

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 89 of 2018

[CRIMINAL JURISDICTION]

STATE

V

LINO FEREI

Counsel : Ms. S. Kiran and Ms. S. Sharma for the State
Ms. L. Vaurasi and Mr. V. Seduadua for Accused

Hearing on : 27- 31 May 2019

Summing up on : 03 June 2019

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are the judges of facts.
2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or

otherwise come to know anything about this case outside this court room, you must disregard that information.

3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibits tendered. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. A police statement of a witness can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense

as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.

8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, 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.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.

10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
13. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
14. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.

15. In order to prove that an accused is guilty of an offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of the offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
16. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.
17. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
18. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

COUNT ONE

Statement of Offence

Rape: contrary to section 207(1) and (2)(a) of the Crimes Act of 2009.

Particulars of Offence

LINO FEREI on the 20th day of February, 2018 at Nasinu, in the Central Division penetrated the vagina of **MAKI RAIJELI SOSEFO** by inserting his finger into the vagina of **MAKI RAIJELI SOSEFO**, without her consent.

19. To prove the offence of rape in this case, the prosecution should prove the following elements beyond reasonable doubt.
 - a) the accused;
 - b) penetrated the vagina of the complainant with his finger;
 - c) without the consent of the complainant; and

- (i) the accused knew or believed that the complainant was not consenting; or
 - (ii) the accused was reckless as to whether or not she was consenting.

- 20. The first element is concerned with the identity of the accused. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.

- 21. The second element involves the penetration of the complainant's vagina with the finger. The law states that this element is complete on penetration to any extent. Therefore, it is not necessary to have evidence of full penetration. A slightest penetration is sufficient to satisfy this element.

- 22. 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 vagina without her consent.

- 23. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not 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.

- 24. Apart from proving that the complainant did not consent for the accused to insert his penis inside her 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.

25. It is not difficult to understand what is meant by the sentence “the accused knew or believed”. But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant’s vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
26. You should also remember that no witness can look into an accused’s mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused’s state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
27. Now let us look at the evidence. The complainant (PW1) said in her evidence that;
 - a) *She is 29 years old. She was residing at Caubati with her uncle, uncle’s wife, uncle’s two sons and a younger daughter as at 20/02/18. One of the sons was Terrence and the other one was the accused.*
 - b) *She said, on 20/02/18, after 6.30am the accused came to her room while she was lying down. She said the accused’s parents always leave the house around 6.30am. At that time she was wearing a blue top and tights. The accused pulled her pants down and inserted his finger inside her vagina. She said the accused ‘made motions with his finger’. She pushed him but the accused pushed her back. She said she could not do anything because the accused was big. She said she was looking at the wall and was crying because she never imagined that the accused would do something like that.*
 - c) *She said she asked the accused where his parents and his sister are. The accused told her that nobody is at home. She said that she was talking to him as she wanted to*

- look for a way for him to move out. She said that the accused also kissed her while his finger was inside her vagina. She turned away and she asked her why he is kissing her and the accused did not respond. She said she felt like killing herself.
- d) According to her estimation the accused was inserting his finger inside her vagina for 15 to 20 minutes. After that the accused took his finger out and left. She had no idea where the accused went. She then ran to the road and called her aunt by the name of Pauline. She did not call her from the house because she was scared. She said that she told her aunt that the accused tried to rape her and told her to come. Aunt Pauline who was residing at New Town came after 7.00am.
 - e) When she was asked the distance, she said the road she ran to was about 05 minutes away from the house. She said that it takes 5 minutes to run that distance.
 - f) She went back to the house with her aunt and she had her shower. She said she did not see the accused when she went back to the house. She then went to the Chinese shop with the aunt to wait for her cousin sister to pick them. Then again she went back to the house with her cousin sister. She took all her things and went to the sister's place at Namadi Heights. Thereafter she lodged a complaint with the police the same day.
 - g) During cross examination she said she was brought up in Rotuma by her grandparents since she was a toddler and she was brought up together with her aunt Pauline.
 - h) She said she would leave the house at 7.30am every morning to catch the 7.45am bus while she was staying at Kuruva Road.
 - i) She said on 20/02/18 she woke up when she heard the door bang and the accused was already in the room pulling her pants down. She said she did not see the accused closing the main door, but when she heard the sound the accused was the only one there. She said that when she opened her eyes the accused was on top of her with his finger inside her vagina.
 - j) She said that after the incident she felt angry, surprised and she 'felt hurt inside' as she never expected that to happen. She said when she ran outside, the main door was open.
 - k) She agreed that she told the police that the accused had both his hands on her sides. She said that it was because she pushed him and he pushed her back and then she could not do anything. She said that the accused was moving his finger inside her vagina where the accused was trying for her to get feelings but she had no feelings and she was just lying down and crying.
 - l) She said that she did not see what time her uncle and the family left that day as she was sleeping. But she was sure that it is the 6.30 bus that they catch.
 - m) She said she did not call out to anybody as she was just crying and telling him to get off. She said she was scared and shocked because she never imagined that he would do that to her. She was also scared that the accused may kill her.
 - n) She agreed that she told the police that she wanted the accused to be taught a good

lesson. She said she told this to the accused's father as well.

- o) During re-examination she said that she had a good relationship with the accused's mother while she was staying in their house. She said that the accused had both his hands on her sides after she pushed him to block (stop) her from moving. She said that this happened after he had taken off her pants. She said the reason the accused put both his hands on her sides was to stop her move.

28. The second prosecution witness was Hailey Elizabeth Pauline Ferei (PW2). She said that;

- a) The complainant is her niece. The complainant was brought in by her mother when she was a baby. As at 20/02/18 she was residing at New Town. On that day, in the morning the complainant called her when she was trying to put her daughter to sleep. The daughter was sick.
- b) She said that the complainant could not talk properly. The complainant sounded scared and her voice was shaky. The only thing the complainant told her was 'aunty please hurry home I am scared'. When she asked her scared of what, the complainant said that she is scared of the accused. She asked her what did he do, but the complainant did not tell her.
- c) She said that the complainant called her before or after 7.00am. She could not recall the exact time. She went to meet the complainant after she put her daughter to sleep. The complainant was standing on the road when she met the complainant. The complainant was crying and shaking. She calmed her down and she asked the complainant what happened.
- d) The complainant told her that; 'when everybody left she heard the door closed, she was still lying down on the bed, the accused closed the door, locked it and came to her, she realized that the accused was inside the room, he pushed her and forced her and blocked her, he pulled her pants down, he put his finger inside her vagina and forced the finger in and shake it, she told him to stop it, but he didn't stop.'
- e) According to the complainant, the complainant told the accused that the witness is coming to Caubati and that is why the accused left her. She said that the complainant told her all this while the two of them were walking towards the house.
- f) She said that the complainant told her that the accused is in the room. So, she called the accused while she was inside the house. The accused answered when she called him for the second time. When she asked the accused whether he is going to work, the accused told her that he will go to work. The accused asked her for a cigarette roll and she gave him \$2. The accused then left and never came back.
- g) She did not ask the accused about what the complainant told her because she knew that if she asked him they will fight. She said that the complainant was having a shower when she was talking to the accused. She does not know the time she was talking to the accused. After the complainant came out from the shower they packed the complainant's stuff. Then she called the accused's father but the phone was diverted.

- h) *They left the house around 7.55am. That was long after the accused had left. They went to the Chinese Shop and waited there for her niece, Sofi to come and pick them. After that the three of them went back to the house to pick the stuff and then they dropped her at Nabua.*
- i) *During cross-examination she agreed that it took her about 30 minutes to reach the complainant after she got the call. She agreed that she would have gone back to the house between 7.30am and 8.00am. When it was suggested to her that what she said about the accused being in the house cannot be true because the accused was at the Valelevu Health Centre, she denied and said that the accused was at home.*
- j) *She agreed that she told the police that “she told me while she was lying on the bed, she heard door bang and saw the accused locked the door behind her”.*

29. The third prosecution witness was Dr. Elvira Ongbit (PW3). She said that;

- a) *She had been a medical doctor for more than 31 years. She had specialized in obstetrics and gynecology. She had been working with the Ministry of Health since 2001. She medically examined the complainant on 20/02/18 at 1.00pm. She tendered the medical report as PE 1.*
- b) *She had noted that the complainant was emotionally affected and was teary eyed. She said that during the vaginal examination, she observed a fresh superficial abrasion below the lower most part of the vaginal opening. She explained that a superficial abrasion means that the injury was affected only on the top most layer of the skin. She also noted healed hymenal lacerations at 6 o'clock and 9 o'clock positions.*
- c) *She said that the abrasion may have been caused by rubbing of fingers or even by an erected penis. She said, fresh means that the injury was clearly visible and such an injury would usually take 4 to 7 days to heal. She said that it is possible for the said injury to have taken place within 6 to 7 hours.*
- d) *The two hymenal lacerations she observed were more than 2 weeks old.*
- e) *During cross examination she agreed that it is possible for the abrasion she noted to have been there for 7 days. She said that anything that would be rubbed in the area could cause an abrasion. When she was asked whether it is expected to see a hymenal laceration if a finger was moved anyhow for 15 to 20 minutes by force, she said that an adult vaginal opening, specifically the hymen, is elastic and because of the two healed hymenal lacerations the vaginal opening can stretch and expand more and therefore it is possible in such a situation that it will not show any visible injuries. She said that it is possible for the abrasion to have been there for more than 48 hours but it is also possible for that injury to have sustained within [the last] 24 hours.*

30. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The

burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence and call witnesses.

31. The accused (DW1) said in his evidence that;

- a) *On 20/02/18 he woke up at 6 o'clock. That is the usual time he would wake up because he had to take two buses to go to work. That day he was having a running stomach. His parents left the house that day at 6.30am. He was sitting on the steps in front when they left. He said that he told his father that he is going to go to work after he come out from the toilet. Thereafter he went back to the toilet.*
- b) *After he came out of the toilet he went to his parent's room to switch on the fan because he was sweating. He said that the complainant was in his room (the other room) at that time.*
- c) *While he was lying down he could smell a cigarette and when he came out he saw Aunt Pauline (PW2) sitting near the door. At that time the complainant went to have a shower.*
- d) *He said that, that morning the complainant asked him for a power board and he told her that he does not know. He said he asked PW2 for a cigarette and she gave him two dollars. He then told her that he is going to buy a roll and he went to the house opposite his house to buy one. Since it was not available there, he told her that he is going to the shop and he left for the shop. He said this happened around 6.45am.*
- e) *He walked down to the main road and on the way to the main road, he met his friend Roko (DW2). He told Roko that he is going to get a sick sheet. He said he met Roko at 6.55am.*
- f) *After that he went to the Valelevu Health Clinic in the bus. He said he reached the clinic around 7.15am. The number he got was 6 and one Indian doctor examined him and prescribed certain medication. The doctor also gave him a sick sheet. The sick sheet was tendered as DE2. After that he went to the pharmacy and then walked to the Valelevu bus stop. It was almost 8.00am.*
- g) *He said he first found out about the allegation when he was reaching Nabua from Valelevu Clinic. His mother called him while he was still in the bus. His mother told him that a complaint has been lodged at the Totogo Police Post. He said he then went to the Totogo Police Post. When he went there it was around 8.45am.*
- h) *He said that he did not insert his finger into the complainant on 20/02/18. He said the main door and the toilet door makes a sound when they are closed. He said after an incident during the Christmas party in 2017 his relationship with Aunt Pauline was not good.*
- i) *During cross examination he agreed that on 20/02/18 he got himself prepared to go to work. He denied the suggestion that he had a good relationship with Aunt Pauline on 20/02/18. He agreed that the sick sheet tendered as DE2 does not indicate the time he was seen by the doctor.*

- j) *During re-examination he said that he looked after Aunt Pauline's daughter for a week before the daughter was taken to his grandmother.*
32. The Second Defence Witness was Roko Kolinio Bale (DW2). He said that;
- a) *On 20/02/18 he left home around 6.35am for work. He said he was waiting for the 7 o'clock bus near the Chinese shop. He said he met the accused whom he knew for a couple of years at the Chinese shop. The accused told him that the accused is going to Valelevu. He said he cannot confirm the actual time he met the accused.*
 - b) *During cross examination he agreed that, in the police statement he had given on 23/07/18, he had told the police that he does not know the exact time he left the house and the time he reached the Chinese shop. He also agreed that it is not mentioned in that statement and also in the statement made on 20/04/18 that he was waiting to catch the 7 o'clock bus.*
33. The third Defence Witness was Swastika Shalvina Chandra (DW3). She said that;
- a) *She is a Medical Doctor and on 20/02/18 she was working at the Valelevu Health Centre. She said she would start work at 7.30am. She said she treated the accused who came to see her on 20/02/18 complaining of watery diarrhea and she prescribed medicine. She said that the accused was her 6th patient that day and she must have seen the accused by 8am or little after 8am. She tendered a copy of the out-patient register relevant to 20/02/18 as DE3.*
 - b) *During cross examination she agreed that the document she tendered does not indicate the time she saw the accused.*
34. The fourth Defence Witness was Mario Ferei (DW4). He said that;
- a) *The accused is his son. He said that on 20/02/18 he left the house with his wife and his two small children between 6.30am and 6.35am. While they were leaving, the accused was sitting on the steps. When he asked his wife, she told him that the accused will go to work later and that the accused is having a running stomach. He said, on 20/02/18 he caught the bus at the entrance of the Kuruva Road because that morning they were a bit late.*
 - b) *He said he found out about this incident when his niece, Sofi called him around 8.15am to 8.20am the same day. He said that his niece told him that she is in front of his house. He said when he left the house that morning the complainant was still sleeping.*
 - c) *He said that PW2 is his sister. He said the relationship between his sister Pauline and the accused had no problem until one Christmas party.*

- d) *He said that he did not have issues with the complainant when the complainant was living in his house. He said that he is not aware whether the complainant attended FNU or whether she graduated from FNU.*
- e) *During cross-examination he said that the relationship with the accused and Pauline was good when Pauline came to stay in his house.*

35. Please remember that I have only referred to evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

Medical opinion

36. The third prosecution witness gave her medical opinion based on what she said she observed and her experience. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the third prosecution witness. Evaluating her evidence will therefore include a consideration of her expertise, her findings and the quality of the analysis which supports her opinion.

37. According to the medical opinion, there is medical evidence that something was rubbed in the area where the abrasion was noted, within the last 4 to 7 days before the day the complainant was examined by PW3. That injury could have taken place 6 to 7 hours before the medical examination or it could even have been there for about 7 days. A doctor cannot say the precise time a particular injury was sustained. Further, according to the medical opinion, the absence of a fresh hymenal laceration does not suggest that there was no penetration of the vagina during the period in question. That is because, given the age of the complainant and the two healed hymenal lacerations, the vaginal opening can stretch and expand more and it could accommodate a finger for 15 to 20 minutes without having visible injuries. You may recall that the complainant's evidence

was that the accused was moving his finger inside her vagina in an attempt to arouse her (“get feelings”).

38. When you consider PE 1, you should also remember that what is written in A(4) and D(10) are not admissible in considering whether the facts stated therein are true because those parts are filled based on information received. For that reason, the contents of A(4) and D(10) are blotted out.

Recent Complaint

39. The prosecution says that they are relying on recent complaint evidence. You heard in this case that the complainant had made a complaint to her aunt, the second prosecution witness, after the incident. In this regard you should consider whether that was a prompt complaint regarding the incident and whether the complainant sufficiently complained of the offence the accused is charged with.
40. You may remember that the complainant said in her evidence that she told PW2 about the incident over the phone when she initially called PW2 that day. PW2’s evidence was that the complainant did not tell her what happened over the phone and she only told her that she is scared of the accused and therefore requested her to come soon. PW2 said that the complainant told her about the incident after she met the complainant. You may have also noted that there was variance between the account given by the complainant and the evidence of PW2 about what the complainant told her. You have to deal with these inconsistencies in line with the directions I have already given you on dealing with inconsistencies.
41. You should bear in mind that a recent complaint need not specifically disclose all the ingredients of the offence and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. However, please remember that this evidence of recent complaint is not evidence

as to what actually happened between the complainant and the accused. PW2 cannot confirm whether what the complainant told her is true because she was not there at the place of offence at the material time to witness what actually happened. PW2's evidence in relation to the alleged incident is based on what she understood from the story relayed to her by the complainant and what she could remember about that conversation. Therefore remember that, recent complaint evidence may only assist you to decide whether the complainant is consistent and whether or not the complainant has told you the truth. In the end you are deciding whether the complainant has given a truthful account of her encounter with the accused.

The defence of alibi

42. In this case, the accused takes up the position that he was not there in the alleged place of offence which is his room in the house at Caubati at the time of offence and therefore he could not have committed the alleged offence. The accused says that he left the house at 6.45am on 20/02/18. The defence counsel argues that according to the complainant the alleged incident should take place after 6.45am. The accused said that he met DW2 at 6.55am that day on his way to the main road and then he was at the Valelevu Health Centre at 7.15am. He said that the doctor, DW3 saw him from whom he also obtained a sick sheet and he was at the Valelevu Bus Stop after obtaining his prescribed medicine from the pharmacy, at (almost) 8.00am.
43. The accused also said that he was informed by his mother about the allegation while he was on the bus who also informed him that a complaint had been lodged at the Totogo Police [Station], and then he went to the Totogo Police Station around 8.45am.
44. DW2 said that he did meet the accused near the Chinese Shop on 20/02/18 while he was waiting for the 7.00am bus, but he cannot remember the time he met the accused. DW2 also admitted that he had not mentioned the time he left home

that day and that he was waiting for the 7.00am bus, in the two police statements he had made.

45. The doctor, DW3 said in her evidence that she starts work at Valelevu Health Centre around 7.30am and she would have seen the accused by 8.00am or little after 8.00am.
46. When an accused takes up the position that he was elsewhere at the time of offence that is known as the defence of *alibi*. Please bear in mind that though an accused raises the defence of *alibi*, there is no burden for the accused to prove that he was elsewhere during the time the offence is alleged to have been committed. The prosecution should still prove that it was the accused that committed the offence and therefore the *alibi* is not true.
47. When you consider the evidence of the accused regarding his *alibi*, if you think that the version of the accused is true or it may be true, then you must find the accused not guilty of the offence.
48. However, you should also bear in mind that, you should not assume that the accused is guilty of the offence merely because you decide not to accept his *alibi*. You should remember that sometimes an accused may invent an *alibi* just because it is easier to do so rather than telling the truth. The main question remains the same. That is, whether you are sure that it was the accused who committed the offence.
49. You may remember the complainant being cross-examined on a Facebook page and an allegation was put to her that she had published incorrect information on the said page, that is, she had graduated from FNU in pure science. The complainant did admit that she did not graduate from FNU in pure science. However, she denied this allegation and there was no evidence adduced regarding such publication. The complainant also said that the Facebook page

she was questioned on was an old account and in any way she was not using it in 2018, the year the incident is alleged to have taken place. The evidence did not show any link between the alleged publishing of this incorrect status and the allegation against the accused.

50. According to the defence counsel, this was raised to attack the credibility of the complainant. In the event it occurs to you that the complainant may have published such incorrect information about her, then you should decide whether you would consider the complainant's credibility on the account given by her regarding the allegation against the accused is affected because the complainant may have published such information on her Facebook page sometimes before the alleged incident.
51. The defence also raised an issue regarding the relationship between the complainant and one Fiki who is a sister of the accused's father, DW4. Again there was no evidence linking that issue with the allegation against the accused. Therefore, if you do not find that there is a relevance of that issue regarding the relationship between the complainant and Fiki to the allegation against the accused, you may disregard the evidence regarding the said relationship issue. However, the complainant denied assaulting Fiki in front of DW4, but DW4 said that he witnessed the complainant assault Fiki. In the event you believe DW4 and you find that the complainant lied when she denied assaulting Fiki, you should then decide whether that would make the complainant's evidence regarding the allegation against the accused incredible and unreliable.
52. In essence, the prosecution case is that the accused inserted his finger inside the complainant's vagina without her consent on 20/02/18 after the accused's parents, his brother and his sister left the house in the morning. DW4 said that he did leave the house with his wife and his two small children between 6.30am and 6.35am, and the accused was in the house awake and the complainant was sleeping when they left.

53. The defence says that the complainant was not a credible witness. The defence took up the position that the complainant had either dreamt the incident or made it up. According to the accused he could not have committed the offence because he was not there at his house at the time of offence. He said he left the house around 6.45am.
54. You may have noted certain inconsistencies in the evidence. For example;
- a) The complainant said she told the police that the tights she was wearing were pulled all the way down to her feet. But she said in her evidence that the accused pulled her tights together with her panty, up to her knee. Explaining the answer she gave to the police that her pants were down to her feet and that her evidence that the accused pulled her pants to the knee she said that it is because the tights reached up to her feet because it was long.
 - b) The complainant said in her evidence that the alleged incident took place after 6.30am as the accused's parents usually leave home to catch the 6.30 bus. It was pointed out to her that in her statement made on 20/02/18 the time is stated as 'around 7.00am'. The complainant maintained that she told the police that the incident took place between 6.30am and 7.00am.
 - c) As I have already pointed out, the complainant said that she told PW2 about what happened when she spoke to her over the phone, but the evidence of PW2 was that the complainant told her about what happened when she met the complainant; and the variance between the account given by the complainant and PW2's evidence of what the complainant told her.
55. I have explained to you how to deal with inconsistencies. You should follow the said directions when you deal with any inconsistency you may come across including the above.

56. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
57. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
58. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of the charge;
- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, or his witnesses, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.


If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

59. Any re-directions?
60. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge

against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

61. Your opinion should be whether the accused is guilty or not guilty.




Vincent S. Perera
JUDGE

Solicitors;

Office of the Director of Public Prosecutions for the State
Shekinah Law, Suva for the Accused