

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

**Criminal Case No.: HAC 125 of 2017**

**STATE**

**V**

**ATAMU PENETE**

**Counsel** : Mr. A. Singh for the State.  
: Ms. V. Narara [LAC] for the Accused.

**Dates of Hearing** : 13, 16, 18, July, 2018  
**Closing Speeches** : 19 July, 2018  
**Date of Summing Up** : 20 July, 2018

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**SUMMING UP**

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*(The name of the complainant is suppressed she will be referred to as "NP").*

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

**ROLE OF JUDGE AND ASSESSORS**

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion

of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

### **BURDEN OF PROOF AND STANDARD OF PROOF**

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

### **AMENDED INFORMATION**

13. The accused is charged with one count of attempted rape and three counts of rape (a copy of the amended information is with you).

### **FIRST COUNT**

#### *Statement of Offence*

**ATTEMPTED RAPE**: Contrary to section 208 of the Crimes Act 2009.

#### *Particulars of Offence*

**ATAMU PENETE** on the 22<sup>nd</sup> day of April, 2017, at Lautoka in the Western Division, attempted to have carnal knowledge of "**NP**" without her consent.

## **SECOND COUNT**

### *Statement of Offence*

**RAPE**: Contrary to section 207 (1) & (2) (a) of the Crimes Act 2009.

### *Particulars of Offence*

**ATAMU PENETE** on the 27<sup>th</sup> day of April, 2017, at Lautoka in the Western Division, penetrated the vagina of “**NP**” with his penis, without her consent.

## **THIRD COUNT**

### *Statement of Offence*

**RAPE**: Contrary to section 207 (1) & (2) (a) of the Crimes Act 2009.

### *Particulars of Offence*

**ATAMU PENETE** on the 12<sup>th</sup> day of May, 2017, at Lautoka in the Western Division, penetrated the vagina of “**NP**” with his penis, without her consent.

## **FOURTH COUNT**

### *Statement of Offence*

**RAPE**: Contrary to section 207 (1) & (2) (a) of the Crimes Act 2009.

### *Particulars of Offence*

**ATAMU PENETE** on the 20<sup>th</sup> day of May, 2017, at Lautoka in the Western Division, penetrated the vagina of “**NP**” with his penis, without her consent.

14. To prove the offence of attempted rape the prosecution must prove the following elements of this offence beyond reasonable doubt:
- (a) The accused;
  - (b) Attempted to have carnal knowledge of the complainant “**NP**”;
  - (c) Without her consent.

15. In this trial the accused has denied committing the offence of attempted rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had attempted to have carnal knowledge of the complainant without her consent.
16. The first element of the offence is concerned with the identity of the person who allegedly committed the offence. There is a dispute in respect of the identity of the person who allegedly committed the offence. The accused is denying that on 22<sup>nd</sup> April, 2017 it was him who had attempted to rape the complainant as alleged.
17. The second element is the attempt to penetrate the complainant's vagina by the accused with his penis.
18. This leaves you to consider the third element of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
19. If you are satisfied that the accused had attempted to penetrate the vagina of the complainant with his penis and she had not consented, you are then required to consider whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
20. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.

21. Before you find the accused guilty you must be satisfied beyond reasonable doubt of two things:-
- (a) Firstly that the accused intended to commit the offence of rape. The offence of rape is committed when a man has carnal knowledge of a woman without her consent. Carnal knowledge means penetration of the vagina by the penis to any extent;
  - (b) Secondly with the intention, he did something which was more than mere preparation for committing that offence.
22. In other words, did the accused actually try to commit the offence of rape, in which case he is guilty of attempting to commit rape, or had he only got ready, or put himself in a position, or equipped himself, to do so, in which case he is not guilty.
23. The prosecution says that when the complainant was in the bedroom of the accused he locked the door and told the complainant in an aggressive tone to lie on the bed. When the complainant was on the bed, the accused tried to remove her pants and her panty and also kiss her. The complainant pushed him away wore her pants and panty and went into the kitchen.
24. The prosecution says this overt act of the accused amounted to more than mere preparation for the offence of attempted rape. If you accept that the accused did this, it is for you to decide whether what he did went beyond mere preparation.
25. It is for you to decide what the intention of the accused was and what he did was more than mere preparation. The identification of the accused is in dispute, together with whether it was the accused who:-
- (a) Intended to rape the complainant; and

- (b) What he did was more than mere preparation.
26. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events.
27. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of attempted rape, then you must find the accused not guilty of the offence of attempted rape.
28. To prove counts two, three and four the prosecution must prove the following elements of the offences of rape beyond reasonable doubt:
- (a) The accused;
  - (b) Penetrated the vagina of the complainant "NP" with his penis;
  - (c) Without her consent;
  - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
29. In this trial the accused has denied committing the offences of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time that is on 27 April, 2017, 12 May, 2017 and 20 May, 2017.
30. The first element of the offences is concerned with the identity of the person who allegedly committed those offences.

31. The second element is the act of penetration of the complainant's vagina by the penis.
32. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
33. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
34. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
35. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
36. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offences he is charged with.
37. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
38. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means 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 evidence to support the account given by the complainant.

39. In this case, the accused is charged with four offences, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
40. You must be satisfied that the prosecution has proved all the elements of all the offences beyond reasonable doubt in order for you to find the accused guilty of either or all the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or all the offences, then you must find the accused not guilty.

#### **ADMITTED FACTS**

41. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
42. From the admitted facts you will have no problems in accepting the above as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
43. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

## **PROSECUTION CASE**

44. The prosecution called four (4) witnesses to prove its case against the accused.
45. The first prosecution witness was the complainant "NP". In the year 2017 she was 14 years of age born on 9 September, 2002, a Form 3 (Year 9) student. The complainant resided at Velovelo, Lautoka with her parents, four brothers and one sister.
46. On 22 April, 2017 the complainant was at home with her siblings and her father. Her mother was not at home since she had gone to work. During the day she asked the accused her father if she could go and watch the inter zone meet at Churchill Park. Her father replied that she is to go first in the bedroom with him, she obliged.
47. In the bedroom she was shocked when her father locked the door and told her in an aggressive tone to lie on the bed. When the complainant was on the bed her father tried to remove her pants and her panty and also tried to kiss her. The complainant pushed him away.
48. After this, she wore her pants and panty and went into the kitchen. The complainant got scared when her father did this to her. She did not tell anyone because she was told by her father not to tell anyone about what he had done to her. The complainant's siblings were outside the house at this time.
49. On 27<sup>th</sup> April in the afternoon the complainant was in the kitchen cooking the accused came and told her that he wanted to have sex with her. She refused, at this time the accused pulled the complainant's hand and took her to his bedroom. In the bedroom he locked the door, told her to lie on the bed and forcefully removed her pants and panty and inserted his penis into her vagina. He covered her eyes with one of her mother's clothes. The

sexual intercourse continued for about 5 minutes. When she got up she saw the bed sheet was wet. The complainant left the bedroom and had her shower.

50. On this day the complainant's mother was not at home but at work. The complainant was frustrated and she did not allow her father to have sexual intercourse with her. She did not tell anyone about what the accused had done to her. He told her if she told anyone both will go to prison so she did not tell anyone.
51. In respect of the third incident, in the afternoon of 12<sup>th</sup> May, whilst cooking her father came and punched her on the left shoulder, because she had cooked food in a small pot and it was not enough.
52. According to the complainant her mother was not at home but at work and her siblings were watching a movie. After dinner her father came and told her that he wanted to have sexual intercourse with her. The complainant refused, upon hearing this, her father pulled her hair and took her into his bedroom. The complainant was crying at this time.
53. Inside the bedroom her father took off her clothes and told her to lie on the bed and then inserted his penis into her vagina for about 10 minutes she was frustrated and fearful of what the accused was doing to her. She did not shout for help because he told her not to shout or tell anybody otherwise both will be in trouble. The complainant did not tell anyone because she was afraid her father would do something to her.
54. Finally, on 20<sup>th</sup> May, at about 5.45am the complainant dropped her mother at the road side so that she could go to work. When she returned the accused was in the sitting room. The complainant went to her bedroom but there was no mattress in the room so she went to her parent's bedroom and slept there.

55. When she woke up, she was shocked to see her father sleeping beside her. At this time he forcefully removed the complainant's pants and panty and inserted his penis into her vagina for about 10 minutes.
56. After what her father had done, she wanted to run away from home she was really frustrated and afraid. At this time the complainant heard her siblings calling her from outside the bedroom. Her father told her not to respond but to wait inside the room. After removing the louver blades of the bedroom he then jumped out of the window.
57. Her father had gone outside to check if there was any one around. After sometime he came into the bedroom to tell the complainant to leave the room. The complainant did not tell anyone about what her father had done to her since she was scared. He had told her not to tell anyone and whatever had happened was only to be kept between the two.
58. On 3 June, 2017 the complainant's grandmother Titilia Nasokia who lived close by came and asked the complainant why the accused had jumped out of the window. The complainant told her grandmother whatever she had told the court. Upon hearing his, her grandmother informed the complainant's mother.
59. On 4<sup>th</sup> June, the matter was reported to the police by the complainant's mother, on this day the complainant was medically examination. Prior to 2017 the complainant's relationship with the accused was sometimes good and sometimes bad.
60. In cross examination the complainant agreed that in respect of the first incident her father had tried to remove her pants and panty and also tried to kiss her. She further stated that she did not tell her brothers because she was told by the accused not to tell anyone. She disagreed that her father told her not to go to the inter zone meet because there was no money. She did not have a good relationship with her father who was a strict father. He

would not allow her to go to the movies, hang out with friends and do things on her own.

61. In respect of all the incidents the complainant did not tell her siblings or her mother about what her father was doing to her since the accused had told her not to tell anyone about what he was doing to her. The complainant disagreed to the suggestion that all the incidents never happened which was the reason why she had not informed anyone about what the accused was doing to her.
62. The complainant maintained that all the incidents had happened and that her mother and grandmother had not influenced her to say all these things against her father.
63. The second witness was Titilia Nasokia the maternal grandmother of the complainant. Her house was about 20 to 30 meters away from the house of the accused. The accused was married to her daughter Lusiana they had 6 children. The complainant was one of them.
64. The witness did not have a good relationship with the accused. She was very close to all her grandchildren. Her grandchildren would not visit her very often because they were scared of their father. Her observations were that the accused used to beat and swear at his children and she did not feel good about it.
65. The witness recalled on Saturday, 20<sup>th</sup> May she was looking for herbal medicine but could not find it near her house so she went to a coconut tree near the house of the accused which was close to his bedroom. The witness saw the accused standing outside his bedroom fixing the louver blades. This made the witness suspicious. Firstly it was close to 7 in the morning and secondly the clothes he was wearing was a sulu vakatoga or sulu wrap around only.

66. The witness could not stop thinking about what she had seen and she also noticed her granddaughter the complainant was sad and pale not happy and joyful and her school work was affected as well.
67. The witness could not wait anymore so on Saturday 3<sup>rd</sup> June, when the accused was not at home the witness called the complainant to her house and started questioning her. The witness asked the complainant if there was anything going on between her and her father. The complainant nodded, when asked the second time there was no answer, on the third and fourth time the complainant started crying and told her everything her father had been doing to her. The complainant said that her father had sexual intercourse with her on numerous occasions. When Lusiana the complainant's mother came home the witness told her everything the complainant had told her. The matter was reported to the police.
68. In cross examination the witness stated that she had an awkward feeling towards the accused which turned into hatred since she saw him ill-treating her grandchildren. Despite observing what the accused was doing to her grandchildren she did not report the matter to the police or the Social Welfare Department.
69. The witness agreed that although the complainant was close to her, she was told what the accused had done, after she questioned the complainant. The witness further stated that the complainant would not lie to her about what her father had done.

#### Ladies and Gentleman Assessors

70. Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for a child of 14 years not to complain about what she had gone through to her mother when her mother came home on the days of the alleged incidents or to her other siblings who were at home

where the alleged incidents took place. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full or not at all as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

71. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in this case did not inform her mother immediately after she came home from work or to her siblings. On 3<sup>rd</sup> June, when asked by her grandmother whether there was something going on between her and her father the complainant told her everything her father was doing to her.
72. This is commonly known as recent complaint evidence. The evidence given by Titilia, the grandmother of the complainant is not evidence of what actually happened between the complainant and the accused since Titilia was not present and did not see what had happened between the two.
73. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told her grandmother what the accused had done to her in particular having sexual intercourse with her on numerous occasions when questioned by her grandmother therefore she is more likely to be truthful. On the other hand, the defence says that the complainant did not complain to her mother or her siblings but only complained when questioned by her grandmother since the incidents did not happen. Furthermore, the complainant did not tell her grandmother anything about the accused attempting to rape her and therefore she should not be believed.

74. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.
75. The third witness was Lusiana Ratu the mother of the complainant who informed the court that she was married to the accused for more than 17 years and they have 6 children. The complainant was their second eldest child.
76. The accused was physically abusive and aggressive towards her and he would verbally abuse their children. The children were afraid of their father. In 2014 the witness took out a domestic violence restraining order against the accused in regards to his behaviour. On 3<sup>rd</sup> June, the witness reached home at about 11pm, her mother Titilia Nasokia called her to her house. Her mother told the witness that the accused had sexually assaulted the complainant. At this time the complainant came into the house nodded and said yes to what had happened to her.
77. The witness immediately went to the Police Station to report the matter. At the Police Station she was told to come the next day with the complainant.
78. On 4<sup>th</sup> June, the witness and the complainant gave their police statements and the complainant was taken to Lautoka Hospital for medical examination. When the accused was at the Police Station the witness asked him about the incidents which he denied committing. After she stated that the complainant cannot lie, the accused admitted that he had done it.
79. In cross examination the witness stated that there was a domestic violence restraining order against the accused granted in 2014. The order was for him not to contact or approach her or the children. After about two months



the witness accepted the accused into the house so that he could contribute to the family. Since then he was residing with the witness and their children. The witness agreed that on 8 July, 2017 she had visited the accused at the remand center, however, she disagreed that she had told him that the allegation was made up by her mother since her mother hated him. Furthermore, the witness also stated that after her mother had told her about what the accused had done to the complainant the witness sat down with the complainant and they talked about what had happened.

80. The final prosecution witness was Dr. Sainimili Leba who graduated with an MBBS degree from the Fiji School of Medicine in the year 2014. After graduation the witness completed her internship at the Lautoka Hospital for 1 year.
81. The doctor was able to recall examining the complainant on 4<sup>th</sup> June, at the Lautoka Hospital. The Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.
82. The initial impression of the patient was that she looked sad, was crying but not in respiratory distress, she did not want to talk preferred the mum to convey the story of the incident.
83. The specific medical findings of the doctor were:
  - (a) Vaginal examination the hymen was not intact;
  - (b) No vaginal bleeding;
  - (c) No vaginal discharge;
  - (d) No cervical excitation tenderness; and
  - (e) Bruises around vaginal area and thigh.
84. The professional opinion of the doctor was that the age of the injury the hymen was not intact appeared to be more than 3 days old.

85. The doctor further stated if the penetration of the vagina happened on 20<sup>th</sup> May her opinion was consistent with her medical findings since she did not see any vaginal bleeding or vaginal discharge. The hymen not being intact could be by blunt trauma such as a penis penetrating the vagina.
86. The bruises seen on the vaginal area and thigh of the complainant were old injury but the doctor could not say how old they were. According to the doctor the history related to her was consistent with her findings.
87. In cross examination the doctor agreed hymen not intact meant the patient was sexually active having sexual intercourse. In respect of the bruises seen around the vaginal area the doctor stated it could have been caused by blunt trauma or force or it could have been caused by anything.

#### Ladies and Gentleman Assessors

88. You have heard the evidence of Dr. Leba who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. 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. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.
89. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.

90. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
91. This was the prosecution case.

#### Ladies and Gentleman Assessors

92. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.
93. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination.

#### **DEFENCE CASE**

94. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath. You must then take into account what the accused adduced in evidence when considering the issues of fact which you are determining.
95. The accused informed the court that in 2017 he was not working, he is married to Lusiana for more than 17 years and from this marriage he has six children. The accused and his wife used to discipline their children if they were naughty or if they didn't listen to him.
96. He loved his children, he was not a strict father he always taught his children to do the right thing for example if they were naughty for the first time he would give them a warning but if they repeated the next time he

would “smack” them. He would not “smack” them every time but only sometimes and they won’t get seriously injured.

97. The accused denied all the allegations made against him he said he has been framed by his mother in law. For more than 10 years now he has not been talking to his mother in law and they did not have a good relationship with each other. The reason is his mother in law keeps telling his children that he was a bad father.
98. The accused stated that he never did whatever is alleged against him. His mother in law hates him and this allegation has been brought against him by his mother in law.
99. In cross examination the accused stated that he loved his wife and children and they in turn loved him. Sometimes he beat his wife and there was a domestic violence restraining order issued against him. When questioned whether he assaulted his children the accused at first said yes then changed his position to say he did not. He agreed the domestic violence restraining order was for him to stay away from his wife and children.
100. The accused disagreed that because he was assaulting his children they were afraid of him. The complainant likes the accused but she spent a lot of time with her grandmother. The accused further stated that he was sure that his mother in law was influencing his daughter. Furthermore, the accused stated he had allowed his mother in law to build a house on his land and now she wants to take away his land, house, all his properties and chase him out.
101. The accused said he heard his daughter giving evidence against him, and that someone was briefing his daughter to say such things against him and he could not believe that.

102. According to the accused it was not true that his mother in law saw him coming out of the window and putting the louver blades back. He further stated that his daughter, his wife and mother in law were lying in court. When the accused was in remand his wife came to see him and told him the allegations were not true which was made up by her mother.
103. The accused stated that he does not know how his daughter became sexually active but agreed the allegations against him came from someone he loves very much.
104. This was the defence case.

### **ANALYSIS**

105. The prosecution alleges that the accused had attempted to have sexual intercourse with the complainant without her consent on one occasion and on the other three occasions he had unlawful sexual intercourse with the complainant without her consent.
106. The first incident was on 22<sup>nd</sup> April, the accused had told the complainant to go to his bedroom. When both were in the bedroom he locked the door and told the complainant to lie on the bed in an aggressive tone. When the complainant was on the bed, the accused tried to remove her pants, panty and kiss her. The complainant pushed him away wore her pants and panty and left the bedroom.
107. The second incident was on 27<sup>th</sup> April, when the complainant refused to have sexual intercourse with the accused he pulled her hand and took her to his bedroom. In the bedroom he forcefully removed the pants and panty of the complainant and inserted his penis into her vagina.

108. The accused covered the eyes of the complainant with the complainant's mother's clothes. The sexual intercourse continued for about 5 minutes.
109. In respect of the third incident on 12<sup>th</sup> May, after dinner the accused told the complainant that he wanted to have sex with her when she refused he pulled the complainant's hair and took her to his bedroom. Inside the bedroom the accused took off the complainant's clothes and told her to lie on the bed and then inserted his penis into her vagina for about 10 minutes.
110. Finally on 20<sup>th</sup> May, the complainant was sleeping in her father's bedroom when she woke up she saw her father sleeping beside her. The accused forcefully removed the complainant's pants and panty and inserted his penis into the complainant's vagina for about 10 minutes.
111. On 3<sup>rd</sup> June, the complainant's grandmother asked the complainant why the accused had jumped out of the window. The complainant told everything the accused had done to her.
112. According to the prosecution on all incidents, the complainant did not consent to what the accused was doing to her. She was afraid and frustrated by what the accused was doing to her, she even wanted to leave the house on one occasion.
113. Furthermore, the incidents happened when the complainant's mother was not at home. She did not tell her mother or her siblings about what the accused was doing to her because she was threatened by her father not to tell anyone and if she did, both will be in trouble and will go to prison.
114. The maternal grandmother of the complainant had seen the accused on the 20<sup>th</sup> May fixing the louver blades of his window at 7am whilst wearing a sulu vakatoga or sulu wrap around. This prompted the witness to confront

the complainant to ask her if there was anything going on between the complainant and her father.

115. The complainant after nodding started crying and told her everything her father had been doing to her particularly having sexual intercourse with her. The complainant's mother was informed and the matter was reported to the police.
116. On 3<sup>rd</sup> June, the mother of the complainant Lusiana was told by Titilia that the complainant had been sexually assaulted by the accused. Upon hearing this, complainant's mother reported the matter to the police. The complainant was medically examined at the Lautoka Hospital.
117. Dr Sainimili Leba had examined the complainant on 4 June, 2017 at the Lautoka Hospital. The professional opinion of the doctor was that the hymen was not intact which appeared to be more than 3 days old.
118. The doctor further stated if the penetration of the vagina happened on the 20<sup>th</sup> May her opinion was consistent with her medical findings since she did not see any vaginal bleeding or vaginal discharge. The hymen not being intact could be by blunt trauma such as a penis penetrating the vagina.
119. The accused denied all the allegations made against him he said he has been framed by his mother in law. For more than 10 years now he has not been talking to his mother in law and they did not have a good relationship with each other. The reason is his mother in law keeps telling his children that he was a bad father.
120. The accused stated that he never did whatever is alleged against him. His mother in law hates him and this allegation has been brought against him by her.

## Ladies and Gentleman Assessors

121. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
122. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
123. In deciding the credibility of the witnesses and the 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 is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. 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 be accurate in another.
124. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.



125. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
126. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt for all the counts. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
127. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
128. In this case, the accused is charged with one (1) count of attempted rape and three (3) counts of rape, as mentioned earlier you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
129. Your possible opinions are:-

Count One:            **ATTEMPTED RAPE**: GUILTY OR NOT GUILTY

Count Two:           **RAPE**: GUILTY OR NOT GUILTY

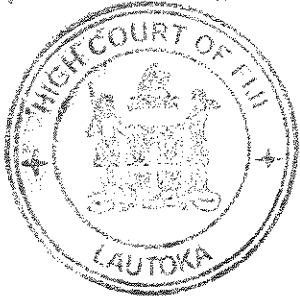
Count Three:        **RAPE**: GUILTY OR NOT GUILTY

Count Four:         **RAPE**: GUILTY OR NOT GUILTY


Ladies and Gentleman Assessors

130. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.

131. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



**At Lautoka**  
20 July, 2018

  
**Sunil Sharma**  
**Judge**

Solicitors

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