

**IN THE HIGH COURT OF FIJI**

**AT LABASA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 38 of 2017**

**STATE**

**V**

**1. EPARAMA WARUA**

**2. STAN DAVIDSON RAMERE**

**Counsel** : Ms. Dharshani Kumar for the State  
Ms. Karen Boseiwaqa for the 1<sup>st</sup> Accused  
Mr. Romanu Vananalagi for the 2<sup>nd</sup> Accused

**Dates of Trial** : 9 & 11 October 2018

**Summing Up** : 12 October 2018

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

**SUMMING UP**

**Madam Assessors and Gentleman Assessor,**

**[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the two 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 two 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 two accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the documents tendered as defence exhibits and any admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration.

The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submissions made by the State Counsel and closing submissions made by State Counsel and both 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 he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has 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, MW, was 13 years and 5 months old at the time of the alleged incident (her date of birth being 12 January 1998), and was 20 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 are 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 their 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 and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission 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 or omission, you may conclude that the underlying reliability of the account is unaffected.

[18] However, if there is no acceptable explanation for the inconsistency or omission, 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 inconsistency or omission 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 or omission 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 the witness to be reliable.

[19] Ladies and Gentleman Assessor, 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 two accused are guilty or not to 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] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [27] 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.
- [28] This is because the accused are presumed to be innocent. They may be convicted only if the prosecution establishes that they are guilty of the offences charged. The fact that the 2<sup>nd</sup> accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [29] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [30] 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.
- [31] 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 two 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.
- [32] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for 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.
- [33] I must also explain to you as to the reason for permitting a closed court proceedings 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 it is a closed court proceedings, the complainant is relieved of any mental pressure to describe the often unpleasant incidents experienced by her. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the two accused's behaviour and you should not draw any adverse inference against them on that account.
- [34] Let us now look at the charges contained in the Amended Information.

[35] There are two charges preferred by the Director of Public Prosecutions (DPP), against the two accused:

**COUNT 1**

***Statement of Offence***

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

***Particulars of Offence***

**STAN DAVIDSON RAMERE**, on 4 June 2011, at Labasa in the Northern Division, penetrated the vagina of MW, with his penis, without her consent.

**COUNT 2**

***Statement of Offence***

**AIDING AND ABETTING:** Contrary to Section 45 and 207 (1) and (2) (a) of the Crimes Act of 2009.

***Particulars of Offence***

**EPARAMA WARUA**, on 4 June 2011, at Labasa in the Northern Division, aided and abetted **STAN DAVIDSON RAMERE** to penetrate the vagina of MW, with his penis, without her consent.

[36] As you would notice, the 2<sup>nd</sup> accused has been charged with Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act), in Count 1; while the 1<sup>st</sup> accused has been charged with Aiding and Abetting the 2<sup>nd</sup> accused to commit the offence of Rape, contrary to Section 45, 207 (1) and (2) (a) of the Crimes Act, in Count 2.

[37] Let me now explain the elements of count one, which is a count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act.

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

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

[39] Section 207(2) (a) 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;*

[40] 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.*

[41] 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.

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

- (i) The 2<sup>nd</sup> accused;
- (ii) On the specified day (in this case on 4 June 2011);
- (iii) At Labasa, in the Northern Division;
- (iv) Penetrated the vagina of MW with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[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 2<sup>nd</sup> accused and no one else committed the offence.

[44] The second element relates to the specific time period during 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 complainant's vagina with the 2<sup>nd</sup> accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the 2<sup>nd</sup> accused penetrated the vagina of the complainant with his penis to any extent.



[46] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the 2<sup>nd</sup> accused penetrated the complainant's vagina, with his penis, without her consent.

[47] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[48] Apart from proving that the complainant did not consent for the 2<sup>nd</sup> accused to insert his penis, into her vagina, the prosecution must also prove that, either the 2<sup>nd</sup> accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The 2<sup>nd</sup> accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the 2<sup>nd</sup> accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[49] A woman 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 13 years and 5 months of age at the time of the incident, and therefore, she had the mental capacity to consent.

[50] Let me now explain the elements of count two, under which the 1<sup>st</sup> accused has been charged with Aiding and Abetting the 2<sup>nd</sup> accused to commit the offence of Rape, contrary to Section 45, 207 (1) and (2) (a) of the Crimes Act.

[51] Section 45 of the Crimes Act reads as follows:

45. — (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) for the person to be guilty —

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) Subject to sub-section (6), for the person to be guilty, the person must have intended that —

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person —

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

(6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

(7) If the trier of fact is satisfied beyond reasonable doubt that a person either—

(a) is guilty of a particular offence otherwise than because of the operation of sub-section (1); or

(b) is guilty of that offence because of the operation of sub-section (1)—

But is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence."

[52] Therefore, in order for the prosecution to prove the second count that the 1<sup>st</sup> accused Aided and Abetted the 2<sup>nd</sup> accused to commit Rape, they must establish beyond any reasonable doubt that;

- (i) The 1<sup>st</sup> accused;
- (ii) On the specified day (in this case on 4 June 2011);
- (iii) At Labasa, in the Northern Division;
- (iv) Intended that his conduct would aid and abet the 2<sup>nd</sup> accused;
- (iv) For the 2<sup>nd</sup> accused to penetrate the vagina of MW with his penis;
- (v) Without the consent of the complainant; and
- (vi) The 2<sup>nd</sup> accused knew or believed that the complainant was not consenting, or he was reckless as to whether or not she was consenting.

[53] 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.

[54] If you are satisfied beyond any reasonable doubt that the 2<sup>nd</sup> accused, on 4 June 2011, at Labasa, penetrated the complainant's vagina with his penis, without the consent of the complainant and the 2<sup>nd</sup> accused knew or believed that the complainant was not consenting, or the 2<sup>nd</sup> accused was reckless as to whether or not she was consenting, then you must find him guilty of the first count of Rape.

[55] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the 2<sup>nd</sup> accused not guilty of the first count of Rape.

- [56] If you are satisfied beyond any reasonable doubt that the 1<sup>st</sup> accused, on 4 June 2011, at Labasa, aided and abetted the 2<sup>nd</sup> accused to commit Rape, then you must find him guilty of the second count of Aiding and Abetting.
- [57] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the 1<sup>st</sup> accused not guilty of the second count of Aiding and Abetting.
- [58] However, in the event you have a reasonable doubt as to whether the prosecution has proven the two elements based on consent, which I explained earlier, beyond reasonable doubt and therefore the offence of Rape, in count one is not established, as an alternative, you may consider whether the 2<sup>nd</sup> accused is guilty or not guilty of the lesser offence of Defilement of a Young Person between 13 and 16 Years of Age, in respect of the said count, though the 2<sup>nd</sup> accused is not formally charged in the Amended Information for that offence.
- [59] In terms of Section 215(1) of the Crimes Act:
- "A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years".*
- [60] As I have mentioned before, in layman's terms, having carnal knowledge with or of any person, means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.
- [61] Therefore, for the prosecution to prove the offence of Defilement of a Young Person between 13 and 16 Years of Age, the prosecution must establish beyond reasonable doubt that the 2<sup>nd</sup> accused, on 4 June 2011, at Labasa, penetrated the vagina of the complainant, who is between the age of 13 and 16 years, with his penis.
- [62] It is a defence to this offence if it appears to you that the accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years at the time.
- [63] No issue of consent comes into play under Section 215(1) of the Crimes Act, as it is said it is no defence to any charge under this Section to prove that the person consented to the act.
- [64] Accordingly, in such a situation, the prosecution will have to prove that the 1<sup>st</sup> accused Aided and Abetted the 2<sup>nd</sup> accused to commit the offence of Defilement of a Young Person between 13 and 16 Years of Age, in respect of the second count.
- [65] 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 the two elements based on consent

beyond reasonable doubt in count one. If you are satisfied that the prosecution has established all the elements constituting the offences of Rape beyond reasonable doubt, then you must find the 2<sup>nd</sup> accused guilty of Rape as charged in respect of count one.

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

[67] 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:

#### **ADMITTED FACTS FOR EPARAMA WARUA [THE FIRST ACCUSED]**

##### **1. COMPLAINANT AND ACCUSED**

1.1 **Complainant:** MW, was aged 13 years and 5 months. She resided at the Salvation Army Family Care Centre, Labasa in June of the year 2011.

##### **1.2 Juveniles:**

Eparama Warua was 15 years of age and resided at Sarwan Singh Street, Labasa with his uncle, Villame Ramere.

##### **2. FACTS**

2.1 On the night of 4 June 2011, the complainant and the two juveniles were at the Salvation Army Family Care Centre.

##### **3. CAUTION INTERVIEW**

3.1 On 27 July 2011, Eparama Warua was interviewed at the Labasa Police Station by Detective Constable Litia. Eparama's sister Asenaca Nairuruu was present with Eparama Warua during the interview.

#### **ADMITTED FACTS FOR STAN DAVIDSON [THE SECOND ACCUSED]**

1.1 From 3 June 2011 to 5 June 2011, MW, the complainant was accommodated at the Salvation Army Family Care Centre [Care Centre] in liaison with the Social Welfare Department as a result of abuse by her mother.

1.2 At the material time the complainant was 13 years of age.

1.3 The Salvation Army Family Care Centre is located downstairs.

1.4 Stan Davidson and his family [inclusive of his parents and 3 siblings and Eparama Warua] lived upstairs. Stan Davidson was 15 years of age at the time.

1.5 Stand Davidson's father, Villame Ramere, is the Pastor of the Salvation Army and his mother Lanleta Ramere is a cook at the Care Centre.

1.6 On 21 June 2011, Stan Davidson was interviewed under caution by Detective Constable Vasemaca. Lanleta Ramere, Stan's mother was present with him during the interview.

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

### Case for the Prosecution

[69] The prosecution, in support of their case, called the complainant, MW.

### [70] Evidence of the complainant MW

- (i) The complainant is now 20 years of age. Her date of birth is 12 January 1998.
- (ii) She testified that she has been living in Benau, Labasa for six years. She had got married in 2014. She has 2 children, one is 5 years and the other is 2 years old.
- (iii) The complainant said that even prior to her marriage she had been staying in Benau, with her parents.
- (iv) In the year 2011, she was in form one (Year 7). She was attending Labasa Arya Secondary School.
- (v) She testified that on 4 June 2011, she was living at the Salvation Army Family Care Centre. She was placed there by Social Welfare Authorities, as she was having some problems with her mother. She had been at the Centre for only 2 or 3 days.
- (vi) She testified to the events that took place on the night of 4 June 2011. She said that they were in the sitting room doing their homework. There were 3 other girls along with her at the time.
- (vii) Eparama, the 1<sup>st</sup> accused, had called her to go upstairs (to the top floor). The 3 girls had told her not to go. However the 1<sup>st</sup> accused had said that uncle was calling her (in reference to Stan's, the 2<sup>nd</sup> accused's father, who was a Pastor). Since the complainant thought that the Pastor was calling her, she had gone upstairs.
- (viii) When the complainant had gone up, the 1<sup>st</sup> accused had said that uncle was inside the room. So she had gone inside the room, but she could not see uncle. By that time the 1<sup>st</sup> accused closed the door and the 2<sup>nd</sup> accused had pulled her. She testified that the time was 5 past 10.
- (ix) She said there was no light inside this room, which was a bedroom. She could see inside the room due to the light of the neighbour's house shining inside the room.

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- (x) The complainant said when she went inside the room, the 2<sup>nd</sup> accused was sitting on his bed using the phone. The 1<sup>st</sup> accused had closed the door and sat on a chair. This chair had been beside the bed. The 1<sup>st</sup> accused had taken the chair and placed it beside the door and sat there. When the complainant had asked where uncle was the accused had said that uncle had gone to sleep.
  - (xi) The complainant had asked the 1<sup>st</sup> accused to open the door that she wanted to go outside. At this point the 2<sup>nd</sup> accused had pulled her hand and taken off her sulu. She had told the 2<sup>nd</sup> accused not to take off her clothes. However, he had said keep quiet. When the 2<sup>nd</sup> accused had pulled her sulu, she had hit him with her hand and told him don't take off her clothes. The witness demonstrated in Court how she did so.
  - (xii) The 2<sup>nd</sup> accused had then taken off her clothes and laid her down. He had then sat on her and had taken her t-shirt off. The 2<sup>nd</sup> accused had pushed her shoulders and laid her down on the floor, sat on top of her and taken her t-shirt off.
  - (xiii) The complainant was wearing a panty at the time. The 2<sup>nd</sup> accused had pulled out her panty, taken out his penis and put inside her vagina. She had felt pain in her vagina and frightened. When the 2<sup>nd</sup> accused put his penis into her vagina she had tried to remove it with her hand. However, the 2<sup>nd</sup> accused had pushed her hand down. She said she did this because she did not want to have sex with the 2<sup>nd</sup> accused. However, the 2<sup>nd</sup> accused had forcefully put his penis into her vagina.
  - (xiv) The witness said that she couldn't do anything at this time because the accused had threatened her. She said "if I gonna shout they are going to do something to me". She testified that at the time the 2<sup>nd</sup> accused was putting his penis into her vagina, the 1<sup>st</sup> accused was sitting on the chair and looking. The chair was placed near the door of the room.
  - (xv) The complainant said she did not want to lie down on the floor, or for her t-shirt, sulu or panty to be removed by the 2<sup>nd</sup> accused, and that she had made this known to him.
  - (xvi) Thereafter, the 2<sup>nd</sup> accused's younger brother Patrick had knocked on the door. The 1<sup>st</sup> accused had opened the door. Patrick had come inside the room and seen her inside the room. He had then gone to his father's room. At the time Patrick came into the room, the 2<sup>nd</sup> accused had already sex with the complainant.
  - (xvii) She testified that the two accused had carried her down to the stairs and put her on the stairs and gone back to the top flat where they lived. Later she said that it was the 2<sup>nd</sup> accused who carried her. The 1<sup>st</sup> accused was going in front and the 2<sup>nd</sup> accused was following. They had left her there with her clothes. She had then worn her clothes and gone into the bedroom downstairs.

(xviii) The witness testified that she did not tell anyone about the incident until she went to school and informed her Home Economics' teacher, Mrs Deo. She said she informed her teacher the following Monday, which was the 6 June 2011.

(xix) The complainant was cross-examined at length by both Counsels for the 1<sup>st</sup> and 2<sup>nd</sup> accused.

(xx) The position taken up by the 1<sup>st</sup> accused is that the complainant had insisted that the 1<sup>st</sup> accused tells her when they are watching movies and that he had undertaken to do so. It was suggested to the complainant that later that evening when they were watching movies, the 1<sup>st</sup> accused had called her from upstairs to tell her that they were watching movies. The complainant denied this suggestion.

(xxi) The following further suggestions were put to the witness on behalf of the 1<sup>st</sup> accused:

Q: And you were told by the other girls not to go but you went anyways?

A: I went because the 1<sup>st</sup> accused told me that the Pastor was calling me.

Q: I put it to you that when you went upstairs you watched one Hindi Bollywood movie with Stan and Eparama?

A: No.

Q: I put it to you that after a few minutes Stan left for the bedroom?

A: No.

Q: And thereafter you joined Stan in the bedroom – you went by yourself?

A: No. I didn't.

Q: Thereafter, I suggest to you that after a while later/a few minutes later, Eparama came into the bedroom and saw you and Stan on the bed?

A: No.

Q: Before 4 June 2011, you had seen Eparama?

A: Yes.

Q: So you had seen him around for a while?

A: Yes.

Q: And you are well aware of Eparama's condition from waist down?

A: Yes.

Q: And you were well aware that he needs those crutches (sticks) to walk around?

A: I am not sure about him using the sticks. May be he was using it, but in front of me I have not seen him using the sticks.

Q: You always see him with those two sticks?

A: No.



Q: Whenever you see him he is using the two sticks for support, correct?

A: No.

Q: At that time in 2011, you would have observed that Eparama cannot stand independently?

A: That I don't know.

Q: I put it to you that you made up this story of being called upstairs and was locked in the bedroom by Eparama, because you just wanted to leave the Centre?

A: No.

(xxii) The position taken up by the 2<sup>nd</sup> accused is that the complainant had come on her own free will into the bedroom and wanted to have sex with him.

(xxiii) The following suggestions were put to the witness on behalf of the 2<sup>nd</sup>

Accused:

Q: At around 10.05pm you were called by Eparama to come upstairs?

A: Yes.

Q: And when you came Stan was watching TV in the sitting room?

A: No.

Q: I put it to you that when you came Stan was watching TV in the sitting room?

A: No.

Q: And I also put it to you that you then came and joined Stan in watching TV?

A: No.

Q: And after a few minutes Stan then went to his room to sleep?

A: No.

Q: You then followed him into the room?

A: No.

Q: You then came into the bedroom and touched Stan on his side?

A: No.

Q: Stan then turned and asked you what you were doing in his bedroom?

A: No.

Q: And then you told Stan that you wanted to have sex with him?

A: No.

Q: And Stan told you that if you are willing too then he will have sex with you?

A: No.

Q: You both then undressed yourselves?

A: No.

Q: You then laid on top of the bed?

A: No.

Q: And then Stan laid on top of you and inserted his penis into your vagina?

A: No.

Q: Then you two had sex?

A: There was sexual intercourse but not according to their version of events. The only time there was sexual intercourse was when they forced me.

Q: I put it to you that after a few minutes then Stan told you that they should stop having sex?

A: No.

Q: Then Stan told you please dress yourself and go downstairs?

A: No.

Q: All these were true version of what happened on the night 4 June 2011?

A: No.

Q: The version you told Court in your evidence-in-chief was a lie?

A: No.

(xxiv) The defence showed certain inconsistencies and omissions made by the complainant in her statement to the police, compared to her testimony in Court.

- The complainant had made her statement to the police on 15 June 2011. However, she takes the position that the complaint to the police was made on the Monday following the incident (which would be 6 June 2011). In her statement it is recorded "I did not inform anybody about this incident until I went to school yesterday and I told Mrs Deo what happened to me that Saturday".
- In her testimony in Court she said that Stan held her hand after Eparama locked the door. However, in her statement to the police she says "Eparama held my hands".
- In her testimony in Court she said that Stan pulled her on to the floor. However, in her police statement she has stated "Eparama and Stan both pulled my hand towards the bed".
- In her testimony she said that Stan put his hand on her mouth to block it. However, in her police statement she has stated "Eparama closed my mouth with one t-shirt".
- The complainant testified in Court that she was carried from the room to the stairs. However, in her police statement it is recorded thus "Eparama and Stan then quickly took me outside and told me to go down. I went downstairs".

[71] 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 two accused. I explained to them that they could give sworn evidence from the witness box and/or call witnesses on their behalf. They could also address Court by themselves or through their counsel. They could even remain silent. They were given these options as those were their legal rights. The accused need not prove anything. The burden of proving their guilt rests entirely on the prosecution at all times. In this case, the 1<sup>st</sup> accused opted to remain silent, while the 2<sup>nd</sup> accused opted to offer evidence under oath in support of his case. I must emphasize that you must not draw any adverse inference against the 1<sup>st</sup> accused due to Court calling for his defence or of his choice to remain silent.

### Case for the Defence

[72] The 2<sup>nd</sup> accused gave evidence in support of his case. The defence also tendered to Court the following documents as defence exhibits:

Defence Exhibit DE1 – A photograph taken by the 2<sup>nd</sup> accused of the Salvation Army Home Care Centre-Front View.

Defence Exhibit DE2 – A photograph taken by the 2<sup>nd</sup> accused of the Salvation Army Home Care Centre-Side View.

### [73] Evidence of Stan Davidson Ramere

- (i) He is the 2<sup>nd</sup> accused in this case and is currently residing at Savusavu. He is a farmer by occupation.
- (ii) He testified that on 4 June 2011, he was in the sitting room (upstairs) watching a movie. Around 10.00 – 10.15 in the night he saw the complainant come inside their house. She came to watch a movie. He had told her that girls are not allowed to come up unless his father calls or there is approval from his mother. The complainant said she had already asked for permission.
- (iii) Thereafter, the complainant had sat on one settee near the door. Eparama was also present at the time.
- (iv) After a while he had stood up and gone to his bedroom to sleep. The complainant and Eparama were still watching movies.
- (v) He had been lying on his bed. The room was dark. After about 7 – 10 minutes he had heard the door opened. He had thought it was Eparama coming to sleep and he had asked him to close the door. After a while, he

had felt someone touching his left side. He had used his hands to touch that person as he felt surprised. He said if it was Eparama he could have touched his head. However, when he put out his hand he had touched the person's stomach. He realised it was the complainant's stomach.

- (vi) He had then told the complainant that girls are not allowed on the top floor and that she had crossed the boundary. So he had told her to go back. However, the complainant had asked if they could have sex that night. In the first instance, the witness said he can't do it. Then the complainant asked him again. The second time she had said that she wants him. The witness testified that he had asked the complainant straight if she is willing then he can do it, if not he cannot do it.
- (vii) The complainant had then undressed herself. She had taken out her singlet, she took out her bra and her skirt. Then she had come close to him and kissed him. Then the complainant had taken out his singlet/t-shirt. Then the witness had asked her to lie down. When she had lied down he had got on top of her and taken off his underwear. Then he had inserted his penis into her vagina. He had been having sex with the complainant for about four minutes.
- (viii) Then the door had opened and Eparama had come in to the room. He had come inside the room and sat beside the bed. This was before he had ejaculated. The witness said that since Eparama was in the room he had felt uncomfortable. Then he had told the complainant that they should stop. The complainant had said that she did not want to go down and that she wanted to sleep with him that night. He had asked her again to go down and she had accepted. The complainant had then got dressed. They had opened the door and he and complainant had come together to the verandah. He had told the complainant to go down and sleep.
- (ix) The 2<sup>nd</sup> accused was cross examined at length by the Prosecution. However, he continued to deny all the allegations against him.

### Analysis

[74] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, while the defence relied on the evidence of the 2<sup>nd</sup> accused himself.

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

- [76] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [77] As I have stated before, 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 beyond reasonable doubt.
- [78] The position taken up by the 1<sup>st</sup> accused is that he had called the complainant upstairs to watch movies as she had requested him to do so. He denies having enticed her to come upstairs. At the time the complainant came upstairs the 2<sup>nd</sup> accused had also been watching movies with him. Later the 2<sup>nd</sup> accused had gone to his bedroom. A few minutes later, the complainant had gone by herself to the bedroom.
- [79] The 2<sup>nd</sup> accused testified in Court and totally denies the allegation of Rape against him. However, he has admitted to having consensual sexual intercourse with the complainant.
- [80] You have heard the evidence of the witness for the prosecution as well as the defence. Therefore, it is for you to decide which witnesses are truthful and which are not. If you accept the version of the accused that the complainant consented to having sexual intercourse with the 2<sup>nd</sup> accused then you must find both accused not guilty of the two charges. However, even if you do not accept this version, that alone does not mean that the accused are guilty of the charges because the burden to prove their guilt beyond reasonable doubt remains with the prosecution at all times.
- [81] The defence also showed certain inconsistencies and omissions in the evidence given by the complainant during their testimony in Court. I have already directed you on how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected. However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question.
- [82] To what extent such inconsistency or omission 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.
- [83] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witness, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the two accused not guilty of the charges, since the prosecution has failed to prove its case. If

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

- [84] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider the 2<sup>nd</sup> accused's evidence also for its consistency and also the probability of his version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case.
- [85] If you neither believe the evidence adduced by the defence nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and they should be found not guilty of the charges.
- [86] However, I must caution you that even if you reject the evidence of the defence as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.
- [87] You must consider each count separately and you must not assume that because one accused is guilty on one count, that the other accused must also be guilty of the other count as well.
- [88] As I have already informed you, in the event you have a reasonable doubt as to whether the prosecution has proven the two elements based on consent, which I explained earlier, beyond reasonable doubt and therefore the offence of Rape, in count one is not established, as an alternative, you may consider whether the 2<sup>nd</sup> accused is guilty or not guilty of the lesser offence of Defilement of a Young Person between 13 and 16 Years of Age, in respect of the said count. In a like manner you will have to decide whether the 1<sup>st</sup> accused is guilty or not guilty of aiding and abetting the 2<sup>nd</sup> accused to commit the lesser offence of Defilement of a Young Person between 13 and 16 Years of Age.
- [89] In this regard you should also consider the fact that the 2<sup>nd</sup> accused has admitted to having consensual intercourse with the complainant.
- [90] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you believe the evidence of the defence, then you must find the two accused not guilty of the charges;*
  - ii. *If you neither believe nor disbelieve the evidence of the defence, then again you must find the two accused not guilty of the charges;*

- iii. *If you reject the version of the defence, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the two accused not guilty of the charges;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider whether the elements of the charges of rape and aiding and abetting of rape have been established beyond reasonable doubt. If so you must find the accused guilty of the respective charges. If not you must find the accused not guilty of the respective charges.*
- vi. *As an alternative to Rape in count one, you may consider whether the 2<sup>nd</sup> accused is guilty or not guilty of Defilement of Young Person between 13 and 16 Years of Age in respect of the said count.*
- vii. *As an alternative to Aiding and Abetting Rape in count two, you may consider whether the 1st accused is guilty or not guilty of Aiding and Abetting the 2<sup>nd</sup> accused to commit the offence of Defilement of Young Person between 13 and 16 Years of Age in respect of the said count.*

[91] Any re directions the parties may request?

[92] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately on the charges 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.

[93] Your possible opinions should be as follows:

**Count One (Against the 2<sup>nd</sup> Accused)**

Rape - Guilty or Not Guilty

If not guilty,

In the alternative

Defilement of Young Person between 13 and 16 Years of Age- Guilty or Not Guilty

**Count Two (Against the 1<sup>st</sup> Accused)**

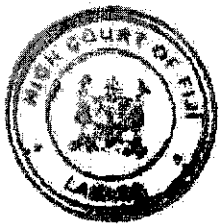
Aiding or Abetting Rape- Guilty or Not Guilty

If not guilty,

In the alternative:

Aiding and Abetting Defilement of Young Person between 13 and 16 Years of Age- Guilty or Not Guilty

[94] I thank you for your patient hearing.



*Riyaz Hamza*  
Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LABASA

Dated this 12<sup>th</sup> Day of October 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Labasa.  
Solicitors for the 1<sup>st</sup> Accused : Office of the Legal Aid Commission, Labasa.  
Solicitors for the 2<sup>nd</sup> Accused : Vananalagi & Associates, Suva.