

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

High Court Criminal Case No. HAC 119 of 2016

BETWEEN : STATE

AND : JONE VAKACEGU

Counsel : Mr Seruvatu for the State  
Ms Volau for the Accused

Dates of Hearing : 09 & 11 July 2019

Closing Speeches : 12 July 2019

Date of Summing up: 12 July 2019

(The complainant's name is suppressed and will be referred to as LL)

SUMMING UP

Madam and gentlemen assessors,

1. I must now sum up the case to you. You must then retire to consider your opinions. 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. A suggestion put to a witness is not evidence. I must say that the purpose of the closing speech is to outline the evidence that each party rely on to fall in line with their respective arguments. It is not an exercise to introduce new evidence or to give evidence from bar table. If you heard any new information which you did not hear in the evidence given by the witnesses in this case, you must disregard such information.
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 opinion.

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.

Madam and gentlemen 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. 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 his or her 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 maturity, education level, social status and for other similar reasons. Some may not complain at once due to immaturity, lack of education, social status and etc. A complainant's reluctance to report an incident could be due to many reasons. 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 a complaint.

14. Another consideration may be; 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. These are only examples. 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.

15. When you evaluate evidence, you should see whether the version of a witness is probable or improbable. You must see whether the witness has relayed a consistent story and whether it tallies with his or her previous statements or the evidence of other witnesses.
16. A previous statement made by a witness to the Police is not evidence. But those statements can be used to test the consistency and credibility of the witness if you are satisfied that such a statement was made. The statement to Police could only be used to ascertain whether the witness has said something different to what he or she said in Court. These portions only assist to decide whether the witness was consistent in that particular issue.
17. 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 solely rely on the evidence of the complainant without any other evidence to support it.
18. 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.
19. The Accused need not prove his innocence. The fact that the Accused did not give 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 offence 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.

Madam and gentlemen assessors,

20. We will now look at the offences that the Accused is indicted for. After the closure of the prosecution case this court has made a finding of not guilty in respect of the third count. Therefore, now you have to consider only the first, second and the fourth counts. You may see that there is one count of indecent assault and two counts of rape in the Information filed by the Director of Public Prosecutions as follows;

**First Count**

*Statement of Offence*

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Act 2009.

*Particulars of Offence*

Jone Vakacegu on the 16<sup>th</sup> day of May 2016, at Nadi, in the Western Division indecently assaulted LL.

**Second Count**

*Statement of Offence*

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

*Particulars of Offence*

Jone Vakacegu on the 17<sup>th</sup> day of May 2016, at Nadi, in the Western Division penetrated the vagina of LL with his fingers, a child under the age of 13 years.

**Fourth Count**

*Statement of Offence*

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

*Particulars of Offence*

Jone Vakacegu on the 03<sup>rd</sup> day of June 2016, at Nadi, in the Western Division penetrated the vagina of LL with fingers, a child under the age of 13 years.

21. You should consider each count separately. You must not assume that the Accused is guilty of the other counts just because you find him guilty to one count.
22. The prosecution and the defence agreed to the following facts. Therefore, those facts need not be proved again by the prosecution and you can use those facts to make your opinions without any further proof. The final amended admitted facts are;
- I. The Accused in this matter is Jone Vakacequ, 83 years old, security officer of Salovi, Nadi at the time of the alleged offences.
  - II. The complainant in this matter is LL, 10 years old, student of Vutuvutu, Mulomulo, Nadi at the time of the offences.
  - III. The complainant was born on the 22 July 2005.
  - IV. The Accused is known to the complainant as Tai Vili.
  - V. The complainant was medically examined by Dr Karshika on 4 June 2016.
23. The first count is indecent assault. To prove the offence of indecent assault, the prosecution must prove the following elements beyond reasonable doubt;
- a) the Accused;
  - b) unlawfully assaulted the complainant; and
  - c) the said assault was indecent.
24. The first element involves the identity of the Accused who committed the offence. The prosecution should prove beyond reasonable doubt that it was the

Accused who committed each offence. The identity of the Accused is not disputed. It is admitted that the Accused in this case is Jone Vakacegu and he is known to the complainant as Tai Vili.

25. Assault is the use of unlawful force. A touch constitutes an assault if it is done without a lawful excuse. The word “unlawfully” simply means without lawful excuse.

26. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent.

27. The second and fourth counts are rape. Now I will explain what matters you must take into consideration to determine whether the offence of rape is proved by the prosecution. The prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vagina of the complainant with his fingers;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not she was consenting.

28. 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 as mentioned before.

29. The second element involves the penetration of the complainant’s vagina with his fingers. The law states that even the slightest penetration of the vagina is sufficient to constitute the offence of rape. For the offence that the Accused charged with in this case the penetration is not by penis. The offence is constituted by penetration of the 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 vagina of the complainant with his fingers to any extent.

30. The third and the fourth elements are based on the issue of consent. However, the law says that a child under the age of 13 years is incapable of giving consent. You will see in the Final Amended Admitted Facts that the parties have admitted that the complainant was 10 years old at the time of the alleged offences. Therefore, the Prosecution does not have to prove whether the complainant consented or not, because consent is not relevant to the charges of rape in this case. So, you don't have to consider the issue of consent in the third and fourth elements that I just mentioned to you.

31. If you believe that the prosecution proved the relevant elements of rape you may find the Accused guilty for the respective counts. Likewise, if you believe that the prosecution failed to prove the relevant elements of rape in respect of any of the counts you must find the Accused not guilty for that count or counts.

Madam and gentlemen assessors,

32. 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 presented in this case when forming your opinions. The prosecution called three witnesses to prove the case against the Accused.

33. In respect of the first count the complainant gave evidence that on 16 May 2016 the Accused called her to his house to show her something. According to the complainant the Accused had been without his clothes and he had touched her vagina under her tights. She said that she was wearing a panty under the tights. She also said that she told him not to do that, but he forcefully did it. The complainant stated that she was scared to complain it to her parents as she thought that they would beat her up.

34. The complainant said during examination in chief that she took a bottle of oil to give to her aunty that day. During the cross examination of the complainant it was suggested that she was not taking a bottle of oil to her aunt and it was a loaf of bread that she took with her. She was shown her statement by the defence counsel to establish that the complainant had stated a different thing when she made the statement to the police. However, the complainant said that she wrongly mentioned it in her statement as a loaf of bread, but it was a bottle of oil that she took on that day.
35. Regarding the incident relating to the second count the complainant gave evidence that on 17 May 2016 when she was coming back from school the Accused called her. She said that the Accused was showing her a \$ 5 note. She had been near a sugarcane field and she stated that the Accused touched her vagina. She further said that "He touched me again just like before, but this time it was not under my pants, but inside my panty." She further said that the Accused poked her vagina with his hand and she felt pain. According to her evidence the Accused had used his second and third fingers to poke her vagina. She also stated that she saw him putting his fingers inside her vagina and she could also feel it. The complainant said the Accused gave her money and told her not to tell anyone about it. She said that she did not tell anyone as she was scared that nobody would believe her.
36. The complainant was not cross examined by the defence in respect of the second incident.
37. The complainant gave evidence regarding a third incident which happened at the Accused's house. She said that when she was on her way to her school the Accused called her to give something and she followed him to his house. The complainant said that the Accused was naked, and he removed her uniform and the pants as well. She stated that the Accused played with her vagina by using his hand and he pinched it. She also said that the Accused's fingers were inside her vagina and she felt it inside her vagina. Further she testified that the Accused laid on top of her after that. According to the complainant then a

policeman from Mulomulo Police station had called out the Accused. She stated that when the Police officer came in, he had enquired about the incident and had told her to go to school.

38. The complainant identified the Accused as Tai Vili.

39. Under cross examination the complainant stated that the Accused touched inside her vagina. She admitted that she plays soccer and netball at school. She was further cross examined as follows;

Q: I put to you that because the Policeman caught you at Tai Vili's house you got scared thereafter telling the Police officer that Tai Vili touched your vagina?

A: No

Q: I put to you that because the Police officer saw you, you were scared that he was going to tell your parents?

A: No

40. The second prosecution witness was Mataiasi Batirua. He said that in 2016 he was based at Namulomulo community Police post and on 3 June 2016 he was on duty. The witness gave evidence that he was controlling traffic as children were crossing the road. According to the witness when the complainant got off from a bus she had walked towards the Accused's house without going to the school. He said that he saw the complainant going inside the Accused's house. He had followed the complainant and when he reached the Accused's house the door had been closed. The witness said that there was a hole at the back of the Accused's house and when he looked inside through it he saw the complainant lying on the bed. According to the witness the complainant's uniform had been lifted up and the undergarments had been up to her knees. He said that he saw the Accused lying naked on top of the complainant and moving. The witness had banged the door and had called out the Accused's name. He said that he saw both of them getting dressed and the Accused had

then opened the door. The witness had later reported the matter to Nadi Police station.

41. Under cross examination the witness said that the complainant was in her uniform and the Accused was on top of her naked. He confirmed that he saw the complainant wearing undergarments when she stood up. He admitted that he did not see the Accused penetrating the vagina of the complainant and he only saw the Accused moving on top of the complainant. The witness also said that he could clearly see them from where he was.

42. The prosecution called the doctor who medically examined the complainant. Dr Kaushika Anshika Dhaan tendered the medical report of the complainant as Prosecution Exhibit 1. She stated that she examined the complainant on 4 June 2016. She said that the hymen of the complainant was broken, and no blood was noted. The witness explained the possible causes for the hymen to be not intact. She said that there could be rare cases of females born without hymen and stated that penetration by any object, digital or penile or strenuous exercises such as gymnastics, excessive horse riding or bicycle riding or any kind of trauma could cause the hymen to be not intact. The witness explained digital penetration as penetration by fingers. According to her evidence after the hymen is broken there would not be any blood during the subsequent penetrations. She further said that if the hymen was broken on the same day there would be bleeding.

43. During the cross examination the medical witness ruled out that playing soccer or netball could cause broken hymen. In response to a question put by the defence counsel the witness said that pinching inside the vagina can be detected only within a day and the signs will not last for more than a day.

44. That was the case for the prosecution.

45. After the closure of the prosecution case the Accused was explained his rights to address the court, to give evidence or to call witnesses. 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 chose to remain silent and no witnesses were called for the defence. I must remind you that you must not draw any adverse inference from the fact that the Accused remained silent. It is his right.

Madam and gentlemen assessors,

46. It should be noted that in our law no corroboration is needed to prove sexual offences. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, in sexual offences the prosecution can solely rely on the evidence of the complainant, without any supporting evidence whatsoever. It is for you to decide how credible and consistent is the evidence of the complainant.

47. The prosecution case was that the Accused indecently assaulted the complainant in one occasion and penetrated the vagina of the complainant with his fingers in two other occasions.

48. As per the line of cross examination the Accused denies all the allegations.

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

50. 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.

51. If you believe that the prosecution has proved beyond reasonable doubt the elements of indecent assault in respect of the first count and the elements of rape in respect of the second and fourth counts, you may find the Accused guilty to respective counts.

52. If not, you must find the Accused not guilty.

53. Finding the Accused guilty to one or a few counts does not automatically make him guilty for the other count or counts. You must consider relevant evidence separately for each count when arriving at your opinions.

54. If you have a reasonable doubt in respect of any count, then you must find the Accused not guilty to that count or counts.

55. Your possible opinions are;

Count 1 indecent assault-	guilty or not guilty
Count 2 rape -	guilty or not guilty
Count 4 rape-	guilty or not guilty

56. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

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



**Rangajeeva Wimalasena**  
**Acting Judge**

**Solicitors**

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

Solicitors for the Accused: Office of the Legal Aid Commission