evidence of the Accused – Epama Tekei

- (i) *He testified that he was 33 years of age and in a defacto relationship with Francis Verma. He and Francis Verma had been living together as defacto partners for 7 years.*
- (ii) *On 16 March 2017, he was living at Villa 373, Pacific Harbour. He had been living there since November 2016. His boss, Christopher Donlon,*

Francis Verma and PV were the others residing in the house at the said time.

- (iii) On 16 March 2017, he had left for work in the morning. He was working at Sustainable Forest Industries Limited (SFIL). Christopher Donlon was the Director of this company.*
- (iv) He had come home during the lunch break at 1.00 pm. He had not gone back to work after lunch. He had working on the retaining wall, outside the house. He had been putting stone structures on the cement. He said that he had working on the wall until after 6.00 pm.*
- (v) The witness testified, that Francis Verma, Christopher Donlon and PV were at home at the time. He said that Francis and he had an argument and Francis left to Villa 952 along with PV. Francis had said that she was going to spend the night at Villa 952. He had remained at home with Christopher Donlon. He had gone to bed around 1.00 am in the morning.*
- (vi) The next morning, on 17 March 2017, he had been sleeping on his bed when PV had come and jumped on him and said "wake up daddy". She had also said "daddy poke mimi take a Police".*
- (vii) He had asked PV as to who told her that. PV had just kept on running around and went inside the house (the living room area).*
- (viii) He had then asked Francis Verma about this, and they had an argument. She had kept on blaming him. So he had asked Francis to take PV to Doctor Vadei and to get her checked up.*
- (ix) Francis had asked him "did you do that to PV"? He had said "no" and also stated if you want proof, take her down to Doctor Vadei.*
- (x) He testified that this had taken place around 9.00 am on 17 March 2017. Francis and PV had returned home around 8.00 am in the morning. They both had slept the night at Villa 952.*
- (xi) Later, he had come to Suva with Christopher Donlon. He said this was because there was a lot of tension in the house. So he had stayed in Suva for one week. The tension was due to the fact that Francis kept on blaming him for what happened to PV.*
- (xii) The witness testified that even prior to the incident, there was constant fighting/argument between Francis Verma and himself. This was about the biological mother of the child and whether PV was his biological daughter.*

- (xiii) When questioned as to whether PV is his biological daughter, the witness said "no". However, he testified that he had been involved in a sexual relationship with PV's biological mother (Trevina Marama Tuivunilagi). This relationship had been going on since PV was two years old and had lasted until October 2016.
- (xiv) However, the witness categorically stated that he did not have any sexual relationship with Trevina prior to PV being born.
- (xv) When questioned as to whether PV's attitude towards him changed after the alleged incident, he said "it never changed. I love that baby girl very much and she loves me very much. I would not do anything to her".
- (xvi) He categorically denied having poked PV's mimi or her bumbum.
- (xvii) The witness further testified that Francis Verma did not go to work on 16 March 2017, as she was having the flu. He also testified that soon after Allsi, the nanny, left home at 5.00 pm, that Francis Verma had returned home after visiting the Doctor (as she was having the flu).
- (xviii) He stated that PV was coached to say what she had said. He said this was a conspiracy against him due his relationship with Trevina, the biological mother of PV.

[81] Evidence of PC 5169 Lui

- (i) He is an officer attached to the Nabua Police Station.
- (ii) He had charged Eparama Tekei for the offence of Sexual Assault.
- (iii) He was not involved in the investigations into this case.

[82] Evidence of WDC 4082 Ilisabeta Iliena

- (i) She is an Officer currently based at the Nabua Police Station. She is attached to the Crimes Investigations Department and is a Sexual Offences Investigator.
- (ii) She testified that on 5 April 2017, Trevina Marama Tuivunilagi, the biological mother of PV, had made a complaint that her daughter had been sexually assaulted by Eparama Tekei.
- (iii) She testified as to the investigations carried out in this case.

[83] Evidence of Francis Verma

- (i) She testified that on 16 March 2017, she was living at Villa 373, Daniva Place, Pacific Harbour. Her partner, Eparama, her daughter PV and Christopher Danlon were residing with her. She said that the accused was her defacto partner.
- (ii) On the said day, she had gone to work at the Intercontinental Hotel in Natadola. She had become ill during the day. She had returned home around 6.00 pm – 6.30 pm in the evening.
- (iii) Around 7.00 pm PV had wanted to go and visit her cousin Lauren. Therefore, she had taken PV to Villa 952. She had left PV there and returned to Villa 373.
- (iv) Around 8.00 pm – 8.30 pm in the evening the accused had gone and picked up PV and brought her home.
- (v) Thereafter, her older sister had called asking whether she could speak with her in person. Thus she had gone back to Villa 952 with PV. She had been informed about what PV had told Francis Tuivunilagi. That when Francis Tuivunilagi went to change her diaper, PV had told her that Epa had poked her mimi and poked her bumbum. The witness testified that she was in total shock on hearing this. She didn't know what to say and how to react. She was completely blank.
- (vi) She testified that prior to taking PV to Villa 952, PV had been fussing. She had thought that PV had wanted her attention.
- (vii) She had later asked PV about the incident in the vehicle: if something had happened to her or whether Epa did something to her. All she kept saying was that "Epa poked my mimi, Epa poked my bumbum". She had kept on repeating this.
- (viii) She had asked the accused about what PV had told. The accused had said he did not know what PV was talking about and that it (the incident) did not happen.
- (ix) She testified that she and PV had slept the night at Villa 373.
- (x) In cross examination, the witness said that when she asked PV as to where Epa had poked her mimi, she had said that Epa poked her mimi in the bathroom. When asked as to where the accused poked her bumbum, she had said "in the bed".

[84] Evidence of Dr. Selena Kuruleca

- (i) She is a trained Psycho Therapist. She had been trained in Santa Carla, California.*
- (ii) She has been working as a Psychologist since 2001.*
- (iii) She testified as to the normal behavioural patterns of children between the ages of 1-4.*

[85] Evidence of Dr. Oripa Bune

- (i) She is a Medical Officer attached to the Paediatric Department of the CWM Hospital.*
- (ii) She had conducted the medical examination on PV on 6 April 2017.*
- (iii) The Medical Examination Report of the complainant was marked as Defence Exhibit D1*

Analysis

[86] The above is a brief summary of the evidence led at this trial.

[87] As I have informed you earlier, the burden of proving each ingredient of the two charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

[88] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.

[89] The accused is totally denying that the incident took place. His position is that the complainant was coached to say the things she said. He said this was a conspiracy against him due his relationship with Trevina, the biological mother of PV. The accused states that he loves PV very much and she loves him very much. Therefore, he would not do anything to harm her.

[90] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the two counts of Rape, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful

and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offences of Rape, beyond any reasonable doubt.

- [91] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider his evidence also for its consistency and also the probability of his version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the two charges, since the prosecution has failed to prove its case.
- [92] If you neither believe the evidence adduced by the accused nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charges.
- [93] However, I must caution you that even if you reject the evidence of the accused and the evidence led on his behalf as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.
- [94] As you already know there are two counts of Rape against the accused in the information. You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the other.
- [95] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you believe the evidence of the accused and the evidence led on his behalf, then you must find the accused not guilty of both charges;*
 - ii. *If you neither believe nor disbelieve the evidence of the accused and the evidence led on his behalf, then again you must find the accused not guilty of the charges;*
 - iii. *If you reject the version of the accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*

- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the two charges;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of rape have been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
- vi. *As an alternative to Rape in counts one and/or two, you may consider whether the accused is guilty or not guilty of Sexual Assault in respect of the said two counts.*

[96] Any re directions the parties may request?

[97] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the count of Rape separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[98] Your possible opinions should be as follows:

First Count

Rape- Guilty or Not Guilty

If not guilty,

In the alternative

Sexual Assault- Guilty or Not Guilty

Second Count

Rape- Guilty or Not Guilty


If not guilty,

In the alternative

Sexual Assault- Guilty or Not Guilty

[99] I thank you for your patient hearing.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 27th Day of November 2017

Solicitor for the State : Office of the Director of Public Prosecutions, Suva.
Solicitor for the Accused : Vakaloloma & Associates, Suva.