

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: HAC 208 OF 2016**

STATE

-v-

ILIKASIO TAULEKA

Counsel : Mr. J. Niudamu for State  
Ms. K. Vulimainadave with Ms. Manueli for  
Accused

Dates of Trial : 24<sup>th</sup>- 25<sup>th</sup> April, 2018

Date of Summing Up : 26<sup>th</sup> April, 2018

*(Name of the Complainant is suppressed. She is referred to as RK)*

**SUMMING UP**

Madam and Gentlemen Assessors:

1. We have now reached the final phase of this case. The law requires me, as the judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be

recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the Accused person.

2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of facts. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The Counsel for Prosecution and Defence made submissions to you about the facts of this case. That is their duty as the counsel. But it is a matter for you to decide which version to accept and which version to reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the Accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that, before you can find the Accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this Courtroom. Your duty is

to apply the law as I explain it to you to the evidence you have heard in the course of this trial.

10. Your duty is to find the facts based on the evidence and apply the law to those facts and draw reasonable inferences from facts proved. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As Assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of facts in a trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
12. An incidents of rape and sexual assault would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to.
13. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gives evidence. How did he or she stand up to cross examination and re-examination? Was he or she evasive or forthright in his or her answers? You are to ask yourselves, was the witness honest and reliable. But, please bear in mind that many witnesses are not used to giving evidence and may find the court environment distracting.
14. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreed facts of this case are that:

- I. That the Complainant in this matter is RK, 8 years, Class 2R, student of Penang Sangam Primary School, Rakiraki.
  - II. That the Accused person is ILIKASIO TAULEKA, 35 years, Farmer of Naqelecibi Village, Saivou, Ra.
  - III. That the accused is a distant granduncle of the Complainant.
  - IV. That the Accused and the Complainant at about 7.00 pm on the 6<sup>th</sup> of October, 2016 were at a relative's house in Mullau, Rakiraki.
15. The Accused is charged with one count of Rape. The Information reads as follows:

Charge Statement

Statement of Offence

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

Particulars of Offence

ILIKASIO TAULEKA on the 6th day of October, 2016 at Rakiraki in the Western Division, penetrated the vagina of RK, an 8 year old girl, with his finger.

16. I will now deal with the elements of the offence of Rape. A person rapes another person if:
- (a) The person has carnal knowledge with or of the other person without other person's consent; or
  - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or

- (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
- 17. Consent means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent. A person under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The Complainant in this case was 8 years of age at the time of the alleged offence and therefore, she did not have the capacity under the law to give consent. So, the Prosecution does not have to prove the absence of consent on the part of the Complainant because law says that she, in any event, cannot consent. The elements of the offence of Rape in this case are that:
  - (a). the Accused,
  - (b). penetrated the vagina of the Complainant, with his finger.
- 18. Other parts of the offence of Rape are irrelevant to the facts of this case.
- 19. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.
- 20. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a Complainant who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.
- 21. Documentary evidence is also important in this case. Documentary evidence is the evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. Then you can act on such evidence.
- 22. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they had seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts.

Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before Court on the basis of their learning, skill and experience. In this case, the doctor gave evidence as expert witnesses. Expert evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if her opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the case.

23. You must remember that the expert evidence does not implicate the Accused or link him to the alleged offence even if you decide to rely on it. You can only use doctor's opinion to test the constancy of Complainant's story. You must also not rely upon anything the doctor told about the history she had received from the Complainant.
24. In evaluating evidence, you should see whether the story told in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.
25. While cross-examining witnesses of Prosecution, Defence Counsel referred to previous witness statements recorded by police. A previous statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath as being true. You can of course use those statements to test the consistency and credibility of the witness.
26. In testing the consistency of a witness you should see whether the witness is telling a story on the same lines without variations and contradictions. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to

some incapacitation of noticing such points, given the mental status of the witness at a particular point of time, or whether such variation has been created by the involvement of some other person, for example by a police officer, in recording the statement.

27. You must remember that merely because there is a difference, variation, contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.
28. You can consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.
29. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. There can be a reasonable explanation for the delay. It is a matter for you to determine whether, in this case, the lateness of the complaint and what weight you attach to it. It is also for you to decide, when complainant did eventually complain, whether it was genuine.
30. Prosecution adduced evidence of Complainant's grandmother Lavenia to show that the Complainant had made a prompt complaint about the incident. Lavenia in her evidence said that she received such a complaint from the Complainant soon after the incident.
31. This form of evidence is known as evidence of recent complaint. Previous consistent statements are not generally admitted as evidence. Recent complaint evidence is an exception to that rule and admitted in cases of sexual nature only to test the consistency and truthfulness of the Complainant's evidence in Court. Lavenia was not present to witness what had actually happened between the Complainant and the Accused and therefore, her testimony is not evidence as to what actually happened between the Complainant and the Accused. You are

entitled to consider the evidence of recent complaint in order to decide whether or not Complainant has told the truth in Court. The Prosecution says that Complainant's prompt complaint to her mother is consistent with Complainant's account of this alleged incident and therefore she is more likely to be truthful. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what had happened between the Accused and the Complainant. It therefore cannot of itself prove that the complaint is true.

32. Evidence was also led to show that the Complainant looked distressed, that she was crying when she arrived home shortly after the alleged incident. This is how you should approach the evidence of distress. You must be satisfied beyond a reasonable doubt that the Complainant's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged sexual offence. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred. The distress evidence must not be used to connect the Accused to the alleged offence. Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause. In deciding these matters, you must take into account all relevant circumstances. If you are so satisfied then you may give such weight to the evidence of distress as is appropriate. But if you are not so satisfied then you must disregard the evidence of distress.
33. You may also consider whether there is a reason or motive on the part of the Complainant to make up an allegation against the Accused. If she had such a motive, then you may think that this allegation has been fabricated.
34. Please remember, there is no rule in Fiji for you to look for corroboration of Complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of Complainant, depending on how you are going to look at his evidence.
35. I will now remind you of the Prosecution and Defence cases. In doing this it would not be practical for me to go through the each piece of evidence. It was a



short trial and I am sure things are still fresh in your minds. If I do not mention a particular witness, or a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision in this case.

### **CASE FOR PROSECUTION**

#### **PW 1 Dr Pooja Punam Sharma**

36. On the 12<sup>th</sup> of October 2016, doctor Sharma had examined RK at the Rakiraki Hospital and recorded her findings on Police Medical Examination Form.
37. Doctor had noted abrasions on perineal region and on buttocks. With regard to her vaginal examination, the doctor said that the skin around the vulva appeared reddened and hymen was not clearly visible because the introitus looked reddened and bruised. Doctor said that her physical findings are consistent with a sexual assault. She described sexual assault as rape or any kind of penetration without consent. She further said that her physical findings are consistent with the history provided. Doctor further said that she examined the patient 6 days after the alleged incident.
38. Under Cross examination the doctor agreed that abrasions can also be caused by constant rubbing of the skin, scratching or wearing away of the tissues or the skin when engaged in rough games, cycling or wrestling. Doctor however opined that injuries she examined were due to a sexual assault and excluded other causes like playing or anything like that because such activities will not cause injuries in interior parts of vagina like introitus and constant rubbing wouldn't cause abrasions and reddening without force being applied.

#### **PW 2 Lavenia Lewa**

39. Lavenia is the grandmother of the Complainant, RK. She said that RK is her granddaughter and her namesake. She has been looking after RK since she was young. RK was a Class 2 student of Penang Sangam School and was 8 years old in 2016. On the 11<sup>th</sup> of October, 2016 she was residing in Qalau, Rakiraki with her husband and RK and moved to one of her small uncle's house in Mullau when Cyclone Winston destroyed her house in Qalau.

40. On the 11<sup>th</sup> of October 2016, RK returned from school and, after having a wash, she was playing with another boy. When they were talking inside the house Vodi pulled the hand of RK towards the river. She called out RK's name three times and finally RK came from the river side. When RK approached her, she held RK's hand. RK started crying. She asked her *where were you?*, RK informed that Tai Vodi dragged her towards the river. She then asked RK, *what did Tai Vodi do to you?*. RK informed her that Tai Vodi touched her private part. She then asked her, *did he do anything else to you?* She stated that *Tai Vodi wet his finger and inserted it inside her private part*. RK described her private part as '*sila*' or vagina. She comforted RK and took her inside the house. This incident took place around 7.00 when it was getting dark. After receiving this information, she was waiting for Tai Vodi to come home but he had disappeared.
41. RK recognised the Accused who was seated in the dock as Vodi. She said that Vodi is the cousin (brother) of her small uncle's wife. She said that RK used to call him Tai or grandfather. Vodi was living in the same small uncle's house that they were staying in Mullau.
42. She informed her husband's small brother and his wife about the incident but they didn't do anything about it. Then she went to her village and informed her son about it. Her son informed her to send RK to school so they can report the matter to the police. The next morning, she said that RK was waiting for her son at the market but his son did not show up and therefore, RK then went to school and informed her teacher about the incident.
43. Under Cross-examination, witness Lavenia admitted that other relatives of her small uncle were also staying in that same house with them. She admitted giving a statement to police officer Litiana on the 12<sup>th</sup> of October, 2016. When her statement was shown to the witness, she said she could not read. She admitted that she was having grog with a friend when RK returned from school. She admitted saying to police that Samu came and informed that RK was missing and while she and Samu were talking inside the house, Vodi had pulled the hand of RK.
44. Lavenia admitted saying to police that RK had only told her that RK had been with Tai Vodi and not that Tai Vodi had dragged her towards the river. When it

was suggested that she had not told police about wetting of the finger and inserting it into the vagina, the witness said she had informed police what RK had told her. Witness said that if RK did something wrong she only taught her and did not beat her. Witness denied slapping RK to make her cry.

45. Lavenia said that when RK informed her school teacher about the incident, the school teacher was the one who reported the matter to police. She admitted that when Vodi returned home around midnight, Paranome asked Vodi whether what RK said was true or not and Vodi had denied the allegation. Lavenia denied that RK had gone with a boy from Lau to the sugarcane farm whilst they were drinking grog. Lavenia also denied that Vodi was calling RK to come back home when she was following the boy.
46. Under re-examination, the witness said that other people in the house had gone to sugarcane harvesting when the incident happened.

**PW 3 RK (Complainant)**

47. The next witness for Prosecution was RK, the Complainant of this case. RK said that, in 2016, she was residing with her grandmother at her grandfather Paranome's house and was attending school in Penang Sangam Primary School at Class 2.
48. On the 6<sup>th</sup> of October, 2016, she returned from school in the afternoon. She was playing hide and seek with Samu outside. While playing with Samu, Tai Vodi came and grabbed her hand and pulled her towards the creek. Then Tai Vodi took off her panty and touched her vagina. He made his finger wet and touched inside her vagina. At this stage, you will recall RK showed us her index finger. She said it was paining and did not like what Tai Vodi did to her. She asked Tai Vodi to stop it but he never stopped it. Tai Vodi ran away from the scene when her grandmother started calling her. Then she wore her panty and went home. She was crying when she reached her grandmother. Then her grandmother got angry on her because of Tai Vodi. She told grandmother that Tai Vodi touched her vagina.
49. Under cross-examination, RK admitted that, before going to police, she relayed the story to her class teacher Ms. Gounder and Ms. Gounder inquired from her

cousin Samu about the incident in the presence of Ms Vuniwabu and Mrs Lal. She admitted that she had told teachers that when she went to the toilet on Saturday, a man called her from under a coconut tree and when she went to him this man growled at her and slapped her on both cheeks and when she cried, her uncles and aunties came and took her away from the coconut tree.

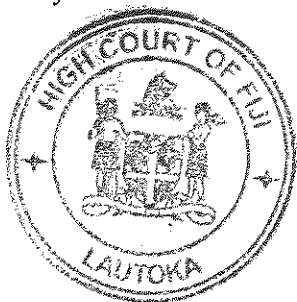
50. She admitted that she told the police a different story to what she had told the teachers. She said the statement she gave to police is the truth. She denied that Tai Vodi was chasing and calling her to go back to the house, when she was following him to the cane field and when her grandmother called her three times she went to the grandmother and got slapped.
51. Under re-examination, RK said that Ms Vuniwabu was speaking to her in Hindi.
52. That is the case for Prosecution.
53. At the close of the Prosecution case, you heard me explain to the Accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or that he could give evidence in which case he would be cross-examined.
54. Accused opted to remain silent. That is his right under the Constitution. You must not draw any negative inference and think that he offered no evidence and opted to remain silent because he is guilty.

### **ANALYSIS**

55. Madam and gentlemen Assessors, the Accused is charged with one count of Rape. Before you could find the Accused guilty, you must be satisfied beyond reasonable doubt that the Accused had penetrated the vagina of the Complainant RK with his finger.
56. Prosecution called three witnesses to prove their case. They based their case substantially on the evidence of the Complainant. Recent complaint evidence, medical evidence and distress evidence was also led to show the consistency of child Complainant's evidence.
57. The Defence case is one of denial. They say that the Accused did not commit the alleged sexual act on the Complainant.

58. You have to be satisfied that the evidence of the child Complainant is truthful and believable. If you are satisfied that she told the truth, then you can safely act upon her evidence in coming to your conclusion. No corroboration is required from an independent source.
59. There is no dispute that the Accused is Complainant's distant grand uncle and that he was living in the same house with the Complainant on the day when the alleged incident happened.
60. Prosecution says that the Complainant maintained her consistency when she promptly complained to her grandmother soon after the alleged incident. Evidence was also led to show that the child Complainant was crying and she was in a distressed condition soon after the incident. The Complainant was 8 year-old student at the time of the offence. You consider if she is consistent and the story told by her is acceptable and believable.
61. You heard what the doctor who had examined the Complainant had stated in her medical report. She had examined the Complainant 6 days after the alleged incident. If you accept her evidence, you may take her medical finding in coming to your conclusion as to the allegation of rape.
62. You observed Complainant's demeanor in court. You decide if she is an honest and credible witness and what weight should be attached to her evidence.
63. Defence says that the Complainant did not tell the truth in Court and that her evidence is not consistent with the story told to her teacher. They also say that Lavenia did not go to police soon after she had received the information because she had trusted the words of denial of the Accused. Lavenia said that she complained to her small uncle and his wife about the incident but they did not do anything and that's why she decided to complain.
64. In light of the directions I have given, you decide what weight you should give to those so called inconsistencies and to Complainant's evidence.
65. The Accused remained silent. That is his right. The Accused is not required to prove his innocence, or prove anything at all. The burden to prove the charge beyond a reasonable doubt is on the Prosecution.

66. If you accept the Prosecution's version of events, and you are satisfied that the Accused had penetrated the vagina of the Complainant with his finger and the Prosecution has proved the case beyond reasonable doubt, so that you are sure of Accused's guilt you must find him guilty. But if you do not believe the Complainant's evidence regarding the alleged offence, or if you have a reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty.
67. Your possible opinion is either guilty or not guilty.
68. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
69. Any re-directions?



Aruna Aluthge

Judge

**AT LAUTOKA**

**26<sup>th</sup> April 2018**

**Solicitor: Office of the Director of Public Prosecution for State**

**Legal Aid Commission for Defence**