

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 91 of 2016

STATE

V

JOSATEKI VAKACEGU

Counsel : Ms. Moumita Chowdhury for the State
Ms. Shantel Hazelman with Ms. Esiteri Radrole for the Accused

Dates of Trial : 18-20 & 23 April 2018

Summing Up : 24 April 2018

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "AA"

SUMMING UP

Madam Assessor and Gentlemen Assessors,

- [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 document tendered as a prosecution exhibit 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 the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They 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 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, AA, was 9 years old at the time of the alleged incident (9 years and 11 and a half months to be precise), in February 2016, and was 12 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] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in 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.
- [18] 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.
- [19] Lady and Gentlemen 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.
- [20] 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.
- [21] 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 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.

- [22] 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.
- [23] 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.
- [24] 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.
- [25] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, 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.
- [26] 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.
- [27] 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. It is not his task to prove his innocence.
- [28] 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?

- [29] 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.
- [30] It is for you to decide whether you are satisfied beyond 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.
- [31] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the victim 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.
- [32] 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.
- [33] The same applies for permitting a closed court proceedings when the complainant gave evidence in this case.
- [34] Let us now look at the charges contained in the Information.
- [35] There are two charges preferred by DPP, against the accused:

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

JOSATEKI VAKACEGU on the 15th of February 2016, at Muslim League Settlement, in Nabua, in the Central Division, penetrated the vagina of **AA**, a child under the age of 13 years, with his finger.

SECOND COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

JOSATEKI VAKACEGU on the 15th of February 2016, at Muslim League Settlement, in Nabua, in the Central Division, penetrated the vagina of **AA**, a child under the age of 13 years, with his penis.

[36] Section 207(1) of the Crimes Act No. 44 of 2009 (Crimes Act) reads as follows:

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

[37] Section 207(2) (a) and (b) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(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.

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

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

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent.

[39] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207(2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

[40] Similarly, 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.

[41] 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."*

[42] Therefore, in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 15 February 2016);
- (iii) At Muslim League Settlement, in Nabua, in the Central Division;
- (iv) Penetrated the vagina of AA with his finger; and
- (v) At the time AA was a child under 13 years of age.

[43] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

[44] 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.

[45] The fourth element involves the penetration of the vagina of AA with his finger. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration.

[46] The final element is that at the time of the incident AA was a child under 13 years of age.

[47] 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 9 years and 11 and a half months of

age at the time of the alleged incident, and therefore, she had no mental capacity to consent.

- [48] Similarly, in order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case the 15 February 2016);
 - (iii) At Muslim League Settlement, in Nabua, in the Central Division;
 - (iv) Penetrated the vagina of AA with his penis; and
 - (v) At the time AA was a child under 13 years of age.
- [49] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.
- [50] 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.
- [51] The fourth element involves the penetration of the vagina of AA with his penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration.
- [52] The final element is that at the time of the incident AA was a child under 13 years of age.
- [53] As stated before, 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. The complainant in this case was 9 years and 11 and a half months of age at the time of the alleged incident, and therefore, she had no mental capacity to consent.
- [54] 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. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.
- [55] If you are satisfied beyond any reasonable doubt that the accused, on 15 February 2016, penetrated the vagina of AA with his finger, then you must find him guilty of the first count of Rape.
- [56] 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.

- [57] If you are satisfied beyond any reasonable doubt that the accused, on 15 February 2016, penetrated the vagina of AA with his penis, then you must find him guilty of the second count of Rape.
- [58] 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.
- [59] However, if you find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 15 February 2016, penetrated the complainant's vagina with his finger, has satisfied beyond any reasonable doubt that the accused, on 15 February 2016, unlawfully and indecently assaulted the complainant by touching any part of the complainant's external genitalia, but without penetrating the external genitalia; as an alternative, you are then allowed to look at the lesser offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act, though the accused is not formally charged in the Information for that offence in the first count.
- [60] Section 210 (1) (a) of the Crimes Act reads as follows:
- (1) A person commits an indictable offence (which is triable summarily) if he or she—
- (a) unlawfully and indecently assaults another person;
- [61] Therefore, in order for the prosecution to prove Sexual Assault in terms of the first count, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case the 15 February 2016);
 - (iii) At Muslim League Settlement, in Nabua, in the Central Division;
 - (iv) Unlawfully and indecently assaulted AA, the complainant.
- [62] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [63] 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.
- [64] 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 any part of the complainant's external genitalia by the accused, but without

penetrating the external genitalia, is an indecent act and thereby amounts to Sexual Assault.

[65] Similarly, if you find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 15 February 2016, penetrated the complainant's vagina with his penis, has satisfied beyond any reasonable doubt that the accused, on 15 February 2016, unlawfully and indecently assaulted the complainant by placing his penis on any part of the complainant's external genitalia, but without penetrating the external genitalia; as an alternative, you are then allowed to look at the lesser offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act, though the accused is not formally charged in the Information for that offence in the second count.

[66] As stated before, Section 210 (1) (a) of the Crimes Act reads as follows:

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

(a) unlawfully and indecently assaults another person;

[67] Therefore, in order for the prosecution to prove Sexual Assault in terms of the second count, they must establish beyond any reasonable doubt that;

(i) The accused;

(ii) On the specified day (in this case the 15 February 2016);

(iii) At Muslim League Settlement, in Nabua, in the Central Division;

(iv) Unlawfully and indecently assaulted AA, the complainant.

[68] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[69] 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.

[70] 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 placing his penis on any part of the complainant's external genitalia by the accused, but without penetrating the external genitalia, is an indecent act and thereby amounts to Sexual Assault.

[71] 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, in counts one and two, beyond reasonable doubt. If you are satisfied that the prosecution has established all the elements constituting the offence of Rape beyond reasonable doubt, then you must find the accused guilty of Rape as charged.

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

[73] 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 "*Admitted Facts*" without placing necessary evidence to prove them:

1. It is admitted that in the year 2016, the victim AA was residing at Muslim League Settlement, in Nabua, with her grandmother Mere Rokotuni.
2. It is admitted that the Accused, Josateki Vakacegu and the victim AA are known to each other.
3. It is admitted that on the 15th day of February 2016, the Accused, Josateki Vakacegu, was at the address where the victim AA was residing.
4. It is admitted that the victim AA was born on 1st March 2006.

[74] You must therefore, treat the above facts as proved.

Case for the Prosecution

[75] The prosecution, in support of their case, called the complainant AA, her grandmother, Mere Rokotuni, and the Medical Officer, Dr. Kelerayani Namudu. The prosecution also tendered the following document as a prosecution exhibit:

Prosecution Exhibit PE1 - The Medical Examination Report of the complainant.

[76] Evidence of the complainant AA

- (i) *The complainant testified that she is 12 years old. Her date of birth is 1 March 2006.*
- (ii) *She is currently residing with her grand-mother, Mere Rokotuni, at Ratu Mara Road, Nabua, Suva.*
- (iii) *She is currently attending Draiba Primary School and is in Class 6.*
- (iv) *In February 2016, she was also living with her grandmother at the same address, which is at the Muslim League Settlement in Nabua (Ratu Mara Road).*

- (v) *She clearly recalled the incidents which took place on 15 February 2016.*
- (vi) *She had gone to school with her younger brother. When returning from school, they had boarded the Cunningham School Bus. After reaching home, she had requested her younger brother to do some work and then he can go and play.*
- (vii) *When she reached the window (looked through the window), she saw that one man was planting taro. She used to call him Kuku Jo. He is also known as Josateki Vakacegu. Kuku Jo had looked at her. His eyes were red. He had told her in a harsh way that he will come home. The complainant had felt scared.*
- (viii) *Kuku Jo had been outside the house. At the back of the house, she was staying in.*
- (ix) *The complainant had gone and closed the back door (fearing) that he will enter. She had then gone to the bathroom and filled the bottle of water. The bathroom is inside the house. After filling the bottle of water she had come to keep the bottle in the kitchen and wanted to leave the house. Kuku Jo had pushed the back door. Later she testified that he had forcibly opened the back door.*
- (x) *Kuku Jo had come into the house and told the complainant to wash the knife. When she was washing the knife, he came behind her. She said, "He held the knife with me and washed the knife with me". This was a cane knife.*
- (xi) *The complainant had then gone into the living room. She took the mattress to sun out. The mattress was on top of the settee. Kuku Jo had pushed her with the mattress. When asked what her position was, she said I was lying straight. When asked, lying straight on what? The witness answered, "On the mattress". "Because he pushed me. That's why I was lying straight". She demonstrated on the doll given to her as to how she was lying straight. Kuku Jo was standing beside her.*
- (xii) *The complainant testified that when she wanted to stand up, Kuku Jo had laid on top of her. The witness demonstrated in Court as to how this took place.*
- (xiii) *When asked, then what happened? The witness testified "He pulled the zip of his trousers down. He pulled my skirt down. And then he pulled down my panty also. Then he spat onto his hand and he rubbed his polo (balls)....he tried to put on my pipi". The witness showed on the doll given to her where the Kuku Jo's polo and her pipi is located.*

(xiv) *The witness was then asked the following questions:*

Q. *Did he put his polo on your pipi?*

A. *Yes.*

Q. *Where exactly did he put his polo?*

A. *On top.*

Q. *On top meaning?*

A. *On top of my pipi. I tried to protect it. He held my hand.*

Q. *Protect it, meaning?*

A. *Protect my pipi. He held my hands using one of his hands. I tried to scream. He closed my mouth using his hand that was holding my hand.*

The witness demonstrated using both her hands as to how she was trying to protect her pipi.

Q. *Then what happened?*

A. *My hand that he let go, he laid on it. He told me not to say it to anyone else.*

Q. *Not to say what?*

A. *(What) he had done to me.*

Q. *You said he put his polo on your pipi? Is there anything else?*

A. *He also put his hand.*

Q. *Which part of his hand?*

The witness demonstrated to Court by showing her index finger.

A. *He also put his index finger inside my pipi.*

Q. *How do you know it was inside your pipi?*

A. *I can feel it and I saw it.*

Q. *How did you feel?*

A. *I felt pain.*

Q. *What happened after that?*

A. *That's the time he told me not to say it to anyone.*

Q. *Who is this 'he' you are referring to?*

A. *Kuku Jo.*

Q. *What happened first?*

A. *He put his polo and then his finger.*

- Q. *How long was his finger inside your pipi?*
- A. *A few minutes.*
- Q. *What happened after that?*
- A. *He told me not to say it to anyone. After that my grandmother pushed the door – the front door. The one that I wanted to exit not the one he entered.*
- Q. *What happened after that?*
- A. *He stood up. When he pulled up the zip of his trousers, my grandmother was looking. My grandmother screamed at him. He told my grandmother, "No, No, I did not do anything".*
- Q. *Was there anyone else in the house, at the time these acts took place?*
- A. *No.*
- Q. *Do you remember the time of the day this incidents happened?*
- A. *No.*
- Q. *What was lighting inside the house?*
- A. *The sun was out. There was light outside.*
- Q. *Was anything blocking your view of Kuku Jo?*
- A. *No.*
- Q. *Can you show where your pipi is?*
- The witness demonstrated on the doll given to her.*
- Q. *What happened after your grandmother arrived home and saw Kuku Jo?*
- A. *She pulled me outside and we went to one Police Officer's house.*
- Q. *Then what happened?*
- A. *When he went, we came back home. We had our bath. Then my grandmother told me for us to go to the Police Station.*
- Q. *Did you go to the Police Station?*
- A. *Yes.*
- Q. *Did you go anywhere else?*
- A. *We went to the hospital.*

- (xv) *The witness clearly identified the accused in Court.*
- (xvi) *In cross examination, the witness admitted that there are 3 doors to the house she was residing in. The front door, another door at the back and another door close to the bathroom/toilet.*
- (xvii) *She also admitted that her grandmother and the accused, Kuku Jo, are cousins, and that sometimes (some days) the two of them don't have a good relationship. So Kuku Jo is not a stranger to her. He usually comes to her grandmother's house.*
- (xviii) *It was suggested to the witness that on the day prior to this incident (14 February 2016), her grandmother had asked the accused if he can come and plant dalo in the backyard and fix the door (the hinges on the front door), on 15 February 2016? The witness answered, "Yes".*
- (xix) *It was suggested to the witness that when she washes her pipi (her private part) properly she uses her fingers to wash inside of her pipi. She answered yes.*
- (xx) *It was put to the witness that in her Police Statement she had said "I wanted to bring the mattress out for sunlight and when he saw me holding the mattress, he came near and grabbed the mattress and threw it down on the floor", which was different to the testimony given by her in Court (which was that she took the mattress to sun out. The mattress was on top of the settee. Kuku Jo had pushed her with the mattress). When asked which version is correct? The complainant said the statement given to the Police.*
- (xxi) *It was also suggested to the complainant, that she never informed the Police the fact that the accused had fallen on top of her. The complainant said she had forgotten to mention it*
- (xxii) *It was also suggested that she did not inform the Police that she together with her grandmother had gone to a Police Officer's house and after coming back home she had gone to have a bath. The complainant said that she told this to the Police, although she agreed it was not found in her statement.*
- (xxiii) *It was also suggested to her that these matters were not mentioned to the Police as the witness was making it up in Court today. The witness categorically denied this suggestion.*
- (xxiv) *The following further suggestions were put to the witness in cross examination:*
- Q. *I suggest to you that Kuku Jo came into the house on 15 February 2016, and he came and fixed the hinge for the broken door?*

- A. No.
- Q. I suggest to you, that when your grandmother came and pushed the door, Kuku Jo was sitting behind the door and he was fixing the hinge for the door?
- A. No.
- Q. I suggest to you, that when your grandmother came and saw that the door was closed and pushed it open she thought that something happened?
- A. Yes.
- Q. I suggest to you that Kuku Jo did not put his polo on your pipi?
- A. He put it.
- Q. I suggest to you that Kuku Jo did not put his hand into your pipi?
- A. No he put it.
- Q. I suggest to you that you only made up the story because you were scared of your grandmother?
- A. What story?
- Q. Whatever you said in Court?
- A. No.

[77] Evidence of Mere Rokotuni

- (i) She is the grandmother of the complainant AA. She resides at 339, Ratu Mara Road, Muslim League (Housing Settlement).
- (ii) Kuku Jo is her uncle's son. His name is Josateki Vakacegu.
- (iii) She recalls on 15 February 2016, when she came back from work, the door was closed from inside. She had come back from work from Milverton Road. It was around 3.00 in the afternoon. When she reached the door (the front door) it was closed. So she pushed the door forcibly. She saw the accused pulling up the zip of his trousers. This was right in front of the door. Her grandchild AA was there. She had stood up and pulled up her skirt.
- (iv) The witness had screamed and looked at the accused and AA and said "Oilei, what did you do to my granddaughter". The accused had replied that he did not do anything. The accused went back to the door that he entered.

(v) *The witness was then asked the following questions:*

Q. *Where was AA at that time?*

A. *She was lying down trying to get up.*

Q. *Lying down where?*

A. *Where I pushed the door.*

Q. *Where was she lying down?*

A. *She was lying on the mattress and trying to get up.*

Q. *Then what happened?*

A. *I looked at the accused and AA and I asked Oilei what did you do to her?"*

Q. *You said AA stood up and pulled up her skirt?*

A. *She was wearing it, but pulling it up. She was lying down when she got up she pulled up the waist of her skirt. The witness demonstrated how this happened.*

Q. *Was there anything else she was wearing?*

A. *Trousers – she was pulling it up. Her panty in pink colour.*

Q. *So she pulled up her skirt and panty?*

A. *Yes.*

Q. *You said you asked Josateki, what have you done to my granddaughter?*

A. *He said he did not do anything to her. I took AA and we went outside.*

(vi) *It was suggested to the witness in cross examination that she had failed to mention the following in her statement made to the Police:*

- *that she took AA outside, and they went and stood below, and waited for Josateki to go away and then went home;*
- *the fact that AA was pulling up her pink panty (when she entered the house);*
- *that AA was getting up from the mattress (when she entered the house);*

The witness said that the Police did not ask her these questions.

(vii) *It was suggested to the witness that she did not mention these facts to the Police, and that she was stating these facts only in Court, because she was making up this story? The witness answered, No.*

(viii) *It was suggested to the witness that she had requested for the accused to come to her house on 15 February 2016 to fix the hinge of*

the front door. She denied having requested the accused to do so. She had only requested the accused to plant taro in the back garden.

- (ix) The witness clarified that she and the accused have a good relationship. "Josateki is my real cousin brother, I really love him so much. We have a good relationship".*

[78] Evidence of Dr. Kelerayani Namudu

- (i) She is practising as a Medical Officer since 2006. Currently she is attached to the Paediatrics Department of the Colonial War Memorial Hospital (CWMH). She has been attached to CWM since 2009.*
- (ii) She testified to the medical examination conducted on AA on 15 February 2016, at 1928 Hours, at the CWM Hospital. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE 1.*
- (iii) The Doctor testified to the history related by AA at column D10 of the Report.*
- (iv) She further testified to the specific medical findings as found in column D12 of the Report.*
- a) On preliminary examination (gross examination of genitalia), on 15 February 2016, a small red pin point mark (1cm) was found at the 6 o'clock position of the fossae navicularis.*
- b) On colposcopic examination, on 16 February 2016, 2 red pin point marks were found at 6 o'clock and 7 o'clock position of the fossae navicularis. Hymenal edges not torn.*

The Doctor drew a diagram on the whiteboard in Court to illustrate the above injuries.

- (v) As per her professional opinion the said injuries could have been caused by a blunt object. When asked to explain further, the Doctor testified considering the circumstances of this case, upon examining the child, an object like a finger.*
- (vi) When asked as to how much force would be required to cause such injuries? The Doctor testified that a substantial force (would be required) but she is unable to quantify.*

[79] 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 remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

Analysis

- [80] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, AA, her grandmother, Mere Rokotuni, and the Medical Officer, Dr. Kelerayani Namudu, to prove its case.
- [81] The prosecution is relying on the evidence of the Medical Officer, Dr. Kelerayani Namudu. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [82] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [83] As I have informed you earlier, the burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [84] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [85] In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved. Based on the said agreed facts the identity of the accused, the date of incident (15 February 2016), the place of incident (Muslim League Settlement, in Nabua), and the fact that the complainant is below 13 years are proved. The only element left for the prosecution to prove is that the accused penetrated the complainant's vagina, with his finger and with his penis, respectively.
- [86] The accused is totally denying that the incident took place. The defence position, is that the accused was requested by the complainant's grandmother, Mere Rokotuni to come to her house on the day of the incident to fix the hinge on the front door.

- [87] Further, the defence position is that when Mere Rokotuni came and saw that the front door of the house was closed and pushed it open and when she saw the accused and AA together, she thought that something had happened.
- [88] 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 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 had proved the elements of the offences of Rape, beyond any reasonable doubt.
- [89] In summary and before I conclude my summing up let me repeat some important points in following form:

- i. *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 of Rape;*
- ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of Rape has been established beyond any reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
- iii. *As an alternative to Rape, you may consider whether the accused is guilty or not guilty of Sexual Assault in respect of the said two charges.*

[90] Any re directions the parties may request?

[91] 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 two counts 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.

[92] 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

[93] I thank you for your patient hearing.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Dated this 24th Day of April 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.