

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 173 of 2015

BETWEEN : STATE

AND : FILIPE TUISAWAU KOIRONIBAU

Counsel : Ms Bogitini for the State
Ms Radrole for the Accused

Dates of Hearing : 23, 24 & 25 September 2019

Closing Speeches : 25 September 2019

Date of Summing up: 27 September 2019

(The Complainant's name is suppressed and she is referred to as AF)

SUMMING UP

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You are to decide the facts of the case,

based on the evidence that has been led before this court. You will then apply those directions to the facts and give me your opinions as to whether the Accused person is guilty or not guilty in respect of each count.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going through evidence. If you do not agree with that opinion you will ignore it and form your own opinion with that evidence.
3. You must base your opinion only and only on the evidence given by the witnesses. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence.
4. You may act only upon the evidence given by the witnesses in this case and nothing else. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so is entirely a matter for you.
5. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinion. You will also not let any sympathy or prejudice sway your opinions. Emotions has no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of each element of the offences. You must not form your opinion based on the emotions, sympathies, prejudices, speculations and morality. As I said before you only have to consider the evidence given by the witnesses in this case and nothing else to form your opinions.

6. I will give you only a summary of evidence. I will not go through every word uttered by the witnesses in this case, and if I leave out something that seems to be important, nothing stops you from taking that into account. Because you decide the facts.
7. After this summing up, you may give your individual opinions as the representatives of the community. You may reject or accept any evidence in forming your opinion. Your opinions need not be unanimous. And you need not give reasons for your opinions.
8. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Ladies and gentleman assessors,

9. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated them.
10. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail and it is also likely that some may perceive the same incident differently and narrate differently. You have to use your common sense in assessing the reliability and credibility of witnesses. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.

11. Generally, complainants of sexual offences react differently when they got to narrate the traumatic experience they have gone through. Some may display obvious signs of distress, anxiety and restlessness, but some may not. Every witness has their own way of expressions when they give evidence about an experience, specially a traumatic one. 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 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.
12. Subsequent conduct of complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may react instantly and report because of their education level, social status, financial independency and for other similar reasons. Some may not complain at once due to immaturity, lack of education, social status and financial dependency. There could be others, who react with shame, fear, shock or confusion, may not complain at once. A complainant's reluctance to report an incident could be due to many reasons. It could be social stigma which follows such incidents or cultural taboos in her society. Some may not even complain at all due to the fear that it may damage family ties. A complainant may not be comfortable to report a matter to close family members due to the respect, fear, or due to the reluctance to openly discuss matters relating to sex with elders.
13. A late complaint does not necessarily signify a false complaint. Similarly, an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to decide what weight should be attached to the promptness or the lateness of the complaint.
14. It must be noted that according to the law sexual offences do not require other evidence to corroborate the evidence of the complainant. Which means you can even solely rely on the evidence of the complainant without any other evidence to support it.

15. Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue.
16. 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. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Memory is fallible, and you might not expect every detail to be the same from one account to the next. A witness may be honest enough but have a poor memory or otherwise be mistaken. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
17. As a matter of law, I must direct you that what a witness said on oath is only considered as evidence. What a witness said in her or his statement to police, that is out of Court and therefore is not evidence. However, previous statements are often used to challenge a particular witness's credibility and reliability because a previous inconsistent statement may indicate that a witness said a different story then, and as a result her evidence might not be reliable. It is for you to decide the extent and importance of this inconsistency.

18. Does the evidence of a particular witness seem 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. 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.
19. 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.
20. When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the Accused is guilty or not. 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 common sense and wide experience which you have acquired living in this society.
21. 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.
22. 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.

23. 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.
24. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the prosecution must prove every element of the offences beyond reasonable doubt.
25. The Accused need not prove his innocence. The fact that the Accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence. The burden is on the prosecution to prove the guilt of the Accused. That means you must be satisfied that the state has proved every element of the offences beyond reasonable doubt. That doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of the offences you must find him guilty.

Ladies and gentleman assessors,

26. We will now look at the offences that the Accused is indicted for. The Accused is indicted for the following counts as per the Information filed by the Director of Public Prosecutions;

Count 1

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.

Particulars of Offence

Filipe Koroinibau between the 1st day of January and the 31st day of December 2013 at Sigatoka in the Western Division, penetrated the vagina of AF with his fingers without her consent.

Alternative Count to Count 1

Statement of offence

Sexual Assault: Contrary to Section 210(1)(a) of the Crimes Act 2009.

Particulars of offence

Filipe Koroinibau between the 1st day of January and the 31st day of December 2013, at Sigatoka in the Western Division unlawfully and indecently assaulted AF by fondling her vagina with his fingers.

Count 2

Statement of offence

Rape: Contrary to Section 207(1) and (2)(b) of the Crimes Act 2009.

Particulars of offence

Filipe Koroinibau between the 1st day of January and the 31st day of December 2013 at Sigatoka in the Western Division penetrated the vagina of AF with his tongue without her consent.

Alternative Count to Count 2

Statement of offence

Sexual Assault: Contrary to Section 210(1)(a) of the Crimes Act 2009.

Particulars of offence

Filipe Koroinibau between the 1st day of January and the 31st day of December 2013, at Sigatoka in the Western Division unlawfully and indecently assaulted AF by sucking her vagina with his tongue.

Count 3

Statement of offence

Sexual Assault: Contrary to Section 210(1)(a) of the Crimes Act 2009.

Particulars of offence

Filipe Koroinibau between the 1st day of January and the 31st day of December 2013, at Sigatoka in the Western Division unlawfully and indecently assaulted AF by fondling and sucking her breast.

Count 4

Statement of offence

Pornographic activities involving juveniles: Contrary to Section 62A (1)(b) of the Juveniles (Amendment) Act 1997.

Particulars of offence

Filipe Koroinibau between the 1st day of January and the 31st day of December 2013, at Sigatoka in the Western Division in private, participate in a video recording of pornographic activities involving AF, a juvenile.

27. Now I will explain what matters you must take into consideration to determine whether the offences are proved by the prosecution. For the first and second counts the elements of the offences are almost the same except for the fact that in first count penetration is by fingers and in the second count penetration is by tongue.

28. Therefore, the prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vulva or vagina of the complainant with his fingers(first count) and with his tongue (second count);
- b. without the consent of the complainant; and
- c. the Accused knew or believed that the complaint was not consenting; or the Accused was reckless as to whether or not she was consenting.

29. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the Accused and no one else committed the offence. The identity of the Accused is not in dispute in this case.

30. The second element involves the penetration of the complainant's vulva or vagina. The law states that even the slightest penetration of the vulva or vagina is sufficient to constitute the offence of rape. The vulva includes the rounded fleshy protuberance situated over the pubic bones that is covered with pubic hair, outer lips, inner lips, clitoris and the external openings of urethra and vagina. The vagina, also known as the birth canal is inside the body. Only the opening of the vagina can be seen from outside. Therefore, one has to necessarily enter the vulva before penetrating the vagina. Any kind of intrusive violation of the complainant's sexual organ, may it be vulva or vagina constitute the offence of rape.

31. As per the offence that the Accused is charged with in this case, the penetration is not by a penis. The offence is constituted by penetration of the vulva or vagina with a thing or a part of the body of the Accused that is not a penis. Therefore, the prosecution must prove beyond reasonable doubt that the Accused penetrated the vulva or vagina of the complainant with his fingers to any extent in respect of the first count. And for the second count the prosecution must prove that the Accused penetrated the vulva or vagina of the complainant with his tongue to any extent.

32. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the Accused penetrated the complainant's vulva or vagina without her consent.
33. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. For the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. Consent obtained through force, threat or intimidation, fear of bodily harm, or by use of authority is not considered as consent given freely and voluntarily. Submission without physical resistance by the complainant alone, to the act of the other person will not constitute consent.
34. The complainant must have the freedom to make the choice. It means she must not have pressured or forced to make that choice. The complainant must have mental and physical capacity to make that choice. Further, the consent given by the complainant may have been limited to a particular sexual activity and not for another sexual activity. Also, the consent can be withdrawn at any time. It is an ongoing state of mind and its revocable once given. Consent of a person for sexual intercourse cannot be assumed.
35. In addition to proving that the complainant did not consent to the Accused to insert his penis into her vulva or vagina, the prosecution should also prove that, either the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
36. The Accused was reckless, if the Accused realised there was a risk that she was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the vagina, you may find that the Accused was reckless as to whether or not the complainant was consenting. In other words, you have to see whether the 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.

37. If you believe that the prosecution proved all the elements of the first count you must find the Accused guilty. If you believe that the prosecution proved all the elements of the second count you must find the Accused guilty to the second count. If you believe that the prosecution failed to prove the first count of rape then you must consider the alternative count of sexual assault. Likewise, if you believe the prosecution failed to prove the second count of rape you must consider the alternative count of sexual assault.

38. I will now discuss the elements of the offence of sexual assault which need to be proved by the prosecution in respect of the alternative counts to first and second counts. Further you may have observed that the third count is also for sexual assault.

39. The main elements of the offence of Sexual Assault are that:

- (i) The Accused,
- (ii) Unlawfully and Indecently,
- (iii) Assault the complainant.

40. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if a right-minded person would consider the act as indecent. It is your duty as assessors to consider and decide whether the act in the respective count is an indecent act amounting to sexual assault.

41. In the alternative count to the first count it is alleged that the Accused committed sexual assault by fondling the vagina with his fingers. In the alternative count to the second count it is alleged that the sexual assault is committed by sucking vagina with his tongue.

42. If you believe that the prosecution failed to prove all the elements of the alternative counts to first and second counts you must find the Accused not guilty to the respective counts.

43. In the third count it is alleged that the offence of sexual assault is committed by fondling and sucking the complainant's breast.

44. If you believe that the elements of the third count is proved beyond reasonable doubt then you must find the Accused guilty to the third count. If not you must find him not guilty.

45. The prosecution must prove the following elements in respect of the fourth count;

- i. The Accused
- ii. In private
- iii. Participate in a video recording of pornographic activity
- iv. Involving a juvenile.

46. There is no dispute in this case about the identity of the Accused. It is admitted that it is the Accused who is shown in the video recording.

47. Juvenile is a person who has not attained the age of 18 years and includes a child and a young person.

48. In this case the following facts were admitted by the parties among other things;

“ The Accused had recorded a video of him and the complainant in his house at Cuvu village, Nadroga sometimes in 2013 to 2014. The content of the video is not disputed by the parties and is tendered by consent. The video contains footage of;

- The complainant nude with the Accused licking the vagina of the complainant by use of tongue; and
- The complainant nude with the Accused using his finger to touch the vagina of the complainant; and
- The complainant nude with the Accused fondling and sucking the breasts of the complainant.

49. Further the Accused admitted during the trial that the complainant was 15 or 16 years at the time of the alleged offences.

50. The only contention was whether the video recording is a recording of a pornographic activity.

51. According to the law pornographic activity includes activity, which is either indecent or obscene, or in any way judged by the standards of the time, is of a sexual nature and offensive.

52. If you are sure that the prosecution proved all the elements of the fourth count beyond reasonable doubt you must find the Accused guilty to the fourth count. If not, you must find him not guilty to the fourth count.

Ladies and gentleman assessors,

53. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions. The prosecution called three witnesses to prove the case against the Accused.

54. The complainant said that her date of birth is 07 April 1998 and she had been living in Cuvu village in Sigatoka since she was small until she started residing

in Nadi two years ago. The complainant said that her parents were separated and therefore she was residing with her grandmother in Cuvu village. According to the complainant the Accused in this case is her uncle and he is related to her from her mother's side. She said that the Accused was like a father to her. She said that she respected him as he is the son of the chief Roko Tui Dreketi.

55. The complainant gave evidence that one day in 2013 the Accused came to her house. He had said that he has a lotion for the white spots on the complainant's body. The complainant had gone to the Accused's house after a while. The Accused had offered to make a cup of tea for her. She said that the Accused made tea for her and him and there was white foam in the tea. The complainant had felt dizzy after having the tea. She said that she wanted to lie down and rest for a while as she was feeling dizzy. She had lied down on a bed which was in the sitting room. She said that she could not close her eyes and she stayed awake. The complainant further gave evidence as follows;

“ He came lie next to me and started touching my body and after doing that I couldn't feel my body that when he started touching my body, I wasn't able to move because the tea that I drink it made my body feel so different and weird.”

56. She said by weird she meant that she did not like what he said. The complainant further said that the Accused licked her vagina with his tongue. She said that she felt his tongue went inside her vagina. She said that she did not agree for him to do that. She said that she could not make him know that she was not agreeing as she could not move. She said that she did not say anything to him as she was scared that he would do something to her or he would threaten her.

57. The complainant gave evidence that on the same day the Accused used his fingers to touch her vagina. She said that his finger went inside her vagina as she felt that something hard going inside her vagina. She said that the finger

went inside her vagina half way through. The complainant said that she did not agree for him to insert his finger. She said that she could not make him know that she was not agreeing as she could not move her body. She said that she did not say anything to the Accused thinking he would do something to her. According to the complainant the Accused has a military background and he is strict and aggressive.

58. The complainant further testified that on the same day the Accused fondled and sucked her breasts. She said that she did not agree to that either. She said she pushed his head and made him know that she does not want him to do that. She said it was when she started feeling her senses back.

59. According to the complainant on the same day the Accused had recorded a video as well. However, she said that she was not aware that he was recording a video.

60. She also said that she was lying down when the Accused inserted his tongue into her vagina. The complainant first said that she could not remember who removed her T shirt and the skirt. However later she said it was the Accused who took off her clothes and she saw him removing the clothes. Then she was asked by the State counsel as to why she said earlier that she could not remember who removed her clothes. The complainant responded that the Accused was the only person who was inside the house and that's how she knows it was him who removed her clothes.

61. The complainant said that after inserting the tongue, the Accused inserted his finger into her vagina. The Accused had fondled and sucked her breasts only after those two acts according to her evidence. The complainant said that she cannot remember what position she was when he fondled and sucked her breasts. She also said that she cannot recall whether it was day time or night time. She said that she cannot even remember what time she went to his house.

62. The complainant said that she did not scream or alert any one as she was scared and ashamed. She said that she was scared about what people would say about her if they get to know about it. She also said that if she share it with any one she was scared that the Accused might do something to her.
63. She gave evidence that she tried to escape when he was fondling and sucking her breasts by pushing him away. She said that she pushed him away and left his house after putting on her clothes.
64. The complainant further said that she cannot recall for how long he was doing these acts to her as her mind was somewhere else. She said that she did not tell anyone about the incidents as she was shocked and ashamed. She said it was the Accused's wife who reported the matter to the Police.
65. Under cross examination the complainant said that she used to frequently visit the Accused's house. In response to the questions put by the defence counsel the complainant said that the Accused offered her a cup of tea on the day she went to get treatments for her white spots.
66. The complainant was shown her statement and she admitted that its her statement and it was made on 11 October 2015. The complainant admitted that she has not mentioned in her statement that the Accused offered her a cup of tea on the day she went to his house for treatment of the white spots. She further admitted that she has not stated to the police that she felt dizzy on that day after drinking tea. She also admitted that the Accused only drinks coffee although she said while giving evidence that he drank tea with her.
67. The complainant further admitted that she has not mentioned in her statement that she laid down on a bed in the sitting room. The complainant said that although she has stated in the Police statement that she laid down on a resting seat outside the house, she laid down on a bed.
68. Under cross examination the complainant admitted that she informed the Police that she was not aware of what had happened on the day she went to

get treatments for her white spots. The complainant further responded to the questions put by the Defence as follows;

Q: Now you also mentioned in your evidence that on that particular day you went for treatment of white spots on your body?

A: Yes

Q: Ratu Filipe started touching your body?

A: Yes

Q: Now you agree with me that nothing of that sort happened on that specific time that you went for treatment of white spots on your body?

A: Yes

Q: And you also mentioned in your evidence that Filipe licked your vagina with his tongue?

A: Yes

Q: Now you agree with me that on that particular occasion that you went for administration of treatment of white spots on your body, nothing of this sort did occur or take place?

A: No. That particular day I went for the treatment for the white spots on my body and then I went back home.

Q: So nothing did take place?

A: It happened when he came back to his house.

69. The complainant admitted that nowhere in her statement she has mentioned that the Accused licked her vagina on that particular day. She further admitted that she has not mentioned in her Police statement that the Accused touched her vagina and inserted his finger into her vagina on the day that she went to administer treatments for her white spots. The complainant admitted under cross examination that at no point of time she was threatened by the Accused. She also admitted that she has not mentioned in her statement that on the day she went for treatments for her white spots she pushed the Accused away or he sucked her breasts.

70. She further responded to the cross examination by admitting that her evidence in court contradicts with what she told the Police in her statement. She confirmed that she gave the statement to the Police after 2 years when the Accused's wife reported the matter to the Police. She admitted that the alleged incidents only came to light because of the report made by the wife of the Accused.

71. The complainant agreed that she used to be playful around the Accused. However, she denied that she had a consensual sexual relationship with the Accused. The complainant denied that the sexual encounter with the Accused happened inside his room. She denied that she was awake and conscious. The complainant denied that she consented Filipe to lick her vagina or to suck and fondle her breasts. She also denied that she consented the Accused to touch her vagina.

72. Under cross examination the complainant said that she struggled. However, when it was put to her that she was relaxed throughout the sexual activity, she said that she was not in her right state of mind.

73. During re-examination the complainant said that some parts are missing in her statement because she was scared, and she was young when she gave the statement to the Police. She said that the alleged acts are mentioned in paragraph 6 of the statement as it happened during the second time she went to the Accused's house. She said that they used to spoil each other and that's what she meant by being playful around the Accused. The complainant said that she did not call for help as she was not in the right state of mind.

74. That was the evidence given by the complainant. The prosecution then called the former wife of the Accused, Amelina Doughty.

75. Amelina Doughty gave evidence that she was married to the Accused for 18 years. She said that in 2015 they were separated, and she was living with her mother. According to the witness in July 2015 she had gone to the house in

Cuvu to pick up a washing machine. She had noticed some devices on the Accused's bed and she had randomly picked a USB which was with those devices. A few days later when she opened the USB she had seen pictures of her children and nieces in the USB. The complainant said that was when she lodged a report and handed the USB to the Police.

76. The prosecution played two video clips pertaining to this case. The witness recognized the video clips as the ones which were in the USB. Further she identified the female in the video as the complainant and the male person in it as the Accused. Amelina Doughty said that the video was recorded in their bedroom. She tendered the CD which contains the video as Prosecution Exhibit 1. The witness said that in the year 2013 she was residing in Cuvu and she was employed at Shangrila Resort. She said that in 2013 she was living with the Accused at the house in Cuvu.

77. During cross examination the witness said that she separated from the Accused in 2014.

78. The next prosecution witness was Sgt 4045 Jemesa Lave. He said that he is working for the cyber-crime unit as a digital forensic specialist. He said that in 2015 he was handed over a USB and he extracted two videos and copied it to a CD. The witness identified the Prosecution Exhibit 1. He further confirmed the contents of the videos to be the same that he extracted from the USB.

79. That was the case for the Prosecution.

80. After the closure of the prosecution case the Accused was explained his rights. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused and he need not prove his innocence. The Accused decided to give evidence.

81. The Accused said that in 2013 he was living alone at his house in Cuvu. The Accused said that during 2013 he had a close relationship with the complainant. However, he said that he had similar relationships with everyone

else in the village. He said that the complainant frequently visited his house. The Accused gave evidence about how he started sexual relationship with the complainant.

82. The Accused said that one particular occasion he licked the complainant's vagina, touched her vagina and fondled and sucked her breasts.

83. The Accused said that the complainant came to his place one day to apply Dhani lotion. He had applied the lotion on her with a cotton wool. The Accused said that after applying the lotion he requested the complainant to go out into the sun. He said then the complainant was lying on a deck chair outside and he told her to go and sleep inside if she wants to sleep.

84. The Accused said that no sexual activity occurred on the day that he applied lotion on her.

85. The Accused said that on another occasion the complainant came to his room when he was alone at home. He said she came and lied next to him and they were talking. The Accused said that they were moving closer while talking and joking and they eventually kissed. He said that the complainant took off her clothes. According to the Accused the events which are captured in the two videos had taken place on that occasion. He said that the complainant was calm and quite. He said that she did not struggle in distress. The Accused said that the complainant did not indicate to him that she did not like the sexual activities. He said that the complainant left after the sexual activities.

86. The Accused denied that he penetrated the complainant's vagina with his fingers. He said there was only contact and it was non-penetrative.

87. Under cross examination the Accused said that he was 48 years old in 2013 and he knew that the complainant was 15 or 16 years at that time. He agreed that his mother is the Roko Tui Dreketi, the high chief of the Burebasaga confederacy. He also said that he worked for the Kalevu which is the high chief of Nadroga.

88. The Accused admitted that when he return from Iraq he had medical packs with surgical and medical items, bandages and morphine. The Accused admitted that it was him and the complainant who are in the two video clips that were played in court. He said it was recorded in 2013 in Cuvu. He admitted that it was him who recorded the videos.

89. He further admitted that in the video he is licking the complainant's vagina, touching her vagina and fondling and sucking her breasts. He confirmed that only himself and the complainant were at home when it was recorded.

90. The Accused denied that the complainant was not responding to the acts happening in the video. But he admitted that the complainant is lying still for most of it. The Accused denied that he made any tea.

91. The Accused denied that the complainant was not in her right state of mind when the video was recorded. He denied that the complainant was afraid of him. He admitted that the video shows some sexual activities but he said that he does not know whether it is pornography.

92. The Accused admitted that the evidence he gave about how the sexual relationship with the complainant started was not put to the complainant when the complainant was cross-examined. When it was put to the Accused that he made up the story, he said that he only responded to a question from his memory.

93. That was the case for the defence.

Ladies and gentleman assessors,

94. It should be noted that in our law no corroboration is needed to prove a sexual offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, the prosecution can solely rely on the evidence of the

complainant only without any supporting evidence whatsoever in sexual offences. It is for you to decide how credible and consistent is the evidence of the complainant.

95. You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the prosecution witnesses are truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or not reliable then you must find the Accused not guilty. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether the prosecution has proved the elements of the offences beyond reasonable doubt with that truthful and reliable evidence.

96. It is important that you must apply the same considerations which you applied in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence of the Accused. You must consider the consistency of his evidence and must also consider the probability of his version. If you find the evidence of the Accused is truthful and reliable, then you must find the Accused not guilty for the counts against him.

97. If you neither believe the evidence adduced by the Accused nor disbelieve his 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 he should be found not guilty.

98. However, I must caution you that even if you reject the evidence of the Accused as not truthful and reliable that does not mean the prosecution case is automatically proved. The prosecution has to prove its case independently of the evidence of Accused.

99. The prosecution case was that the complainant was feeling dizzy after drinking a cup of tea given by the Accused and then the Accused penetrated the complainant's vagina with his fingers and tongue without her consent and fondled and sucked her breasts. Further it is alleged that the Accused in private

participated in a video recording of pornographic activities involving the complainant who was a juvenile.

100. The Accused admitted that he licked and touched the vagina of the complainant. However his contention is that he did not penetrate the vagina and the acts were done with the consent of the complainant. The Accused further admitted that he fondled and sucked the breasts of the complainant with her consent. In respect of the fourth count the Accused admitted that he recorded the sexual activities with the complainant and his only argument was whether the said acts are pornographic activities.

101. As it was said before, it is the duty of the prosecution to prove the elements of the offences against the Accused. The Accused need not prove his innocence.

102. I have now given you the directions of law and summarized the evidence adduced in this case. Before I conclude my summing up let me remind you some points again.

103. If you believe that the prosecution has proved beyond reasonable doubt all the elements of the first, second, third and fourth counts then , you must find the Accused guilty to the respective counts.

104. If you believe that the prosecution did not prove the first count of rape then only you must consider the alternative count of sexual assault. If you believe that the alternative count of sexual assault is proved beyond reasonable doubt, then you must find the Accused guilty to that alternative count. Likewise, if you believe that the prosecution did not prove the second count then only you must consider the alternative count of sexual assault to the second count.

105. If you are sure that the prosecution proved the third and fourth counts beyond reasonable doubt then you must find the Accused guilty to the

respective count or counts. If not, you must find the Accused not guilty to the respective count or counts. You may now retire and consider your opinions.

106. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

107. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



Rangajeeva Wimalasena
Acting Judge

At Lautoka

27 September 2019

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Legal Aid Commission