

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 110 OF 2017

BETWEEN : **STATE**

AND : **MESULAME LESAVUA**

Counsel : *Ms. P. Lata for the State*
Ms. L. Volau for the Accused

Hearing on : *20th - 22nd of July 2020*

Summing up on : *29th of July 2020*

SUMMING UP

(The name of the complainant will be suppressed and will be referred to as V.V)

Lady and gentlemen assessors;

1. It is now my duty to sum up the case to you. Your opinion is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, 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 assessors of facts.

2. As the representatives of the society, your duty here is sacred. 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 to you in my opening address, your opinion should be based only on them. 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/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies 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 the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by 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 draw the most favorable inference to the accused.
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 a reasonable doubt, 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 offence the accused is charged with and

matters that will enable you to decide whether or not the charge is 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.

COUNT 1

Statement of Offence

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

Particulars of Offence

Mesulame Lesavua, on the 25th of December 2016 at Nadi, in the Western Division, unlawfully and indecently assaulted VV.

COUNT 2

Statement of Offence

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

Particulars of Offence

Mesulame Lesavua, between the 01st of January 2017 and 31st of January 2017 at Nadi, in the Western Division, unlawfully and indecently assaulted VV.

COUNT 3

Statement of Offence

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

Particulars of Offence

Mesulame Lesavua, between the 01st of April 2017 and 30th of April 2017 at Nadi, in the Western Division, penetrated the mouth of VV with his penis, without his consent.

COUNT 4

Statement of Offence

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

Particulars of Offence

Mesulame Lesavua, on the 13th of May 2017 at Nadi, in the Western Division, penetrated the mouth of VV with his penis, without his consent.

COUNT 5

Statement of Offence

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

Particulars of Offence

Mesulame Lesavua, on the 13th of May 2017 at Nadi, in the Western Division, unlawfully and indecently assaulted VV.

COUNT 6

Statement of Offence

ATTEMPTED RAPE: Contrary to section 44 and 207(1) and (2) (a) of the Crimes Act of 2009.

Particulars of Offence

Mesulame Lesavua, on the 13th of May 2017 at Nadi, in the Western Division, attempted to penetrate the anus of VV with his penis, without his consent.

18. First I will deal with the elements of the offence of Indecent Assault accused of in the 1st and 2nd counts.

Section 212 (1) of the Crimes Act states that;

212.- (1) A person commits a summary offence if he or she unlawfully and indecently assaults any other person.

Penalty– Imprisonment for five years.

- (2) It is no defence to a charge for an indecent assault on a boy or girl under the age of 16 years to prove that he or she consented to the act of indecency.

19. Therefore the essential elements that the prosecution should prove are;

- i) The Accused
- ii) unlawfully and indecently
- iii) assaulted the alleged victim

The Accused is guilty of **Indecent Assault**, if he 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. Using the above definitions you should consider whether there is doubt in respect of any of the above elements, especially whether the accused has used any physical force.

20. If you find that you have a reasonable doubt in regards to any of the said elements, you should find the accused not guilty of Indecent Assault, but should consider the lesser offence of ‘**Indecently Insulting or Annoying any Person**’ set out in section 213 of the Crimes Act.

- 213.- (1) A person commits a summary offence if he or she, intending to insult the modesty of any person—
- (a) utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by the other person; or

- (b) intrudes upon the privacy of another person by doing an act of a nature likely to offend his or her modesty.

Here the essential elements of the offence would be;

- i) The accused,
- ii) Intending to insult the modesty,
- iii) Makes a sound or a gesture
- iv) Intending the other person to hear or see.

21. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the lesser counts of 'Indecently Insulting or Annoying another Person'.

22. Now I will deal with the essential elements of the offence of Rape alleged in the 3rd and the 4th counts.

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

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

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

(2) A person rapes another person if —

- (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

23. Accordingly, in this case, to prove the offence of Rape as for the alleged counts the prosecution must prove the following elements beyond a reasonable doubt.

- (i) The accused;
- (ii) penetrated the mouth of VV with his penis,
- (iii) Without the consent of VV; and
- (iv) Either the accused;

knew or believed that VV was not consenting; or
was reckless as to whether or not he was consenting.

24. 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.
25. The second element is penetration of the VV's mouth 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.
26. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the mouth of the complainant, without the complainant's consent.
27. 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.
28. Apart from proving that the complainant did not consent for the accused to penetrate his mouth with the accused's penis, the prosecution should also prove

that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.

29. 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 his mouth and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant’s mouth with his penis, 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.
30. 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 upon relevant proven facts and circumstances.
31. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the 3rd and the 4th counts of Rape.
32. The 5th count is of sexual assault.

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

(a) Unlawfully and indecently assaults another person;

Therefore the elements that the prosecution should prove would be;

i) The Accused,

- ii) Unlawfully and indecently,
- iii) Assaulted the alleged victim,

The difference between the Indecent assault and the sexual assault would be that for the latter the assault needs to be of sexual nature.

33. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the 5th count, to wit; the count of sexual assault.
34. The 6th count is of Attempted Rape. Attempt of an offence is described in section 44 of the Crimes Act.

- 44.- (1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.
- (2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence, and the question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
- (4) A person may be found guilty even if–
- (a) Committing the offence attempted is impossible;

35. The attempted rape alleged by the 6th count is committed by the accused allegedly trying to insert his penis into the anus of the complainant. Therefore, the vital ingredients of the 6th count would be;

- (i) The accused;
- (ii) Attempted to penetrate the anus of VV with his penis,
- (iii) Without the consent of VV; and
- (iv) Either the accused;

knew or believed that VV was not consenting; or
was reckless as to whether or not he was consenting.

I have explained you these elements before in dealing with the offence of Rape. They would bear the same meanings.

36. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty to the 6th count, to wit; the count of Attempted Rape.
37. The following were recorded as the admitted facts by the prosecution and the defense.
- i) The complainant in this matter is VV, 14 years of age in 2016, residing at Nakolia settlement, Nawaka, Nadi with his father, Nacanieli Rea, mother Raijieli Naiveno, 3 younger siblings and his grandmother.
 - ii) VV attends Form 3 at Nadi Sangam College.
 - iii) Mesulame Lesavua is married to Raijieli Naiveno's sister.
 - iv) Up until May 2017, Mesulame Lesavua resided in Nakolia settlement, Nadi with his wife.

These admitted facts need no further proof. You should consider them as already proved. If there happens to be any inconsistency between the admitted facts and the evidence, the admitted facts prevail.

Summary of Evidence

38. The PW1, VV 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. His evidence is that;

- i) Presently he is 17 years old and is a student of Nadi Sangam College.
- ii) The accused, Mesulame Lesavua is married to his mother's biological sister and an uncle of his. He used to call the accused, Uncle Lesa.
- iii) On the 25th of December, the Christmas day morning he received a message on his phone from the accused, asking him to come and massage his back.
- iv) Uncle Lesa was living about 5 houses away from theirs. VV has gone there and massaged uncle Lesa's back. He has sensed a smell of liquor coming from the accused. Having massaged him VV has turned to go home.
- v) Then the accused has called him back and when he looked back, the accused, pointing to his erected penis has told that 'Come and try this'. The accused has pulled his pants down and shown VV his erected penis. VV has said 'No, it's forbidden' as they are related and gone home. He did not tell this to anyone as the accused was closely related, just like a family member and also thinking that nobody would believe him.
- vi) In January 2017, once when he was going to the village, passing the accused's house, the accused has called him and when looked at, has told him, to come and try his penis, pointing to his erected penis. VV has ignored the accused and proceeded.
- vii) In April 2017, one day when he was outside his house, hanging out the clothes. The accused has come to his neighbor's house and has called him. He has gone to the accused's house thinking that his aunt would be there. When he went in, his aunt was not there and the accused has locked the door and asked him to kneel down. When he did not kneel the accused has pushed him down and lowering the pants down, has showed his erected penis. Then the accused has told him to open his mouth. When he did not open the mouth, the accused has forced him to open the mouth and thereafter forcefully inserted the penis into his mouth. While he was having the accused's penis in his mouth the accused has called his wife and told her to not to come home but to go to the village.

- viii) While the accused was keeping the phone, VV has stood up and ran to the door and opening the lock has escaped and ran home. He has not told anyone as his father was strict and thinking that if told he would think that he is the one who wanted to do it and was afraid of telling anyone.
- ix) On the 13th of May 2017, his mother has asked him to bring the Roti Roller from the accused's house. Though he thought of telling her that he does not want to go, he thought his aunty would be there and he has said okay and gone to the accused's house. He has seen the accused getting ready to go to work and has knocked on the door and asked for the roti roller. The accused has pointed towards the cupboard. Then VV has gone in to take the roti roller. Though he thought his aunt would be there she wasn't and the accused was alone. By the time he took the roti roller and turned back to come out the accused has locked the door. Then the accused has taken him to the room.
- x) Then the accused has taken his shirt and the pants off and having taken a bottle of coconut oil has started massaging his penis. VV could not go out as the accused was blocking the door. Having applied the coconut oil, the accused has pushed him down for him to kneel down on the floor. Then the accused has forcefully inserted his penis into the VV's mouth. Then the accused has got hold of his head and moved it forward and backwards allowing his penis to go into VV's mouth. He has felt vomitish and has stood up to go, but the accused has blocked his way.
- xi) Then the accused has applied on VV's hands and has asked him to massage his penis. When he stood there without doing that, the accused, having taken some oil, has applied them on the VV's penis and massaged it. Thereafter the accused has told him that he is going to insert his penis into the VV's anus. Though the accused tried, he could not do so as VV was holding his anus tight with all his strength. Having tried, the accused has turned away towards the wall and VV has pulled up his pants and ran out of the house opening the locked door. He has run home and every one

was home when he went. He did not want to tell anyone as he could not trust anyone. He has gone into the room and cried alone.

- xii) After some time VV has attended a 3 day workshop at the Nadi Technical College. It was about peer counselling. On the 2nd day the counsellor has asked them to write about problems if any that they face at school or at home. Then he has written about everything he went through. He wanted help to overcome and to escape from this thing. The counsellor whom he told everything was Mr. Vili.
- xiii) Mr. Vili asked him to tell all that to his mother and come with his parents to meet him on the following day. That night he told everything to his mother. Following morning Mr. Vili had a discussion with his parents and thereafter he went with his parents to the Nadi police station and lodged a complaint.

39. In answering the cross examination by the counsel for the accused, the witness states;

- i) The neighbor's house is about 10 meters away from the accused's house. On the 25th of December 2016, the accused messaged him to come and massage him. Thereafter, the accused showed his erected penis to the witness. The defense suggests that it never happened and the witness denies it.
- ii) In January 2017, the accused was working for the Water Authority of Fiji. The incident that took place in January was around 4.00pm when he has returned from school. The defense suggests that incident did not take place as the accused was at work and the witness denies the suggestion.
- iii) The witness states that when the accused come to his home, if he sees the accused coming he goes and hides in the bedroom and sometimes the accused come to his house without him noticing when sitting on the sofa. Sometimes the accused signals and whispers to him.

- iv) The witness admits that in Nawaka village any improper relationship between him and the accused would raise a great interest. He did not want his parents to find out, any improper relationship between him and his Uncle, Lesa. He denies that he is attracted to the accused and often used to tell the accused that "I want you".
 - v) The defense suggests on instructions that in April 2017, the witness and the accused had consensual sex, starting with kissing each other. The witness denies that. It is further suggested on instructions that in the year 2017, the witness has consensually sucked the accused penis on more than 10 occasions and the witness denies such.
 - vi) Referring to the incidents allegedly happened on the 13th of May 2017, the witness admits that he did not shout or cry for help. He denies that it was because of a consensual sexual encounter. The witness denies that he had a consensual sexual encounter with the accused.
40. In answering the re-examination by the prosecuting counsel, the witness states that;
- i) He did not shout or cry for help during the 3rd alleged incident because, if someone come over and see, they would go and tell the others, which he did not want to happen.
 - ii) During the 4th alleged incident, he tried to get out but the accused moved in blocking his way. He states that when he informed this matter to the counsellor, he did not expect it to be reported to the police. He expected to seek advice from the counsellor to how to get away from it.
41. The PW2 was Mr. Vilisimani Rakikau. He is a Counsellor attached to the Ministry of Education. His evidence was that;

- i) He works as an Alcohol and Other Drugs (AOD) counsellor and he has been in practice since 2007.
- ii) He recalls hosting a peer training workshop in Nadi from 22nd to 24th of May 2017 at the Technical College. The participants were selected from various schools in Nadi and it was a 3 day workshop.
- iii) He remembers VV as a participant in this workshop. When he asked the participants to write down the issues they have, VV has written of an issue which required his attention as a professional counsellor. It was about sexual harassment VV is going through from Mesulame Lesavua on few occasions.
- iv) He first gathered information from the VV and informed the Social welfare accordingly. VV has informed him on the 2nd day of the workshop, the 23rd of May 2017. VV has informed him of the incidents that took place on 4 occasions.
- v) In answering the cross-examination, he states that the students were selected from various schools in the area and they were assured of the confidentiality of the given information and the limitations of such.
- vi) The witness admits that VV did not use the word 'rape' in his report. However, when the witness gave his statement to the police, when the incident is explained the police used the word 'rape' to which he agreed.
- vii) VV has told him that he did not disclose the incidents to anyone else as he was ashamed and also thinking that his parents would not believe him due to their close ties with the accused.

42. The next witness called by the prosecution was Ms. Raijieli Naiveno. She is the mother of the PW1. Her evidence was;

- i) She lives in Nawaka Nadi with her husband and 4 children. VV, the PW1 is her eldest son.

- ii) On the 23rd of May 2017, she was informed by her son VV of harassments by Mesulame Lesavua. He has told her of what Mesulame did to him. Said harassments have commenced in December 2016 and continued till the 13th of May 2017. In addition to the said incidents on the Christmas day in 2016 and the 13th of May 2017, VV told her of harassments in January 2017 and April 2017. When relating those incidents, VV was trembling with fear and was also crying.
 - iii) She has informed those to her husband and they have gone and met the counsellor in the following morning. Thereafter she together with her husband and the son, VV has gone to the Nadi police station and lodged a complaint.
 - iv) Answering the cross examination by the learned counsel for the accused, witness states that, whether consensual or forced it is not a norm to have sexual intercourse between two men hence it will be the talk of the village.
 - v) In answering the re-examination, the witness states that what she meant by harassment is harassing in a harsh manner.
43. With leading the evidence of PW1, Pw2 and PW3, the prosecution closed their case. The defense made an application under section 231 (1) of the Criminal Procedure Act, submitting that the prosecution has failed to submit evidence covering the elements of the 1st and 2nd counts and moved for an acquittal. The Court having listened to the submissions and being satisfied that there are sufficient evidence covering a lesser offence instead of the 1st and the 2nd counts also that there is sufficient evidence covering the rest of the counts decided to call for defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.
44. The accused having understood his rights elected to give evidence on his behalf. His evidence was that;

- i) He lives in Nawaka village since birth. VV is his nephew.
- ii) When queried of the alleged incident on the 25th of December 2016, he states that VV wanted it and came to his home.
- iii) Referring to the alleged incident in January 2017 too, the accused states that VV came to his home and told him that he wants him. However he denies showing his erected penis to VV.
- iv) Explaining the relationship between him and the VV, the accused states that VV always wanted to touch his penis and sometimes when his wife goes to VV's house, he comes to the house where he is alone and wants to suck his penis. That happened mostly during the weekends. VV has done so on more than 10 occasions. He has not forced VV to suck his penis.
- v) Referring to the alleged incident in April 2017, the accused states that VV came to his house and wanted to suck his penis and he did not force VV. He further states that whenever VV come, he call him Uncle Lesa, and they start kissing and VV starts touching his penis. Thereafter VV pulls it out and starts sucking it voluntarily, without being forced.
- vi) In reference to the alleged 4th incident on the 13th of May 2017, he says that VV came to his house and had consensually sucked his penis. The accused, while denying him locking the doors when VV came to his house, states that VV himself locks the doors. He denies trying to insert his penis into VV's anus.

45. In answering the cross examination, posed on behalf of the prosecution, the accused states that;

- i) On the 25th of December 2016, he did not have any drinks. He has gone to the Church. Thereafter he has gone to Nawaka village to have lunch. He states that VV did not come to his house on the 25th of December 2016. Later he states that VV came to his house but nothing happened between them and VV did not say anything to him. Again he states that VV came

and said that he wants him and sucked his penis on that day before going to the church. When confronted with the said inconsistencies, the witness states that he got confused of the dates.

- ii) In January 2017, the accused states that VV came to his house on many occasions. He comes there because VV wants to suck his penis. The accused allowed VV to do it because that is what he wanted.
- iii) He has said to VV to not to come to his place in April 2017 as he has a wife. But VV used to come to his home even thereafter.
- iv) In May 2017, when VV came to his house to take the roti roller, having taken the roti-roller, VV locked the doors and wanted him so badly. Then they started kissing and VV went down on his knees and sucked his penis.
- v) The accused states that even after the 13th of May 2017, he and VV had sex on about 3 times. He further states that attending the technical college workshop changed the VV's mind.
- vi) The accused denies forcing VV to have sex with him or attempting to rape.

46. In answering the re-examination, the accused states that;

- i) On the 25th of December 2016, VV came to his house and sucked his penis before him going to the church.
- ii) When he was interviewed by the police he did not tell these but remained silent as he wanted to come and give evidence in court.

47. 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.

48. 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.
49. The Accused has indicated his stance and it was that the sexual intercourse they had was done with the consent of VV. In other words he denies committing rape. 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 if any.
50. 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 count.

51. Any re-directions? *none*

52. Lady and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When each of you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

53. Your opinion should be;

Whether the accused is guilty or not guilty of the alleged offence of;

- i. Indecent Assault as for the 1st count, and if not
of the offence of Indecently Insulting or Annoying any Person
- ii. Indecent Assault as for the 2nd count, and if not
of the offence of Indecently Insulting or Annoying any Person
- iii. Rape as for the 3rd count
- iv. Rape as for the 4th count
- v. Sexual Assault as for the 5th count
- vi. Attempted Rape as for the 6th count.



Chamath S. Morais

JUDGE

Solicitors for the State : *Office of the Director of Public Prosecutions, Lautoka*

Solicitors for the Accused : *Legal Aid Commission, Lautoka.*