

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

**Crim. Case No: HAC 137 of 2017**

**STATE**

**v.**

**SOLOMONE DAUNAKAMAKAMA**

**Counsel:** Ms. S Serukai for State  
Ms. L. Ratidara with Mr E. Radio for Accused

**Date of Hearing:** 9<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> April 2018

**Date of Summing Up:** 16<sup>th</sup> April 2018

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**SUMMING UP**

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1. The names of the two Complainants are suppressed. They are referred to as "AA" and "AB" respectively.
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
3. Our functions are different. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
4. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

5. I may comment on the facts if I think it will assist you when 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 facts. Hence, it is entirely upon you to accept or disregard any comment I make about facts, unless it coincides with your own independent opinion.
6. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address made by the counsel for the prosecution is not evidence. The purpose of the opening address is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
7. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I deliver my judgment.
8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

### **Burden and Standard of Proof**

9. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
10. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
11. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

### **Information and the Elements of the Offences**

12. The accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act and three counts of Rape, contrary to Section 207 (1) and 2 (b) of the Crimes Act. The particulars of the offences are before you. Therefore, I do not wish to reproduce them in my summing up.
13. The first count is in relation to the first Complainant and the remaining three counts are related to the second Complainant.
14. The main elements of the first count of Rape are that:
  - i) The Accused,
  - ii) Had carnal knowledge with the Complainant.

15. The carnal knowledge means that the accused had penetrated the vagina or vulva of the Complainant with his penis.
16. The main elements of the second, third and fourth counts of Rape are that:
  - i) The Accused,
  - ii) Penetrated the vulva of the Complainant with his finger.
17. The first and second Complainants were twelve and ten years old respectively, at the time of these offences took place. The defence has not disputed the age of the Complainants. Hence, none of them were incapable of giving consent to any kind of carnal knowledge or penetration.

#### **Separate Consideration**

18. The accused is charged with four separate counts of Rape. It is your duty to consider each of these four counts separately. If you find the accused guilty for one count, that does not automatically make him guilty for the remaining counts for which he is charged with.

#### **Agreed Facts**

19. I now take your attention to the agreed facts. They are the facts that the Prosecution and the Defence agreed on without any dispute. Hence, you are allowed to consider the agreed facts as proven facts beyond reasonable doubt by the Prosecution.

#### **The First Element**

20. It is the onus of the Prosecution to prove that it was the accused who has committed these crimes on the Complainants. As I explained above, at no point of time the onus shift on the Accused to prove that it was not him who has committed these crimes.

### **Penetration**

21. I will now explain you the element of penetration. Evidence of slightest penetration of the penis and/or the finger of the accused into the vagina/vulva of the Complainants are sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

### **Evidence of Corroboration**

22. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the Complainant and accept it as reliable and truthful; you are not required to look for any other independence evidence that incriminate the accused or to support the account given by the Complainant.
23. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.
24. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses and the exhibits during the course of the hearing.
25. It is your duty as judges of facts to assess the evidence in order to determine whether the prosecution has proven the charges beyond reasonable doubt. In doing that, you must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not.

Demeanours of the Complainant in the court while giving evidence is not necessarily a clue to the truth of the Complainant's account.

### **Evidence of Prosecution**

26. Let me now remind you briefly the summary of the evidence presented by the prosecution during the course of the hearing. This hearing lasted only for two days. Therefore, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
27. The first Complainant in her evidence explained the events that took place on the 26th of March 2017. She had gone to Tukai Solo's house in the morning of 26th of March 2017. While she was at Tukai Solo's place, the accused came and took her into his room. He took off her clothes and laid her down on the bed. The accused then put his penis into her female private part. He did is for a while. The first Complainant referred her female private part as "pi". The accused had then told her to go and never come back. The first Complainant had seen that the accused inserted his penis into her private female parts. She said it was painful when he did it. The first Complainant had told the accused that it was painful. The accused had threatened her to keep quiet. The first Complainant said that she was frightened.
28. After this incident, she had gone to the forest and then the house of the second Complainant. They are cousins. The first Complainant had told the second Complainant about what Tukai Solo had done to her. The first Complainant was living with her uncle and aunt at Naqiriqiri settlement. It was a mountainous place. According to her evidence the life in the village requires more activities, such as climbing, walking, etc.
29. A week after this incident, she had gone to her mother's house, where she told her mother about what Tukai Solo had done to her. She was then taken to a medical examination.
30. During the cross examination, the first Complainant said that she used to sleep in the forest for sometimes. During that time, she had no proper bath and food to eat. She used to go to the house of the accused to ask for food. The accused had given her food.

He had also advised her when she went there, asking for food. The accused had refused to give her food when she came so often, asking for food. The first Complainant denies that she made this allegation because the accused refused to give her food.

31. The first Complainant in her evidence said that she felt itchiness in her body, including her female private parts when she was in the forest. She had scratched her body because of this itchiness.
32. The second Complainant in her evidence said that she used to go and clean the house of the accused. On the 3rd of December 2016, she had gone to the house of the accused. The accused has got hold of her and took her inside the house, where he inserted his index and middle fingers into her vulva. The second Complainant referred her vulva as "pi". During her evidence, the second Complainant demonstrated the place of her 'pi', where the accused inserted his fingers, using a doll. She felt that his fingers went inside as it was painful. She had not screamed because the accused had threatened her that if they shout, he will kill them. After this incident, she had gone home, but had not told anyone about this incident. The second Complainant said that she did not tell anyone because the accused had threatened them that he will kill them if they tell anyone else. She used the word "we" to refer to herself and the first Complainant.
33. According to the evidence given by the second Complainant the accused had done this act to her three times. The second time it happened on the 10th of December 2016. When she went to his house, she saw the first Complainant and the accused were inside the room. Both of them were naked. The accused got hold of the second Complainant, and put her on the bed. The first Complainant got hold of her, while the accused separated her legs. The accused then inserted his fingers into her "pi". When the accused inserted his fingers, she felt the pain. He had used his index and middle fingers. You have seen that the second Complainant demonstrated using her fingers to show us how deep his fingers went into her "pi". After this incident, she went home and did not tell anyone else, as the accused had threatened her not to tell anyone.
34. The accused has done the same things again on the 18th of December 2016. According to the evidence given by the second Complainant, her mother had told her to go and clean the church. While she was cleaning it, the accused came and got hold of her. He

took her into his room and then inserted his fingers into her female private part. He had used the index and middle fingers to insert into her female private part. It was really painful. She was scared and did not tell anyone else.

35. During the cross examination, the second Complainant said that she did not tell the police that the first Complainant was in the room on the 10th of December 2016, and got hold of her while the accused inserted his fingers into her female private parts. She further said that she did not tell the police that the accused had threatened her that he will kill them, if they tell anyone else. The second Complainant reiterated that the accused did something to her. She also had gone and asked food from the accused. He used to give them food, but refused it when they used to come so often. The second Complainant said that she did not make this allegation because he refused to give food.
36. Doctor Elvira, in her evidence explained about the findings that she found during the medical examination of the two Complainants.
37. In respect of the first Complainant, she has noted healed hymen laceration, situated at 6'clock and fimbriated hymen. Such injuries may have caused if something gone through the vaginal opening with force, such as an erected penis or finger. She ruled out the possibility of causing such injuries by scratching. Moreover, Doctor Elvira said that the hymen cannot be tearing apart due to the strenuous activities of a child. The vaginal opening of a child is smaller that of an adult's.
38. Doctor Elvira has not noted any old or fresh injuries on the second Complainant during her vaginal examination. The hymen of the second Complainant was intact. She explained that if a finger had penetrated into the vulva of a child, it could cause bruises or superficial abrasions. Such injuries would heal within 5 to 7 days.
39. I summarized the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.



### Evidence of the Defence

40. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted not to give evidence.
41. The accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

### Analysis

#### Presentation of the Evidence of the Child Complainant

42. You have seen that the two Complainants gave evidence behind a screen. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the accused.

### Expert Evidence

43. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.
44. In this case you have heard the evidence of Dr. Elvira Ongbit. She is a medical doctor and gave her professional opinion about the observations and the findings she noticed at the medical examination of the two Complainants.
45. Expert evidence is permitted in a criminal trial to provide you with scientific and professional information and opinion, which is within the witness expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for

evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to the injuries, the physical and medical condition of the Complainants subsequent to this alleged offences.

46. With regard to these particular aspects of the evidence you are not experts; and it would be quite wrong for you as assessors to attempt to and/or to come to any conclusions on those issues on the basis of your own observations or experiences. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence. You should bear in mind that, having carefully considered, if you do not accept the evidence of the expert, you do not have to act upon it.

### Evaluation of Evidence

47. Ladies and Gentleman assessors, I now kindly request you to draw your attention to the directions on evaluation of evidence. It is your duty to determine this case based on the evidence. In doing that, you are required to evaluate the evidence in order to determine the credibility, reliability and truthfulness of them. That will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which she has testified.
48. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.
49. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with her own evidence but also with other evidence presented in the case.

50. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.

### **Evidence of the Child Complainant**

51. The most important part of your task is to judge whether the two Complainants have told the truth, and have given a reliable account of the events that they were describing. Some of you will have children and grandchildren who are of a similar age to the Complainants. If so, I think you will recognize the sense of the advice I am going to offer you about your judgment of the evidence of the child Complainant, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice and if you do not agree with it, you should reject it.
52. Children do not have the same life experience as of adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity *etc.* Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it, and about using words they think are naughty, and therefore find it difficult to speak.
53. Experience has shown a number of things. A child may not fully understand the significance of sexual activities and that may be reflected in the way they remember it or describe it. A child's perception of the passage of time is very likely to be different from that of an adult. A child's memory can fade even in the short term. When recounting events later, even a fairly short time later, a child's recall of when and in what order events occurred may not be accurate. She may well not be able to speak of the context in which those events occurred. A child may have particular difficulty

dealing with conceptual questions such as how she felt some time ago, or why she did or did not take a particular course of action.

54. Remember how you normally talk to children of this age. You should bear those difficulties in mind when you consider the answers given by the two young Complainants. All decisions about the evidence are for you to make.

### **Inconsistencies and omissions**

55. Madam and Gentleman assessors, you have heard that the learned counsel for the defence cross examined the two Complainants about the omissions and inconsistencies in the statement that they have made to the police and the evidence given in the court.
56. Both of the Complainants admitted in their evidence that certain incidents that they stated in their evidence have not been stated in the statement that they made to the Police.
57. Moreover, the learned counsel for the defence suggested you that the evidence given by the first Complainant and the second Complainant are not inconsistent.
58. I now explain to you the purpose of considering the previously made statement of the Complainant with her evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such statements when you consider whether the Complainant is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents. The evidence is what the witness testified in court.
59. It is 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.
60. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an

acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

### **Final Directions**


61. Ladies and Gentleman, I now take your attention to the final directions of the summing up.
62. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count one, you can find the accused guilty for the said offence of Rape.
63. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count one, you must find the accused not guilty for the said count of Rape.
64. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count two, you can find the accused guilty for the said offence of Rape.
65. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count two, you must find the accused not guilty for the said count of Rape.
66. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count three, you can find the accused guilty for the said offence of Rape.
67. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count three, you must find the accused not guilty for the said count of Rape.

68. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count four, you can find the accused guilty for the said offence of Rape.
69. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count four, you must find the accused not guilty for the said count of Rape.

**Conclusion**

70. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
71. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



  
R.D.R.T. Rajasinghe  
**Judge**

**At Suva**  
16<sup>th</sup> April 2018

**Solicitors**  
Office of the Director of Public Prosecutions for the State.  
Office of the Legal Aid Commission for the Defence.