

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

CRIMINAL CASE NO. HAC 031 OF 2019

BETWEEN : **STATE**

AND : **ILISONI NAWESI**

Counsel : *Ms. L. Latu for the State*
Ms. G. Henau with Ms. V. Diroiroi for the Accused

Hearing on : *11th of February 2020 – 14th of February 2020*
Summing up on : *20th of February 2020*

SUMMING UP

Lady and gentlemen assessors;

1. It is now my duty to sum up the case to you. Though I am not bound by your opinion, it is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. Firstly, I will direct you on the law that applies in this case. You must accept my directions on law and 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 it coincides with your own reasoning. You are the judges of facts.

2. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated 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.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel during the examination of a witness is not evidence unless the witness accepted

that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

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 available 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 anyone else. Your emotions should not 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 behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences 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 none, a part or all 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 that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his 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 between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. 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. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or 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 of 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 the witness is a matter 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 provide 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 a few guidelines. It is up to you, how you assess the evidence and what weight you give to a witnesses' 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 proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there more than one reasonable inference to draw, against the accused, as well in his favor, based on the same set of proved facts, then you should not draw the adverse inference.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an 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. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.
15. You are not required to decide on every point the Counsels in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges are proved against the accused.

16. 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 a must.
17. Let us look at the Information. The Director of Public Prosecutions has charged the accused for the following offence.

COUNT 1

(Representative Count)

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009

Particulars of Offence

Ilisoni Nawesi, between the 1st day of January 2009 and the 31st day of December 2009, at Natawa, Tavua, in the Western Division, unlawfully and indecently assaulted Setaita Loata.

COUNT 2

(Representative Count)

Statement of Offence

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

Particulars of Offence

Ilisoni Nawesi, between the 1st day of January 2009 and the 31st day of December 2009, at Natawa, Tavua, in the Western Division, had carnal knowledge of Setaita Loata, a child under the age of 13 years.

COUNT 3

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Ilisoni Nawesi, between the 1st day of January 2010 and the 31st day of December 2010, at Natawa, Tavua, in the Western Division, unlawfully and indecently assaulted Setaita Loata.

COUNT 4

Statement of Offence

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

Particulars of Offence

Ilisoni Nawesi, between the 1st day of January 2010 and the 31st day of December 2010, at Natawa, Tavua, in the Western Division, had carnal knowledge of Setaita Loata, a child under the age of 13 years.

COUNT 5

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Ilisoni Nawesi, between the 1st day of January 2011 and the 31st day of December 2011, at Natawa, Tavua, in the Western Division, unlawfully and indecently assaulted Setaita Loata.

COUNT 6

Statement of Offence

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

Particulars of Offence

Ilisoni Nawesi, between the 1st day of January 2011 and the 31st day of December 2011, at Natawa, Tavua, in the Western Division, had carnal knowledge of Setaita Loata, a child under the age of 13 years.

COUNT 7

(Representative Count)

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Ilisoni Nawesi, between the 1st day of January 2012 and the 31st day of December 2012, at Natawa, Tavua, in the Western Division, unlawfully and indecently assaulted Setaita Loata.

COUNT 8

(Representative Count)

Statement of Offence

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

Particulars of Offence

Ilisoni Nawesi, between the 1st day of January 2012 and the 31st day of December 2012, at Natawa, Tavua, in the Western Division, had carnal knowledge of Setaita Loata, without her consent.

COUNT 9

Statement of Offence

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

Particulars of Offence

Ilisoni Nawesi, between the 1st day of January 2016 and the 31st day of December 2016, at Natawa, Tavua, in the Western Division, had carnal knowledge of Setaita Loata, without her consent.

18. The 1st, 3rd, 5th and 7th counts deal with the offence of Sexual Assault. Section 210 (1) (a) of the Crimes Act states that;

210.-(1) An person commits an indictable offence (which is triable summarily) if he or she—

- (a) unlawfully and indecently assaults another person;

19. Therefore, the ingredients of the offence of Sexual Assault would be;

- (i) The Accused
- (ii) unlawfully and indecently;
- (iii) assaulted, Setaita Loata.

20. The Accused is guilty of Sexual Assault, if he has unlawfully and indecently assaulted the victim. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. Assault can be defined as an application of unlawful force on another’s body.

21. You should ask yourselves:

- a) Whether the accused;
- b) Used force; and
- c) You consider the force that was used could have been sexual because of its nature; and
- d) If the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that use of force is in fact sexual in nature.

22. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual Assault as explained above, then you must find the accused guilty of sexual assault. If, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused not guilty.

23. Now I will deal with the essential elements of the offence of Rape.

Section 207(1) of the Crimes Act reads as;

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

Section 207 (2) (a) of the Crimes Act reads as;

(2) A person rapes another person if —

(a) The person has carnal knowledge with or of the other person without the other person's consent;

24. Section 207 (3) of the Crimes Act reads thus;

207. (3) For this section, a child under the age of 13 years is incapable of giving consent.

25. Accordingly, in this case, to prove the offence of Rape as for counts 2, 4 and 6 the prosecution must prove the following elements beyond a reasonable doubt.

(i) The accused;

(ii) Had carnal knowledge with Setaita Loata; and

(iii) At the alleged time, Setaita Loata was under the age of 13 years.

26. However, to prove the offence of rape as for counts 8 and 9, the state must prove;

(i) The accused;

(ii) Had carnal knowledge with Setaita Loata;

(iii) Without the consent of Setaita Loata (the complainant); and

(iv) Either the accused;

knew or believed that the complainant was not consenting; or was reckless as to whether or not she was consenting.

27. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the

accused and no one else committed the offence. Though there is no doubt that the accused is Ilisoni Nawesi and he is well known to the complainant, you should carefully consider the evidence and conclude whether the accused is the one who committed the alleged act.

28. The second element 'carnal knowledge' means having sexual intercourse or the penetration of the Setaita Loata's vagina; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of Setaita Loata with his penis to any extent.
29. The third element required for the counts 2, 4 and 6 is the complainant Setaita Loata to be under the age of 13 years at the time of the alleged offences. As a child below the age of 13 years is incapable of giving the consent in law, it is immaterial whether the complainant, Setaita Loata consented to the alleged act or not.
30. as for the counts 8 and 9, to prove them, instead of the third element given above, the prosecution should prove these two other elements, which I have set out before as the elements (iv) and (v).
31. To prove the fourth element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent. 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;

- i) by force; or
- ii) by threat or intimidation; or
- iii) by fear of bodily harm; or
- iv) by exercise of authority.

32. 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 fifth element of the offence of rape.
33. It is not difficult to understand what is meant by the words “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.
34. Please 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.
35. If you find a reasonable doubt in respect of any of the first two elements, in regards to any of the count of rape, you shall give the benefit of that doubt to the accused and find the accused not guilty of the alleged count of Rape. Similarly, if

you have a reasonable doubt in respect of the 4th and 5th elements you should find the accused not guilty of the counts 8 and 9.

36. The 1st, 2nd, 7th and 8th counts are representative counts. The phrase 'representative count' simply means that during the period given, there alleges to be more than one similar incident and the described incident is only one of them.

Summary of evidence

37. The first witness called for the prosecution or the PW1 was Dr. Mere Wakewaletabua. Her evidence was that;
- (i) She is a MBBS qualified doctor with a Masters in Public Health, working at Rakiraki hospital.
 - (ii) On 05th of December 2017, she remembers examining a patient Setaita Loata and completing the police medical form.
 - (iii) The said medical form is marked and produced as PE1. As for her findings, the patient's hymen was not intact and she did not have any visible injuries. She is unable to tell how or when that happened.
 - (iv) In cross examination she states that the patient has informed her that she has been having sexual intercourse since 2016.
38. The PW2, Setaita Loata is the main witness for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. Her evidence is that;
- i) She is 20 years old, unemployed and currently lives in Matalevu, Tavua with her father.
 - ii) She was born on 27th of November 1999, and a copy of her Certificate of Birth is marked and produced as PE2.

- iii) The witness states that her parents were separated and her mother is in Suva. She has been with her Aunt, Akosita Voka from class 1 to 8, in Natawa, Tavua. Aunty Akosita is one of her father's sisters and is married to Uncle Ilisoni, the accused.
- iv) Aunty Akosita and Uncle Ilisoni had four daughters. During her stay with uncle Ilisoni, Aunty Akosita and her family, they have looked after her and has provided for her.
- v) In the year 2009, she was in class 5, and was attending to Natawa Primary School and was staying at Aunty Akosita's house. She states that at that time her uncle, the accused has started touching her breast, licking her vagina and inserting his penis into her vagina.
- vi) The first incident has happened when she was home alone. Aunty Akosita and her daughters were out, she was cleaning and the accused has come and asked her to go into the room. She states further that the accused has pulled her into the room, spread the mattress, took her clothes off and started touching her breast. Then he licked her vagina and inserted his penis into her vagina.
- vii) On another day when she was still in class 5, when she was alone at home washing the dishes, the accused has come and told her lets go into the room. When she went there, the accused has laid the mattress and told her to lay down. Then he has touched her breasts, licked her vagina and inserted his penis into her vagina. When the learned counsel queried whether the accused said anything after inserting his penis into her vagina, the witness states that he told her to not to tell anyone else. Further, when asked how was her clothes come off, the witness initially states that the accused asked her to take them off and later when asked who took them off, states that the accused took them off.
- viii) She has not told anyone, because the accused has told her to not to tell anyone. When the learned counsel asked why didn't she tell her aunty,

Akosita, the witness states the accused told her that if she tells anyone, he would kill her.

- ix) In the year 2010, she was in class 6, attending Natawa Primary School and staying with her Aunty Akosita and the family. Again when her aunt and her children were out in town and the witness was alone at home, the accused has come home, gone straight into the room, laid the mattress and taken her to the room. He has taken her clothes off and asked her to lay down. Then he has fondled her breasts, licked her vagina and inserted his penis into her vagina.
- x) In 2011, she was in class 7. In that year too, when she was at home alone, doing the home chores, the accused has gone into the room, spread the mattress, taken her clothes off, fondled her breasts, licked her vagina and has inserted his penis into her vagina.
- xi) When she was in class 8 in 2012, her aunty has sent her to the farm to get some produce. The accused has followed her to the farm and made her lay down on the ground and taking her clothes off, fondled her breasts, licked her vagina and has inserted his penis into her vagina. The witness further says that thereafter the accused told her to not to tell anyone. However, when the learned counsel queried why didn't she tell anyone, the witness states that it is because the accused threatened her before. You should also keep in mind that in 2012, the witness was no longer below the age of 13 years. My direction to you is even assuming you believe the witness in regards to this incident, to examine her evidence and see whether the 4th and 5th elements I mentioned before, essential in proving the charge of rape, is sufficiently proved here.
- xii) The final alleged incident has happened in 2016. By that time, she has moved in to her father's house in Matelevu, Tavua. After dinner around 9.00pm, she has gone to the bus shelter to get some fresh air. The accused has come there pulled her and made her lay down on the grass, removed her clothes, touched her breasts, licked her vagina and inserted his penis

into her vagina. The witness says that she tried to stop the accused from removing her clothes by shouting and the accused has told her to not to shout. The witness goes on to explain that if she is going to shout the accused is going to kill her. The bus shelter was about 8 meters away from her house and was just two steps away from the accused's house. However, the witness again says that accused's house was about 20 meters away from the house the witness stayed with her father.

- xiii) The witness identifies the accused as her uncle, Ilisoni who committed the alleged acts. As for her, these incidents have come to light after she informed them to her Aunty Maria Rosa. Maria Rosa, the PW3 is the wife of Inia, the younger brother of her father.

39. This witness has been subjected to cross examination at length by the defense. Answering the cross examination, PW2 says that;

- i) She came to stay with Aunty Akosita and Uncle Ilisoni when she was in class 3.
- ii) The house she stayed in with them was separated by a partition and on one side, her uncle Inia stayed with his first wife and on the other side she stayed with uncle Ilisoni and his family.
- iii) Before coming to stay with uncle Ilisoni and his family, she stayed in Natawa with uncle Sakaraia, who is another brother of her father.
- iv) Uncle Ilisoni and his family treated her like one of their own daughters. She used to hang out with her cousins and go to Natawa Primary School together. Until 2012, aunty Akosita was not employed and was at home when they come back from school. However, when suggested that she at no-time, was alone at home, the witness denies.
- v) The witness admits stating to the police referring to the first incident in 2009, that after the incident the accused told her to not to tell anyone as only the two of them should know. But the witness states that the accused told that he is going to kill her if she tells anyone. It should be noted that in

her examination in chief, the witness did not testify of any threat by the accused, after the very first incident in 2009.

- vi) Towards the end of the year 2009, uncle Ilisoni and his family has moved to a new house in Natawa along with her. It was situated close to the Matelevu bus stop. From Monday to Friday, she used to go to school with her cousins and until 2012; her aunty Akosita was at home when they come from school. She initially admits that she was never alone at home during the year 2010. Later she denies the said suggestion.
- vii) In Natawa, she had many close relatives in addition to aunty Akosita and she used to go and stay with them from time to time. The new house to which they moved in 2010 is surrounded by other houses.
- viii) The witness states that one of the uncle Ilisoni's daughters was elder to her and the rest were younger to her. The witness states that some of the incidents happened at night after 10.00pm while others were sleeping in the rooms she has slept in the living room. However, as for the evidence lead, none of the alleged incidents at home, has taken place either at night or while the others were at home.
- ix) In 2012, the alleged incident has taken place at the farm and it was around 10.00pm. She states that her aunty has sent her out to the garden to get the produce at that time. When queried as to what she was doing in the garden at 10.00pm, the witness refuses to answer that question.
- x) In answering questions by court, the witness testifies that in the year 2012, some incidents happened at home and some happened at the farm. She further states that more than once, incidents happened at the farm, at a particular time in the afternoon. However, she says that she could not recollect the time.
- xi) The witness states that the alleged first two incidents which took place in 2009, happened in the afternoon when she returned from the school.
- xii) The bus stop where the alleged incident occurred in 2016 was made of cement with a roof and has a bench. It has no walls and she was alone in

the said bus stop at 9 O'clock in the night. The witness further states that incident has happened at the side of the bus shelter and that place was covered with thick grass. While she was sitting there, the accused has come and covered her mouth with his hand. You should note that this is inconsistent with her initial version of events.

- xiii) Further, when suggested that when she saw the accused coming, she could have run to her house since it was close by, the witness gives no answer. When the defense queried as to why she didn't come out with that in the examination in chief, the witness refrains from answering.
- xiv) The witness says that the incidents came into light when she went and told her neighbor. She has told the neighbor because the incidents were occurring over and over. But she admits that no incident occurred after the alleged incident in 2016. She further admits that the complaint was made to the police in December 2017. When asked of the reasons for the delay of making the complaint, she gives no answer.
- xv) When suggested that she could have complained to uncle Inia, his wife aunty Maria or uncle Sakaraia, she refused to answer. The neighbor whom she has told to was Taraivini. She was taken to the police station to lodge the complaint by her aunty Maria. Aunty Maria has come and asked her about the incidents. Straight after talking to her they have gone to the police station. At the police station, when giving her statement, Aunty Maria was the one who spoke for her. She further explains that when the police officer asked a question aunty Maria answered for her. The witness states that the statement dated 21st of December 2017, was given by Maria and not the witness. She has not said anything to the police because she was afraid of the police. The police officer has not asked anything from her.
- xvi) The witness states that her aunts Maria and Akosita, they do not like each other. She is not aware of the reason for it.

xvii) She has gone for the medical examination with the police officer Ala. She admits, she told the doctor that her uncle has been having sexual intercourse with her since 2016. When asked of the reason for not informing the doctor of the alleged incidents, she refrains from answering.

40. In re-examination, the witness states;

- i) When the police recorded her statement, they were discussing with aunty Maria and she was asked only some questions.
- ii) She states that she did not complain to uncle Inia or Sakaraia, as she was staying with uncle Ilisoni and was afraid of him. However, it should be noted that since 2016, and even at the time of the alleged final incident, she was staying with her father and she had no apparent reason to be afraid of the accused.

41. The PW3 was Maria Adisenirewa. She is married to Inia Vetaukula and lives in Natawa. Her evidence was that;

- i) In December 2017, while gone to Vatukoula, she has received a telephone call from a school teacher about Setaita Loata, a niece of hers to be taken to the police station and to the hospital, due to certain degrading acts been done to her.
- ii) She went home and after a few days has told her husband Inia about it. Then they have prayed for 3 days and 3 nights and thereafter Setaita Loata has come to her. Setaita has told her about things which happened to her from her childhood. Setaita was frightened and kept on crying. Thereafter she has taken Setaita to the police station with a grandchild of hers, to give a statement to the police.
- iii) Setaita has told her that her uncle, Ilisoni did things that are not good to her when the house is empty. She has also said that she was afraid of her uncle and when asked why, she has told that he will kill her.

42. In answering the cross-examination posed on behalf of the accused, the witness states that;
- i) She has been living in Natawa since 2011 and by that time Ilisoni and his family were living separately in a new house.
 - ii) When asked about the relationship between her and Akosita, she states that it was good as they attend the same church. She admits that there is some tension between the families at the moment. The cause of such tension was the incidents which happened to Setaita.
 - iii) The witness is aware that having moved to the new house, Ilisoni has got his house extended and has also obtained electricity and water too. Ilisoni was farming on the land given to him by his father-in-law.
 - iv) When suggested that prior to 2017, she did not share a good relationship with Ilisoni's family, the witness denies such. Further when asked of the relationship between her and Akosita, she states that they were having a good relationship.
 - v) She admits that Setaita used to come to her house often. When asked whether Setaita has complained of anything to her prior to 2017, she states that Setaita has always said that she wanted to say something, but never did.
 - vi) She has come to know of the alleged incidents through a teacher. When asked whether she heard any rumors even thereafter the witness answers in the negative. The witness further states that she did not ask Setaita of what happened. But Setaita came and told her of the incidents. However, later she states that another aunt of Setaita came and told her of the incident.
 - vii) At the police station she did not speak to the police officer but Setaita did. She denies saying anything to the police officers. However, later admits that she complained to the police because she was concerned of her niece, Setaita. Further she admits the two of them, Setaita and herself

going to the police to complain. This is little inconsistent with her earlier version that she took Setaita with a grandchild of hers.

viii) The witness denies that she convinced Setaita to make these allegations due to the animosity with the accused and his family.

43. In re-examination, the witness states;

i) When she took Setaita to the police station, she took Setaita directly to Officer Ala and officer Ala took Setaita into a room and closed the doors and the witness was made to sit outside.

ii) She affirms that until the alleged incidents were complained of, she was having a good relationship with Ilisoni and his family.

44. With the leading of the above evidence and marking and producing PE1 and PE2, the prosecution closed their case and the Court being satisfied that on the face of it, the prosecution has adduced sufficient evidence covering the elements of the alleged offences, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.

45. The accused having understood his rights elected to give evidence on his behalf. His evidence is that;

i) He has been residing in Natawa, Tavua for 20 years. Her wife, Akosita Voka is from there and they have 4 daughters out of the said marriage. The said daughters are presently aged 28, 24, 18 and 16 years.

ii) He has been farming for a living and in addition to that he used to work in the other farms in the area.

iii) In 2009, he was living with his family in a house with his brother-in-law, Inia and that house was separated by a partition. The house had six rooms and Inia with wife occupied 4 of them whereas he occupied two rooms with his family. Out of the two rooms, one was used as a bedroom and the

other was used as a living room. There was no door separating the living room from the bedroom.

- iv) In 2009, the accused lived there with his wife, 4 daughters and Setaita. Setaita is the daughter of his brother-in-law, Jonetani Bokini. Setaita came to live with them when she was in class 3. When she was 4 years old her mother and father got separated and Setaita was brought to Sakaraia's (another brother-in-law of his) house. Setaita was with Sakaraia and the family until she reached class 3 and thereafter his father-in-law, brought her to them. Since then Setaita was treated as one of their children and been with them until she left to her father's house in 2016.
- v) In 2009, two of his children were not schooling and his wife remained home with them. The accused says that Setaita was never left alone at home during the said period. The accused denies the alleged incidents in count 1 and 2 ever happened.
- vi) They moved out of Inia's house in September 2009. In 2009, Inia was with his first wife Sisilia, and they have had a good relationship then. Maria came to live with Inia in 2011 and since then his wife Akosita and Maria did not get on well.
- vii) In 2010, they were living in the new house and his wife did not work. Setaita went to school with three of his daughters. The youngest child did not go to school then and stayed home with his wife. From Monday to Friday, they have the same routine and his wife was there at home waiting for the children. Therefore the accused states that the alleged incidents in 2010, as for counts 3 and 4 could not have taken place.
- viii) Even in 2011, his wife was not working and Setaita went to school with his children. There were some of the children always home and Setaita was never left alone at home. Since then he states that alleged incidents in 2011, as for counts 5 and 6, could not have happened.
- ix) In 2012, all of the children were schooling and the accused and his wife has started selling their produce at the market. By then, they didn't have

any rooms in their house. There had been a separation by a curtain and he and his wife used to sleep in one side while all the children used to sleep on the other side of the curtain. By the time cyclone Winston came in 2016, Setaita was not with them.

- x) The accused states that the bus stop is about 500 meters away from his house. It is adjoining to the king's Road and is just in front of Setaita's house. There are 3 other houses at very close proximity and they could be seen from the bus stand. Though there were rumors in the society and having heard them and they being serious allegations he was worried, he has carried on with his usual work.
- xi) Even though a complaint was lodged, police did not come in search of him but after about 2 months, he went to the police station and gave a statement. Thereafter he went home and went on with his work and after about 9 months thereafter, he was charged.
- xii) The accused altogether denies all the allegations levelled against him by the complainant. He states that he treated Setaita as one of his daughters and he loved Setaita the same way he love his daughters.

46. In cross examination, the accused states that;

- i) The accused admits that out of his 4 daughters, two are elder to Setaita and the other two are younger to her. The accused denies that he was the pastor of the Penueli church which was located on his land.
- ii) The accused admits that he refused to answer any of the questions asked by the police. Here you should not draw any adverse inference from it as it is his right granted by the constitution. The accused are not supposed to give any information against their interests. It is for the investigators to find out the relevant evidence and prosecutors to prosecute them.
- iii) The accused denies all the allegations levelled against him by the complainant. When asked of a reason for Setaita to falsely accuse him, the accused states that there was some other person who waves and calls

Setaita and she mistakenly thought that was him and that is where the differences started. Later they became bigger and Setaita made the accusations.

- iv) Further, in 2012, Setaita made the same allegations against one Varinava who is another relation of hers and that was settled within the family without reporting it to the police. In addition, the accused alleges that Setaita is a liar and she always lies.
47. In re-examination the accused states that he was not the pastor of the penueli church, which was on his land and he was only a member of that church. While denying that church was moved out as a result of these allegations, the accused states that church was destroyed by the cyclone Winston and they could not rebuild it so far.
48. With leading the above evidence of the accused, defense closed their case.
49. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the 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 appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
50. There are few points which need your additional attention. One thing is the inconsistencies between the evidence of Setaita and Maria. Setaita states that there were constant rifts between Akosita and Maria and Maria denies such. Setaita states that Maria came to her and asked about the incidents and Maria says that Setaita came to her and told. Setaita states that Maria was the one who spoke to the police officer at the time of recording of the complaint and Maria

says that she was asked to wait outside, while police recorded Setaita's statement.

51. Another thing would be the manner the complainant gave evidence. You may have noted the time taken by the complainant to answer a direct simple question. Is she a slow thinker? She has been prompt in giving some of the answers. She refused to answer some of the important questions. Was she holding back something relevant to these allegations? It is up to you to decide on those issues. If you have a reasonable doubt that she has lied on an important issue, can she be trusted on the rest is a matter that should be carefully considered. There is a Latin Legal Maxim to say '*Falsus in uno, falsus in omnibus*' – meaning 'False in one thing, false in all.'
52. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offences have been proven beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
53. The Accused has indicated his stance through his evidence. His stance is that he did not do the alleged acts. Even in case you do not accept the accused's stance as true, you should not consider it in order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case.

With the submission of the accused's stance, one of the three situations given below would arise;


- (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
- (ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
- (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged counts.

54. Any re-directions?

55. Lady and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. You have the copies of the documents tendered as exhibit "PE 1" and "PE 2". When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

56. Your opinion should be;

In respect of each count, whether the accused is guilty or not guilty.


Chamath S. Morais
JUDGE



Solicitors for the State : *Office of the Director of Public Prosecutions, Lautoka*
Solicitors for the Accused : *Office of the Legal Aid Commission, Lautoka*