

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 205 of 2017

STATE

V

- 1. SEMI NAIKAU**
- 2. ISIKELI NASAKU**

Counsel : Ms. S. Naibe for the State.
: Ms. K. Vulimainadave for the First Accused.
: Ms. J. Singh for the Second Accused.

Dates of Hearing : 01, 02 and 03 December, 2020
Closing Speeches : 07 December, 2020
Date of Summing Up : 08 December, 2020

SUMMING UP

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

Ladies and Gentleman Assessors

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

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely

for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

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

BURDEN OF PROOF AND STANDARD OF PROOF

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

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

INFORMATION

13. The first accused is charged with two counts of indecent assault and the second accused is charged with two counts of rape (a copy of the consolidated information is with you).

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SEMI NAIKAU, on the 17th day of October, 2017 at Lautoka, in the Western Division, unlawfully and indecently assaulted "SN" by touching her breast.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SEMI NAIKAU, on the 17th day of October, 2017 at Lautoka, in the Western Division, unlawfully and indecently assaulted “SN” by touching her vagina..

THIRD COUNT

Statement of Offence

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

Particulars of Offence

ISIKELI NASAKU, on the 18th day of October, 2017 at Lautoka, in the Western Division, penetrated the vagina of “SN” with his penis without her consent.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

ISIKELI NASAKU, on the 18th day of October, 2017 at Lautoka, in the Western Division, penetrated the vagina of “SN” with his penis without her consent.

14. As you are aware, after the prosecution closed its case, this court had ruled that the first accused had a case to answer in respect of both the counts of indecent assault as charged. In respect of the second accused this court had ruled that he had a case to answer in respect of the third count of rape only therefore, you are to disregard the fourth count of rape completely.
15. To prove counts one and two the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:

- (a) The first accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant “SN” by touching her breast and her vagina.
16. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed these offences.
17. The words “unlawfully” and “indecently” in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
18. Assault is the unlawful use of force on the complainant “SN” by the act of touching her breast and her vagina.
19. In respect of the count of indecent assault the accused has denied all the elements of the offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant “SN” by touching her breast and her vagina.
20. If you are satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then you must find the first accused guilty of the offence of indecent assault. However, if you have a reasonable doubt in respect of any elements of the offence of indecent assault then you must find the accused not guilty.
21. To prove count three the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
- (a) The second accused;
 - (b) Penetrated the vagina of the complainant “SN” with his penis;
 - (c) Without her consent;

- (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
22. In this trial the second accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
23. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
24. The second element is the act of penetration of the complainant's vagina by the penis.
25. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
26. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
27. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
28. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the

complainant's vagina without her consent then you must find the accused guilty as charged.

29. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty.
30. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.

Ladies and Gentleman Assessors

31. You will recall when the complainant was giving evidence she had informed you that the first accused who was her maternal uncle had asked her to come to his house at Paipai to spend her school holidays. When the second accused came to her uncle's house, her uncle had encouraged and/or told the second accused to have forceful sexual intercourse with her.
32. The law confers a responsibility upon this court to direct you to consider this evidence and decide whether the first accused had indeed assisted the second accused to commit the offence of rape. In view of the evidence before this court I would like to direct you that the law says when a person aids, or abets, the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
33. For the first accused to be guilty of committing the offence of rape you have to consider the following:
 - (a) That his conduct must have in fact aided, or abetted, the commission of the offence of rape by the second accused; and
 - (b) The offence of rape was committed by the second accused.

34. The first accused must have intended that his conduct would aid, or abet, the commission of the offence of rape by the second accused.
35. Furthermore, intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. You decide intention by considering what the first accused did, you should look at his actions before, at the time of, and after the act.
36. However, you cannot find the first accused guilty of aiding, or abetting, the commission of the offence of rape if, before the offence was committed, the first accused had:
- (a) terminated his involvement; and
 - (b) Took all reasonable steps to prevent the commission of the offence of rape.
37. Aiding and abetting in this context means doing one or the other of these three things while aware that an offence is being committed:
- a) Intentionally helping another to commit an offence: or
 - b) Intentionally encouraging the other to commit an offence by words or by presence and behaviour; or
 - c) Intentionally conveying to the other, by words or by presence and behaviour, an assent to and concurrence in commission of an offence.
38. To prove that the first accused is guilty as an aider and abettor the prosecution must prove the following elements beyond a reasonable doubt that:

- a) It was the accused and no one else;
- b) The accused was present at the commission of the offence or was in the vicinity of the alleged offending so as to be able to aid or abet by encouragement its commission; and
- c) The first accused intended to either:
 - i) Do acts which helped the second accused to commit the offence;
 - ii) Encouraged the second accused to commit the offence and this encouragement may consist of mere presence and behaviour provided they are intended to encourage the second accused to commit it;
 - iii) Conveyed to the second accused assent and concurrence in the commission of the offence, and such assent and concurrence may be conveyed by mere presence and behaviour provided they are intended so to convey assent and concurrence.

39. The prosecution is submitting that the first accused had aided, or abetted, the second accused to have forceful sexual intercourse with the complainant by telling him to kiss, remove her clothes, suck her breast, lick her vagina and then penetrate his penis into the vagina of the complainant without her consent.

40. On the other hand the first accused has denied committing the offence of rape by aiding, or abetting the second accused to rape the complainant. The first accused is saying that the allegation by the complainant is a made up story to falsely implicate him because he did not give the complainant a mobile phone as promised by him.

41. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the first accused had aided, or abetted, the

commission of the offence of rape by the second accused then you must find the first accused guilty of the offence of rape.

42. If on the other hand you have a reasonable doubt with regard to the involvement of the first accused or any of those elements concerning aiding, or abetting, the offence of rape, then you must find the first accused not guilty.
43. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
44. You must be satisfied that the prosecution has proved all the elements of all the offences beyond reasonable doubt in order for you to find the accused persons guilty of either or all the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or all the offences, then you must find the accused persons not guilty.
45. In this case, there are two accused persons you should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. You must not assume that because one accused is guilty on one count that he must be guilty of the other as well or if one accused is guilty of one count the other must be guilty as well.

ADMITTED FACTS

46. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final amended admitted facts.
47. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.

48. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

49. The prosecution called two witnesses to prove the charges against both the accused persons.
50. The complainant informed the court in 2017 she was 16 years of age and a form 4 student. On 16th October, after completing her Fiji Junior Exams she went to the house of her maternal uncle Semi Naikau who is the first accused (hereinafter referred to as “uncle”). When she arrived at her uncle’s house at Paipai her uncle was at the farm.
51. Her uncle was living with his wife and their infant baby. At about half past six in the evening, her uncle returned from his farm he was happy to see her at his house. They all had their devotion and after dinner they slept.
52. The house of her uncle did not have any bedrooms there was an open space in the living room with a partition separating the eating area from the sleeping area. The sleeping area had a curtain in between.
53. The next day on the 17th the complainant, her uncle and her aunt woke up after devotion her uncle started questioning her whether she had a boyfriend. The complainant responded by saying she did not. The next question her uncle asked her was whether she had sexual intercourse. The complainant replied she did not. At this time she was afraid since it was her uncle who was asking her such questions which he was not supposed to.

54. In the afternoon after having their devotion whilst sitting down, her uncle again asked her whether she had sexual intercourse. The complainant again responded that she had not. According to the complainant her aunt was present during the conversation upon hearing her response, her uncle came close to her and touched the top portion of her breast from on top of her clothes.
55. The complainant was wearing a t-shirt and a sulu. After this, her uncle touched her vagina from on top of her sulu. The complainant was afraid because he was her uncle and he wasn't supposed to do what he had done.
56. After the first accused had finished touching her vagina and her breasts he said "*you can have sexual intercourse and get married*". The complainant did not like what her uncle had said and done to her. When her uncle was touching her breasts and vagina, the complainant's aunt was sitting with them and watching.
57. After this, her uncle told her and her aunt to take off their tops so that he could see their breasts. The complainant did as she was told because her aunt had done so. The first accused then asked his wife to see the breasts of the complainant and see if she can have sexual intercourse the complainant's aunt agreed. The complainant was afraid since she could not believe what was happening, the complainant had a good relationship with her uncle.
58. Next morning on the 18th, after devotion the first accused told the complainant that he will start looking for a man to date her. The complainant was afraid since he said this in an aggressive manner.
59. On this day in the evening, the second accused Tai Sike who is her grandfather came to the house of the first accused. Tai Sike is her grandfather by virtue of being the uncle of her mother. After dinner, her uncle,

his wife (the complainant's aunt) and the second accused were talking amongst themselves when the complainant went to sleep on the bed.

60. At around 11pm her uncle came and woke her and told her to sleep where they were sitting. When the complainant went to sleep in that part of the room, both the accused persons and her aunt were sitting down.
61. After a while, her uncle told Tai Sike to come and lie down beside the complainant and then he told her aunt to switch off the light. At this time the first accused said whatever he was going to do to his wife, the complainant and the second accused will have to do as well. All were in one room but on either side.
62. The first accused said both the ladies are to lie down and for him and the second accused to take off the t-shirt worn by the ladies and then for them to fondle their breasts. The complainant refused then the first accused got angry and told the complainant to lie down.
63. When the complainant laid down the first accused told Tai Sike to remove the complainant's t-shirt and suck her breast. At this time the complainant started to cry and said that she did not want this to be done to her. The first accused scolded her and told her not to rebel.
64. The second accused did everything the first accused said. The second accused removed her clothes and started sucking her breast. After this, the first accused then told the second accused to lick the complainant's vagina. The second accused started licking her vagina. The complainant struggled and pushed the second accused who told her uncle. Her uncle got angry on her and said don't be stubborn and lie down there. The complainant said she did not want to.
65. The second accused licked the vagina of the complainant for about 10 minutes. At this time she was pushing the second accused and telling him

that she did not like what he was doing to her but the second accused did not stop.

66. Her uncle then said for them to insert their penis into the vagina. Upon hearing this, the second accused inserted his penis into the complainant's vagina which was painful. She pushed the second accused who told her uncle that the complainant was not willing. The first accused responded by saying just lie still so that Tai Sike could do whatever he was doing and not to be arrogant. The complainant was crying when the second accused had sexual intercourse with her for about 4 to 5 minutes.
67. By this time she was really weak so she said that she cannot take it anymore but the second accused did not stop he continued. After the accused stopped, the complainant got up and went outside she was weak and her clothes were wet she saw blood on it.
68. The complainant had her shower she was feeling weak, her vagina was painful and blood was coming out. After a while, her aunt called her to come inside the house.
69. When she was in the house her uncle said that they have to do it again since this was the last night she has to sleep with Tai Sike. The complainant refused the first accused then agreed that they will not do anything. The complainant went to sleep on the bed.
70. The next day after morning devotion, the first accused asked the complainant whether she had enjoyed what had happened the previous night. The complainant did not reply because she did not like what had happened.
71. In the presence of the complainant the second accused gave the first accused \$100 to buy her clothes. After Tai Sike left, the first accused told his wife to take the complainant to town to buy her clothes. The complainant and her

aunt went to town after buying her clothes they went back to Paipai to the first accused's house.

72. The complainant stayed at the house of her uncle for one and a half weeks she told her uncle that she wanted to go home but the accused did not want to give her the phone to call her mother. When her mother called she did not tell her mother what had happened to her but she said that she wanted to come home. When she was talking to her mother, her uncle and his wife were sitting there and also her uncle had told her not to tell anybody about what had happened.
73. The complainant's mother then spoke to her uncle and told him to let the complainant come back home. During the one and half weeks she was at the house of her uncle he had the phone with him. Before leaving her uncle's house he gave her \$20 being her fare to go home.
74. When the complainant reached her home she started crying and then she told her mother everything that had happened to her. She told her mother about her uncle touching her breast, the second accused sucking her breast, licking her vagina and having sexual intercourse with her.
75. The complainant's mother could not believe that something like this could have happened to her daughter by her own brother. The matter was reported to the police and the complainant was medically examined.
76. The complainant also stated that when her uncle had touched her breast and vagina she did not run away from the house of the accused because he was an aggressive man and she did not have any money with her.
77. When the complainant went to town with her aunt, she did not run away because her uncle had promised to give her a mobile phone. The complainant identified both the accused persons in court.

78. In cross examination by the counsel for the first accused, the complainant agreed that the first accused had called her mother requesting the complainant to spend the school holidays with his family at Paipai.
79. The complainant was eager to go to the house of her uncle because he had promised to give her a mobile phone if she goes to his house. The complainant agreed with the suggestion that she was not told to remove her top but told to lift it up by the first accused.
80. She also agreed that her mother had disciplined her for being naughty by cutting her hair before she went to spend her school holidays at the house of the first accused. The complainant denied that when the second accused came to the house of her uncle there was a discussion about her getting married to the second accused.
81. She also denied the suggestion that she made up the allegations against her uncle because he had promised to give a mobile phone but did not. However, the complainant agreed that she was angry and disappointed with her uncle for not fulfilling his promise.
82. When cross examined by the counsel for the second accused, the complainant agreed that the second accused was not her real grandfather. She agreed that she had told the court that her uncle never let her call her mum.
83. The complainant was referred to her police statement dated 31st October, 2017 to the last page, 3rd paragraph which was read as follows:
- "I then told the uncle that I wanted to speak to mom. Then uncle gave me the phone and I spoke to mom and told her that I wanted to come home. Mom then said yes for me to come home. Then uncle said that yes I will go home today".*
84. When it was suggested to the complainant that she had told the police that her uncle had let her talk to her mum, the complainant disagreed and said it

was her mother who had called her uncle and he had given his phone to her. The complainant agreed what she told the police was a lie.

85. The complainant agreed she knows the second accused but denied whenever she wanted money she would ask from him. According to the complainant her uncle was only sometimes nice to her. She went to the house of her uncle because he had called her mother asking for the complainant to come and spend school holidays at his house and he will give her a phone.
88. The complainant did not speak to the second accused over the phone before he came to Paipai and she was also not aware of any arrangements made by her uncle for her to get married to the second accused.
89. The complainant also denied that the second accused had come to the house of her uncle for them to get married and that the second accused had told her that if she was not ready to get married he will get married to someone else.
90. The complainant agreed that when her uncle used to go to the farm she did not tell her aunt that she did not like what had happened to her or that she wanted to go home.
91. When it was suggested the reason she did not say anything to her aunt was because nothing had happened the complainant said as a couple both her uncle and her aunt knew what had happened to her.
92. The complainant stated that she had told her uncle that she wanted to sleep on the bed but he had told her to go and sleep on the floor and she had told this to the police.
93. The complainant was referred to her police statement second page, second last paragraph which was read as:

“Whilst I was sleeping, uncle woke me up to come and sleep on the other side in which a mat was spread. I then got up to come and sleep on the other side.”

94. The complainant agreed there was nothing in the police statement to suggest that she had refused to get up or telling her uncle that she did not want to sleep on the other side of the room.

Ladies and Gentleman Assessors

95. The learned counsel for the accused in this regard was cross examining the complainant about some inconsistencies in the statement she gave to the police when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of this witness with her evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
96. It is obvious that passage of time can affect one’s accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
97. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you’re considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.
98. The complainant maintained that on that night the second accused had kissed, sucked her breast, lick her vagina and penetrated his penis into her vagina.

99. From Lautoka city after doing their shopping the complainant went back to the accused's house because she had not received the mobile phone she was promised and this made her upset. Another reason why she went back to the house of her uncle was that she was afraid of him.
100. The complainant denied that she had made up a story against the second accused, because no mobile phone was given to her.
101. In re-examination the complainant said that she did not run away or escape from the house of the accused was because she was weak and feeling pain in her vagina. She also stated that she was upset because the mobile phone was not given to her.
102. The final witness the mother of the complainant Kinisimere Ravutu informed the court that the first accused is her biological brother. He had called her to allow her daughter to go and spend her school holidays at his place and to look after his wife who had just given birth.
103. It was after 1 ½ weeks her daughter came home when she was at Paipai the witness had only called twice, on the first occasion her brother had answered the phone and on the second occasion he gave the phone to the complainant to speak.
104. When the witness first saw her daughter getting out of the bus she looked weak as she came nearer the witness could see that something had happened to her.
105. When in the house her daughter started to cry, the witness asked what had happened she was told the first accused had harassed her to stay with Isikeli Nasaku that is to have sexual intercourse with Isikeli.

106. The complainant further told her that Isikeli had pulled her hand to make her lie down and removed her clothes and had sexual intercourse with her. The witness started to cry and called her brother and told him she will report the matter to the police.

Ladies and Gentleman Assessors

107. Complainant's of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
108. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant told her mother after about one and half weeks of the alleged incidents about what had happened to her.
109. This is commonly known as recent complaint evidence. The evidence given by Kinisimere Ratuvu is not evidence of what actually happened between the complainant and both the accused persons since Kinisimere was not present and did not see what had happened between the complainant and both the accused persons.
110. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant who was 16 years of age at the time told her mother her uncle had forced the second accused to have sexual intercourse with her.

111. The complainant further told her mother that Isikeli had pulled her hand to make her lie down, removed her clothes and had sexual intercourse with her.
112. Finally, the prosecution says considering the age of the complainant at the time she did tell her mother important and relevant information about what her uncle and Isikeli had done to her and therefore she is more likely to be truthful.
113. On the other hand, the first accused says the complainant had made up a story against him since she wanted a mobile phone if what she told the court was the truth she would have resisted what was done to her. The second accused says he did not do anything as stated by the complainant. The complainant made a false complaint against him.
114. Both the accused say that the complainant stayed at the house of the first accused for 1 ½ weeks if anything had happened she would not have stayed at the house of the first accused for that long and therefore she should not be believed.
115. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
116. In cross examination by the counsel for the first accused the witness agreed that the accused had come home to ask for the complainant to come and spend her school holidays at his house.
117. Upon cross examination by the counsel for the second accused the witness stated that she had allowed the complainant to stay at her uncle's house for three days only. She did not call the complainant after she did not return

after three days because the first accused is her brother and she had entrusted her daughter to him.

118. According to the witness her brother was also aware that the complainant is to come back home after three days.

119. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

120. At the end of the prosecution case you heard me explain to both the accused persons their options. They have these options because they do not have to prove anything. The burden to prove their guilt beyond reasonable doubt remains with the prosecution at all times.

121. The first accused chose to remain silent and did not call any witness that is his right and you should not draw any adverse inference from the fact that the first accused decided to remain silent and not call any witness.

122. From the line of cross examination the first accused takes the position that he did not commit the offences as alleged. He did not touch the breast and vagina of the complainant or aid or abet the second accused to rape the complainant by penetrating her vagina with his penis without her consent.

123. The first accused is also saying that the evidence of the complainant is not probable in the circumstances as narrated by her and therefore she should not be believed. The accused is the uncle of the complainant and he cannot do such a thing to his niece.

124. If what the complainant alleges is the truth then she would have resisted, alerted the neighbours and also would have told her aunt but did not because nothing had happened. The first accused did not touch the complainant's breast and vagina if he had, she would have left his house.
125. In respect of the evidence of the second accused the first accused says you should not believe the second accused because he is trying to save himself and is pointing a finger at him. The first accused did not aid or abet the second accused to have sexual intercourse with the complainant.
126. The complainant had stayed at his house for 1 ½ weeks instead of three days so if anything wrong had happened to the complainant she would not have stayed at his house for that long. Also the complainant had gone to Lautoka city with the wife of the accused she would have reported the matter to the police and/or run away from her aunt.
127. The complainant made up a story to implicate the first accused because she wanted a mobile phone from the first accused which she did not get.
128. This was the first accused case.
129. I now draw your attention to the evidence adduced during the course of the hearing by the second accused. The second accused elected to give evidence on oath which you must take into account when considering the issues of fact which you are determining.
130. The second accused Isikeli Nasaku informed the court that he knows the complainant due to his village ties with the complainant's family particularly the complainant's mother. On 18th October, 2017 he was working in his farm when he received a call from the first accused and the complainant. According to Isikeli, the first accused and the complainant's mother wanted the complainant to be his wife. He told them if the complainant refuses it's okay with him.

131. The complainant then spoke and she said that she was waiting for him he then left for Paipai and arrived at the house of the first accused. The first accused was with his wife, his child and the complainant.
132. Thereafter they all talked about the complainant (in her presence) after this they slept. When they went to lie down, it was the first accused who was talking and telling him what to do. He did not do anything since the complainant did not want to.
133. The first accused had told him to kiss the complainant, remove her clothes, suck her breast, lick her vagina and have sexual intercourse with her. He told the first accused that he had done what he had told him but he did not.
134. The second accused did not have sexual intercourse because the complainant did not want to. Next morning the complainant asked for \$100.00 which he had given to her. The second accused denied the allegation made against him by the complainant.
135. When cross examined by the state counsel the second accused stated that the complainant called him Tai Sike which means grandfather because the complainant's maternal grandfather was his cousin brother. The accused did not know that the complainant was 16 years of age in the year 2017 but he agreed she was a High school student at that time.
136. This accused agreed when he arrived at Paipai the complainant's parents were not there, he had gone to Paipai to discuss about his marriage with the complainant. The accused said the marriage proposal was planned by the first accused and the complainant's mother.
137. The second accused further agreed this proposition was not put to the complainant's mother in cross examination by his counsel, however, he had

not made this up. He used to see the complainant and talk to her at the village but he never spoke to her about getting married to him.

138. The accused also agreed that he had not obtained the consent of the complainant's parents to talk about getting married to the complainant. At the house of the first accused he was lying beside the complainant and it was the first accused who had told him to kiss, remove the complainant's clothes, suck her breast, lick her vagina and then insert his penis into her vagina.
139. The accused denied committing the offence alleged by the complainant. He also denied the suggestion that he had made up a story when he said that his marriage proposal to the complainant had started at the house of the complainant by her mother.
140. During cross examination by the counsel for the first accused the second accused agreed that prior to coming down to Paipai on 18th October he was aware that a mobile phone was to be given to the complainant.
141. In re-examination the accused stated that his marriage with the complainant had started from the complainant's house by her mother and the first accused. At the house of the first accused it was the complainant who had come to lie down beside him.
142. This was the second accused case.

ACCOMPLICE EVIDENCE

Ladies and Gentlemen Assessors

143. The prosecution also relies on the evidence of the second accused Isikeli Nasaku in respect of the fact that it was the first accused who had aided or abetted Isikeli to have forceful sexual intercourse with the complainant. As

you are aware that Isikeli is charged with the first accused which makes him an accomplice.

144. In this regard, I must warn you that it is unsafe to convict the first accused on the evidence of Isikeli Nasaku alone, and without corroboration from other sources. Before you consider whether there is corroboration of Isikeli's evidence, you must ask yourselves whether his evidence is reliable and credible, that is whether it is capable of belief, and then whether you believe the evidence the second accused gave is such that you can rely upon it and accept as being the truth.
145. Corroboration is any evidence which comes from independent source and which affects an accused person by connecting or tending to connect him or her with the crime in question. Further it must be evidence which implicates an accused person that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the accused committed it.
146. Please exercise care when you are evaluating the evidence of Isikeli when he said it was the first accused who was telling him to kiss, remove the complainant's clothes, suck her breast, lick her vagina and then penetrate her vagina with his penis and have sexual intercourse.
147. You must look for corroboration of Isikeli's evidence in this respect because it is unsafe to find the accused guilty without such evidence. It is a matter for you to decide whether you accept the evidence of Isikeli Nasaku as being corroborated by independent evidence and whether you accept the evidence of Isikeli as being reliable and credible.
148. The prosecution says the evidence of Isikeli is corroborated by the evidence of the complainant that the accused had called the second accused to his house, told the second accused to sleep beside the complainant and then told the second accused to do what he was doing to his wife.

149. It is for you to decide what weight you wish to give to the evidence of the second accused against the first accused in this regard.

ANALYSIS

150. The prosecution alleges that the first accused had invited the complainant to visit his house and spend her school holidays with his family. The first accused also promised the complainant that he will give her a mobile phone when she comes to his house.
151. The first accused was happy to see the complainant at his house, next day in the morning the first accused in the presence of his wife touched the breast and vagina of the complainant. The complainant did not like what the first accused had done to her.
152. The following day the second accused who the complainant calls grandfather came, in the evening after dinner the complainant went to sleep on the bed. Both the accused persons and the complainant's aunt were sitting in the living room. At around 11pm the first accused woke the complainant and told her to sleep in the area where they were sitting.
153. The complainant went and laid down after a while the second accused came and laid beside her. The first accused told his wife to switch off the lights, thereafter the first accused told the second accused to do what he was doing to his wife.
154. The second accused did what the first accused told him to do this included the second accused kissed, removed the complainant's clothes, sucked her breast, licked her vagina and then had forceful sexual intercourse with her.
155. The complainant did not consent to have sexual intercourse with the second accused she was pushing him away and also crying. The first accused scolded

the complainant and told her to cooperate and allow the second accused to do what he was doing. The complainant did not consent to what the second accused had done to her.

156. The complainant could not leave the house of the first accused because she did not have money for her fare and she could not call her mother because her uncle had the phone. When the complainant went home she informed her mother about what both the accused persons had done to her. Thereafter the matter was reported to the police.
157. The prosecution also says the second accused whilst giving evidence had also stated that it was the first accused who was telling him what to do corroborates to an extent what the complainant told the court about the first accused.
158. On the other hand both the accused persons deny the allegations made against them by the complainant they say the complainant did not tell the truth in court. If she was indecently assaulted and raped she would have resisted and/or alerted the neighbours.
159. Furthermore, the accused persons say the complainant had gone to Lautoka city with her aunt to buy her clothes if there was anything done to her she would not have come back to the first accused house but run away to her house or reported the matter to the police.
160. Both the accused persons were not there so the complainant had nothing to fear about yet she did not report the matter to the police or run away from her aunt. After the shopping the complainant went to the house of the first accused and stayed there for about one and half weeks. Both the accused persons are asking you not to believe the complainant.

161. The first accused submits that he did not touch the breast and the vagina of the complainant as mentioned by her. The complainant made up a story to implicate him because the complainant wanted a mobile phone which he did not give her as a result she was upset with him and then she made up a false story against him. Also if the complainant did not like what the first accused had done to her she could have left his house but she did not because nothing had happened.
162. The first accused is also saying that you should disregard the evidence of the second accused against him since the second accused is an accomplice who is in a difficult situation hence he is trying his level best to get out of this by pointing a finger at him.
163. The second accused says although he was told by the first accused to have sexual intercourse with the complainant when she refused he did not do anything to her the complainant has made a false allegation against him. He had gone to the house of the first accused to discuss about getting married to the complainant which was arranged by the first accused and the complainant's mother.

Ladies and Gentleman Assessors

164. You have seen all the witnesses give evidence keep in mind that some witnesses react differently when giving evidence.
165. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

166. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
167. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
168. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused persons have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
169. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
170. If you accept the version of the defence you must find the accused persons not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt for all the counts. Remember, the burden to prove the accused persons guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
171. The accused persons are not required to prove their innocence or prove anything at all. They are presumed innocent until proven guilty.

172. As mentioned earlier, there are two accused persons you should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. You must not assume that because one accused is guilty on one count that he must be guilty of the other as well or if one accused is guilty of one count the other must be guilty as well.

173. Your possible opinions are:-

Count one **INDECENT ASSAULT**: Accused one - GUILTY OR NOT GUILTY.

Count two: **INDECENT ASSAULT**: Accused one - GUILTY OR NOT GUILTY.

Count of **RAPE**: Accused one – GUILTY OR NOT GUILTY.

Count Three: **RAPE**: Accused two - GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

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

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



A handwritten signature in black ink, appearing to read 'Sunil Sharma'.

Sunil Sharma
Judge

At Lautoka

08 December, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused persons.