

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 445 of 2018

STATE

V

JOSUA DIGITAKI KOTOBALAVU

Counsel : Ms. Unaisi Tamanikaiyaroi for the State
Ms. Vuli Savou for the Accused

Dates of Trial : 10-14 February 2020

Summing Up : 17 February 2020

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "LNK". The name of the complainant's sister is also suppressed. Accordingly, she will be referred to as "LBL".

SUMMING UP

Madam Assessors and Gentleman Assessor,

[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the documents tendered as prosecution exhibits and any admissions made by the parties by way of agreed facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submissions made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11] As I already indicated to you, a matter which will be of primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and 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 correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15] According to the evidence you heard in this case, the complainant, LNK, was 6 years old at the time of the alleged incident, and was 7 years old when she testified in Court (As per her Birth Certificate which has been tendered as Prosecution Exhibit PE1, she will be turning 8 on 25 February 2020). Experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that

the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

- [16] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [17] You heard in this case the evidence of LBL, the sister of the complainant, who said she is now 12 years old. The witness said that when she returned home after school, LNK had told her thus: "She told me that she was with her friend Leba and my Pu she went to one of my auntie's. Then Leba's father called Leba. Then LNK came to my grandmother's room and she laid down and sleep. Then when she woke up, she saw Josua's hand in her private part. When she woke up she saw her trousers besides her. Then Josua put his private part out and then he told LNK to look at his private part. Then Josua stood up and told LNK not to tell me or anyone else, otherwise, I am not going to give her 50 cents."
- [18] The complainant need not specifically disclose all of the ingredients of the offence and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that the complainant made a prompt and a proper complaint, then you may consider that her credibility is strengthened in view of that recent complaint.
- [19] It must be borne in mind that the complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [20] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.

- [21] However, if there is no acceptable explanation for the inconsistency or omission, 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 inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission 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 his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider the witness to be reliable.
- [22] Ladies and Gentleman Assessor, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [23] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [24] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the charge. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [25] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [26] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [27] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain

thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.

- [28] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [29] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [30] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [31] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [32] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [33] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [34] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.

- [35] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [36] I must also explain to you as to the reason for the use of screen, when the complainant and her sister gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness or witnesses. It is believed that when a screen is placed, the complainant is relieved of any mental pressure to describe the often unpleasant incidents which she alleged took place. The same applies with regard to the recent complaint witness, who testified as to what the complainant had informed her. Please bear in mind that you must not infer that such a protection to the witnesses was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [37] The same applies for permitting a closed court proceedings when the complainant and her sister gave evidence in this case; and also for permitting a support person to sit beside them when they testified in Court. I wish to reiterate once again that you must not infer that such a protection to the witnesses was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [38] Let us now look at the charges contained in the Information.
- [39] There are two charges preferred by the Director of Public Prosecutions (DPP), against the accused:

COUNT 1

Statement of Offence

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

Particulars of Offence

JOSUA DIGITAKI KOTOBALAVU, on the 11th of October 2018, at Nasinu, in the Central Division, penetrated the vulva of **LNK**, a child under the age of 13 years with his finger.

COUNT 2

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: Contrary to Section 213 (1) (a) of the Crimes Act 2009.

Particulars of Offence

JOSUA DIGITAKI KOTOBALAVU, on the 11th of October 2018, at Nasinu, in the Central Division, with intent to insult the modesty of **LNK**, exhibited his penis to **LNK** intending that his penis be seen by **LNK**.

[40] As you are aware the accused has already pleaded guilty to Count 2, which is the charge of Indecently Annoying Any Person. As such, you do not have to make any determination in respect of the said count. However, please bear in mind that although the accused has pleaded guilty to Count 2, that does not automatically make him guilty of Count 1, which is a count of Rape. The accused is presumed to be innocent of the said charge. He may be convicted of the count of Rape only if the prosecution establishes beyond reasonable doubt that he is guilty of the said offence charged. It is not his task to prove his innocence in respect of the said charge.

[41] As you would notice the accused has been charged with one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act).

[42] Let me now explain to you the elements of Count 1.

[43] Section 207(1) of the Crimes Act reads as follows:

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

[44] Section 207(2) (b) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a); or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

[45] Therefore, when Section 207(1) is read with Section 207(2) (b) it would read as follows:

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

(2) A person rapes another person if —

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

[46] Section 207(2) (b) refers to a person penetrating the vulva, vagina or anus of the other person, to any extent, with a thing or a part of the person's body that is not a penis.

[47] Section 207(3) of the Crimes Act provides that *"For this section, a child under the age of 13 years is incapable of giving consent."*

[48] Therefore, in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified date (in this case the 11 October 2018);
- (iii) At Nasinu, in the Central Division;
- (iv) Penetrated the vulva of LNK, with his finger; and
- (v) At the time LNK was a child under 13 years of age.

[49] Let me now elaborate on these elements in respect of Count 1.

[50] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[51] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[52] The fourth element involves the penetration of the complainant's vulva, with his finger. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. The element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the complainant's vulva, with his finger, to any extent.

[53] The final element is that at the time of the incident LNK was a child under 13 years of age.

[54] The issue of consent will not arise in this case. A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 6 years of age at the time of the alleged incident, and therefore, she had no mental capacity to consent.

[55] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape is obviously considered as a Sexual Offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

[56] If you are satisfied beyond any reasonable doubt that the accused, on 11 October 2018, at Nasinu, penetrated the complainant's vulva with his finger, then you must find him guilty of the first count of Rape.

[57] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the first count of Rape.

[58] However, if you find that the prosecution has failed to establish beyond reasonable doubt that the accused penetrated the vulva of LNK, with his finger, but you find from the available evidence that the accused unlawfully and indecently assaulted LNK by touching her thighs; as an alternative, you are then allowed to look at the lesser offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act, though the accused is not formally charged for that offence in Count 1.

[59] Section 210 (1) (a) of the Crimes Act reads as follows:

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

(a) unlawfully and indecently assaults another person;

[60] Therefore, in order for the prosecution to prove Sexual Assault in terms of Count 1, they must establish beyond any reasonable doubt that;

(i) The accused;

(ii) On the specified day (in this case 11 October 2018);

(iii) At Nasinu, in the Central Division;

(iv) Unlawfully and indecently assaulted LNK, by touching her thighs.

- [61] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [62] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [63] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of touching the complainant’s thighs by the accused is an indecent act and thereby amounts to Sexual Assault.
- [64] However, I wish to emphasize that you need to go in this direction ONLY if you find that the prosecution has failed to establish beyond reasonable doubt that the accused penetrated the vulva of LNK, with his finger. If you are satisfied that the prosecution has established all the elements constituting the offence of Rape beyond reasonable doubt in respect of Count 1, then you must find the accused guilty as charged.
- [65] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [66] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as “Agreed Facts” without placing necessary evidence to prove them:
1. The accused is Josua Digitaki Kotobalavu, 20 years of Lot 3 Vesivesi Road, Kinoya.
 2. The complainant is LNK, 6 years of Tovata Road, Makoi. The complainant was born on the 25th of February 2002. The birth certificate of the complainant is tendered by consent. **[It must be noted that as per the birth certificate of the complainant her date of birth is recorded as 25 February 2012 and not 2002].**
 3. The accused and complainant are first cousins as their mothers are biological sisters.
 4. On the 11th of October 2018, at around 11.00 a.m. the complainant was at her grandmother’s home at Tovata Road, Makoi.
 5. At one point in time on the alleged date, the accused was alone with the complainant.

6. At one point in time on the alleged date, the accused then showed his unclothed penis to her. There was no one else present in the room when the accused did this to the complainant.
7. The complainant then told her relatives and the matter was reported to the police on the 13th October 2018.
8. The complainant was medically examined on the 13th of October 2018 by Dr. Elvira Ongbit.
9. The resume of Dr. Elivira is hereby tendered by consent. The contents of the resume are not disputed. **[However, the prosecution did not call Dr. Elvira Ongbit to give evidence in this case as she was said to be overseas. In her place the prosecution called Dr. Nikotimo Bakani].**

[67] Since the prosecution and the defence have consented to treat the above facts as “*Agreed Facts*” without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt, subject to the above clarifications referred to by me.

Case for the Prosecution

[68] The prosecution, in support of their case, called the complainant (LNK), her sister, LBL, and Medical Officer, Dr. Nikotimo Bakani. The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit **PE1**- Birth Certificate of the complainant.

Prosecution Exhibit **PE2**- Medical Examination Report of the complainant.

Prosecution Exhibit **PE3**- The diagram drawn by Dr. Nikotimo Bakani.

[69] Evidence of the complainant LNK

- (i) *It is an Agreed Fact that the complainant was 6 years of age at the time of the alleged incident. Her date of birth is 25 February 2012. Her birth certificate was tendered to Court as Prosecution Exhibit PE1.*
- (ii) *The complainant testified that she currently lives at Tovata, Makoi. She said that her mother, her grandmother, her aunt and her sisters, Caucau and LBL also stays in the same house.*
- (iii) *She testified that she is attending Nasinu Gospel (Primary School) and is in Year 2.*
- (iv) *The complainant said that she has one brother and three sisters.*
- (v) *The complainant testified that she knows her cousin Josua. She said Josua does not stay with them at Tovata Makoi.*
- (vi) *When asked, did you cousin Josua did anything to you? The witness answered yes. When asked what did Josua do to you? The witness said “I was sleeping.*

He took off my skirt. He held his right hand and he do something to me (kitaka vei au)".

(vii) *The following questions were then asked from the witness and she answered as follows:*

Q. *What did he do?*

A. *He did my pia.*

Q. *What do you mean by pia?*

A. *The front of us.*

Q. *What do you use the pia for?*

A. *For urine.*

Q. *Can you point where your pia is?*

A. *The Witness showed/demonstrated by pointing to her genital area.*

Q. *You said you were sleeping and he took off your skirt?*

A. *Yes.*

Q. *How did you know he took off your skirt if you were sleeping?*

A. *I could feel it.*

Q. *And you also told us that he held his right hand?*

A. *Yes.*

Q. *What did he do with his right hand?*

A. *He poked here (witness pointed towards her genital area).*

Q. *Where was he poking?*

A. *The witness stood up and pointed towards her genital area.*

Q. *How do you know he poked you there?*

A. *I was sleeping and I can remember (and I was thinking).*

Q. *And when he poked what did you feel?*

A. *His hand.*

Q. *Apart from his hand what did you see, did you see his hand?*

A. *Yes.*

Q. *What did you see?*

A. *Only his hand.*

- Q. *Can you show us what you saw from his hand?*
A. *The witness showed her index finger and middle finger.*
- Q. *When did you see his hand like that?*
A. *When he put it outside.*
- Q. *Put it outside what?*
A. *Inside the room.*
- Q. *When you saw his hand what were you doing?*
A. *I woke up all of a sudden.*
- Q. *On this day was it day time or night time?*
A. *Day time.*
- Q. *Where were you?*
A. *Inside the room.*
- Q. *Whose room?*
A. *One of our cousin's.*
- Q. *Do you usually sleep in that room?*
A. *No.*
- Q. *On that day, who told you to go to that room?*
A. *My grandmother.*
- Q. *Who else were at home on that day when Josua poked you?*
A. *No one.*
- Q. *So it was only you and Josua?*
A. *Yes.*
- Q. *Did you go to school on that day?*
A. *Yes.*
- Q. *Can you remember what time you came home?*
A. *Day time, a bit after lunch.*
- Q. *When you got home from school, what did you do?*
A. *Nothing.*

- Q. *Where was Josua?*
A. *Inside the room.*
- Q. *The room Josua was in, was it the same room?*
A. *Yes my cousin's room.*
- Q. *Where were you in the house?*
A. *At the sitting room.*
- Q. *From the sitting room, where did you go after that?*
A. *I went inside the room to sleep.*
- Q. *When you went to the room to sleep, where was Josua?*
A. *He was also inside the room.*
- Q. *What was Josua doing when you went to sleep?*
A. *He was pressing his phone.*
- Q. *Can you remember what you were wearing that day?*
A. *A t-shirt and a skirt.*
- Q. *Were you wearing anything underneath the skirt?*
A. *No.*
- Q. *Then after you went to sleep, when you woke up from your sleep, what was the first thing you saw?*
A. *His hand.*
- Q. *When you first saw his hand, where was it?*
A. *It was with him.*
- Q. *When you woke up did you feel anything?*
A. *Yes.*
- Q. *What did you feel?*
A. *Hurt from his hand.*
- Q. *Can you explain what you mean by that?*
A. *No answer was given by the witness.*
- Q. *What hurt?*
A. *"Here to me" and witness pointed to her genital area.*

Q. *Do you have a name for that place?*

A. *Pia.*

Q. *How did his hand hurt you?*

A. *His hand was sharp.*

Q. *Which part of the hand are you talking about?*

A. *The witness again showed her index and middle fingers together.*

Q. *When you felt hurt from his hand, what did you do?*

A. *I told him not to do it.*

Q. *What did he say to you?*

A. *He didn't do it.*

Q. *What do you mean?*

A. *No answer was given by the witness.*

Q. *Did he speak or say anything to you?*

A. *Yes.*

Q. *What did he say to you?*

A. *He told me to look at his balls (polo).*

Q. *Did he tell you to look at his balls before or after he hurt you with his hand?*

A. *After.*

Q. *When he said for you to look at his balls, what was he doing?*

A. *Nothing.*

Q. *When Josua showed you his balls, what did you do?*

A. *Nothing.*

Q. *Did you see his balls or not?*

A. *No.*

.....

Q. *You said Josua said to look at his balls?*

A. *Yes.*

Q. *How did he show you his balls?*

A. *He put it out.*

Q. *What did he put it out off?*

A. *His ball (polo).*

Q. *Where in the house, did he show you his balls?*

A. *In the sitting room.*

Q. *After he put out his balls, what did he then do?*

A. *He then told me not tell this to my sister.*

Q. *When he put out his balls, were you close to him or far?*

A. *I was far from him.*

Q. *What did you say?*

A. *I then tell (told) my sister.*

Q. *After he showed his balls, what did he do after that?*

A. *Then he took his bag and left.*

Q. *When you came back from school that day, was Josua already at home?*

A. *Yes.*

Q. *How did you come back home from school?*

A. *I came with my friends.*

(viii) *The witness said that Josua had left for his house. It was still day time. After he left, she was waiting for her sister, LBL, to tell her what had happened to her. She had been waiting for her sister at her grandmother's house. When asked if it was the same house she and Josua had been in, the witness said yes.*

(ix) *The witness testified that the first person to come home was her sister LBL. It was still day time. She had been in the sitting room. As soon as LBL came, she had gone straight to LBL and told what Josua did to her. The witness said she had told her sister "I told her that while I was sleeping, he (Josua) then pulled my skirt". "He then took his hand and put it into my mimi".*

(x) *When asked what she uses her mimi for? The witness said "pia". The complainant had also told her sister thus: "I also told LBL that Josua told me if I am going to tell LBL he will not give me 50 cents.*

(xi) *The complainant then testified that she, her mother and her sister LBL had gone to the Police Station to report the matter. Thereafter, she had been taken to a Doctor to be checked (examined).*

- (xii) The complainant clearly identified the accused Josua in Court.*
- (xiii) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.*
- (xiv) The defence highlighted the following inconsistencies between the testimony given by the witness in Court as against the statement given by her to the police:*

(1) In her evidence in Court the complainant said that she was sleeping in her cousin's room. However, in her statement to the police, she has stated that she was sleeping inside her grandmother's bedroom.

(2) In her evidence the complainant said that Josua was already in the room and was pressing his phone. However, in her statement to the police, she has stated that she was sleeping inside her grandmother's bedroom when Josua came inside.

(3) In her evidence in Court the complainant referred to her private part as 'pia'. However, in her statement to the police, she has stated thus: "After he used his two fingers inside my private parts (Pipi)".

(xv) It was suggested to the witness that someone had helped her tell her story to the police, and the witness said yes. The complainant said that at the time she was giving her statement to the police her mother and her two sisters LBL and Caucau were also there.

(xvi) It was also suggested to the witness that she took off her own skirt after Josua had told her to take off her skirt. The witness said no.

(xvii) The following questions were then asked from the witness in cross examination and she answered as follows:

Q. After your skirt came off, Josua saw that you were scared?

A. Yes.

Q. Then he just touched your thighs and left the room?

A. That is correct.

Q. After Josua left the room, he was in the sitting room?

A. Yes.

Q. And in the sitting room, was where he showed you his penis?

A. Yes.

- Q. *And after he showed you his penis, he left the house?*
A. *That is correct.*
- Q. *Before Josua left the sitting room, he didn't say anything to you?*
A. *Yes.*
- Q. *So what he did was he just showed you (flashed) his penis for not more than 5 seconds and then he left the sitting room and left the house to go home?*
A. *Yes.*
- Q. *You told us before, that underneath your skirt, you were not wearing anything?*
A. *That's correct.*
- Q. *I will now take you to the police statement where you gave your story.*
A. *Yes.*
- Q. *When you told your story to the woman police officer, you said you had your panty on.*
A. *That is correct.*
- Q. *So which version is correct? Did you have your panty on, or you didn't have anything under your skirt?*
A. *I was wearing my panty.*
- Q. *So the answer you gave the State Counsel was incorrect?*
A. *The answer I gave was correct.*
.....
- Q. *After Josua showed his penis to you, he had gone home. At any time or even before coming to Court did your mother, Caucau or LBL help you remember the incident?*
A. *No.*
- Q. *After the incident you and your family discussed about Josua?*
A. *No.*
- Q. *Is it true that Josua only touched your thighs?*
A. *No.*
- Q. *I put it to you that's all he did, he just touched your thighs?*
A. *That's correct.*

Q. *And also after he showed his penis to you, he did not say anything, neither did you do anything and he left the house?*

A. *That's correct.*

Q. *And when at the police station, when you told your story, you were assisted to tell your story, correct?*

A. *Yes.*

Q. *So some of the information in that statement (the paper I showed you) are not from you?*

A. *That is correct.*

(xviii) In re-examination the witness said that whatever she had told her mother at home, that is what she had told her in the police station. When asked whether the story she told at the police station was her mother's story or her own story, the witness stated that the story she told at the police station was her own story.

(xix) The witness testified that the incident she told her sister really did happen. She said that "Josua removed my skirt he then put his both hands to me". When asked as to what she meant by both hands, the witness demonstrated by showing her index finger and middle finger.

(xx) When asked in re-examination as to what exactly Josua did to her that day, the witness answered as follows: "He came, he removed my panty and he put his hand inside". When asked "where did he put his hand?" The witness said "my pia".

[70] Evidence of LBL

(i) She is 12 years of age and currently residing in Tovata, Makoi, with her mother, grandmother and her small sister (LNK - the complainant).

(ii) She testified that in month of October 2018, she was attending Saint John Bosco Primary School and was in Class 5.

(iii) Even in October 2018, she was residing at Tovata, Makoi. Her mother, younger sister (LNK), her uncle and aunty were staying in that house together with her. Her grandmother was staying besides their house.

(iv) The witness testified that on 11 October 2018, she had gone school. She had finished school at 2.30 that day and got home around 4.00. When she got home, her grandmother and LNK were at home. LNK was in the sitting room. The witness said that the complainant was in a different way (she was sad). She had asked her what happened and LNK had told her the story about the incident.

(v) The witness said that LNK had told thus: "She told me that she was with her friend Leba and my Pu she went to one of my auntie's. Then Leba's father

called Leba. Then LNK came to my grandmother's room and she laid down and sleep. Then when she woke up, she saw Josua's hand in her private part. When she woke up she saw her trousers besides her. Then Josua put his private part out and then he told LNK to look at his private part. Then Josua stood up and told LNK not to tell me or anyone else, otherwise, I am not going to give her 50 cents."

- (vi) Later when her mother had arrived home, the witness and the complainant had sat down and explained to their mother the story about what Josua did.*
- (vii) The witness said that LNK had told her about this incident on the same day it happened. The witness said that it was on 9 October 2018. She remembers the day as 9 October 2018, because the matter was reported to the police on 11 October 2018.*

[71] Evidence of Dr. Nikotimo Bakani

- (i) Currently he is serving as a Medical Officer at the Medical Services Pacific (MSP) in the Labasa Office, as a Gynaecologist. He has been based at MSP Labasa for 3 years. He has been practising as a Medical Officer for 17 years.*
- (ii) The witness testified that a medical examination on the complainant was conducted by Dr. Elvira Ongbit, on 13 October 2018, at 10.45 a.m. The Medical Examination Report was tendered to Court as Prosecution Exhibit **PE2**.*
- (iii) He testified that Dr Ongbit is his colleague based in Suva and said he is familiar with the work of Dr Ongbit.*
- (iv) The Doctor testified as to the specific medical findings as found in column D12.*

Vaginal Examination Findings:

- Hymen is intact.*
 - Fresh superficial abrasions noted on inner sides of both labia minora.*
- (v) The doctor was asked to explain the make-up or structure of the female genitalia. He drew a diagram detailing the female genitalia. The diagram was tendered to Court as **PE3**.*
- (vi) He testified that the vulva is the visible outer area of the female reproductive organs. He said everything shown in the diagram is the vulva – which*

comprises, the mons pubis, the labia majora, the labia minora, the urethral opening, the hymen, the fassa navicularis and posterior fourchette.

(vii) The Doctor explained in detail as to what was meant by fresh superficial abrasions on the inner sides of both labia minora.

(viii) The Doctor testified that some of the causes for an injury of this nature could be due to rubbing or friction from blunt objects, such as fingers, penis or any inanimate object.

[72] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could give sworn evidence from the witness box and/or call witnesses on his behalf. He could also address Court by himself or his counsel. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to offer evidence under oath.

Case for the Defence

[73] The accused gave evidence in support of his case.

[74] Evidence of Josua Digitaki Kotobalavu

(i) The accused testified that he is currently residing at Vesivesi Road, Laucala Beach with his mother and brothers. He has 8 other siblings – 4 sisters and 4 brothers.

(ii) He testified that on 11 October 2018, he was at home in Laucala Beach. During the lunch hour, he had gone to the Kinoya area and met up with his friends. After lunch - between 1.00 – 3.00 p.m. he was just around Kinoya. Then he testified that he went to Tovata.

(iii) The following questions were then asked from the witness and he answered as follows:

Q. Do you know why you are in Court today?

A. I was accused of Rape.

Q. Can we talk about the allegation?

A. Yes.

Q. Who is accusing you?

A. My family.

- Q. *Who is this family member?*
A. *LNK.*
- Q. *On 11 October 2018, did you meet LNK?*
A. *I do not remember.*
- Q. *Can you tell us something about this allegation?*
A. *Yes.*
- Q. *What can you say about this allegation?*
A. *I did not poke that child.*
- Q. *Why do you say that?*
A. *Because I know what I did.*
- Q. *What did you do?*
A. *I asked her to remove her pants. I saw her face that she was afraid.*
- Q. *Then what?*
A. *I stood up and went to the washroom/toilet.*
- Q. *When you asked her to take her pants off where was the place?*
A. *In the room.*
- Q. *Whose room?*
A. *My room.*
- Q. *Whose house is it?*
A. *It is my grandmother's house.*
- Q. *And where is this place?*
A. *Tovata, Makoi.*
- Q. *Before you asked LNK to take off her pants, where were you and she?*
A. *I was in the sitting room. She was outside playing.*
- Q. *Then?*
A. *It started to rain. I called inside to come and sleep.*
- Q. *Then?*
A. *Then I told her to take off her pants.*

Q. *Then?*

A. *That's when I saw she was scared.*

Q. *At this time was there anyone else at home?*

A. *No.*

Q. *You then left the room, went to the toilet, then what happened?*

A. *I came back and showed her my penis.*

Q. *What happened after that?*

A. *She did not want to look.*

Q. *Then?*

A. *I left her there and went to Kinoya.*

Q. *Before you left for Kinoya, did you say anything else to her?*

A. *No.*

Q. *You didn't say anything to her in the sitting room?*

A. *.....*

Q. *Did you say anything to LNK in the room?*

A. *The only thing I said was for her to take off her pants.*

Q. *Did you do anything to LNK?*

A. *No.*

Q. *Is there anything else you would like to tell this Court today?*

A. *Yes. I seek forgiveness from this Court about the actions I have done that was inappropriate. Because of my short temper has led me to this case. I stand before you, before this Honourable Court I seek forgiveness. That is all. Thank you.*

Q. *What actions were you talking about?*

A. *When I had told her to remove her pants.*

Q. *Any other actions?*

A. *That is all.*

(iv) *The witness was cross examined at length by the prosecution and several suggestions were put to him.*

- (v) *In re-examination, the witness said that what he did was that he removed the complainant's pants and touched her thighs. And he also showed his penis to her.*

Analysis

- [75] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, her sister, LBL, and Medical Officer, Dr. Nikotimo Bakani. The defence relied on the evidence of the accused himself.
- [76] The prosecution relies upon the evidence of the Medical Officer, Dr. Nikotimo Bakani. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [77] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [78] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [79] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [80] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt. Based on the said agreed facts the date of incident and the place of incident has been agreed upon. It has also been agreed that the complainant was 6 years old at the time of the incident, and therefore, that she is a child under the age of 13 years is also proved beyond reasonable doubt. However, the prosecution has to prove beyond reasonable doubt that the accused penetrated the vulva of LNK, with his finger.
- [81] The accused has testified in Court and totally denies that he poked or penetrated the vulva of the complainant. He admits that he asked the complainant to remove her pants. When she did so, he had touched her thighs. He also admits to showing his penis to the complainant. This is an agreed fact as well.
- [82] The defence also takes up the position that the complainant has been coached by her mother and other family members to fabricate this story against the accused (to fabricate the fact that he poked the complainant's vulva with his finger).

- [83]** I must direct you that in terms of the law, it is required that a parent or a guardian be present when a minor is making a statement to the police. Similarly, it is a normal precautionary procedure adopted by Courts to permit a support person to sit beside a minor when the said minor, who is considered a vulnerable witness, is giving evidence in Court.
- [84]** The defence also showed certain inconsistencies and omissions in the evidence given by the complainant during their testimony in Court. I have highlighted those portions while summarising the evidence of the complainant. I have already directed you on how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected. However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question.
- [85]** To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
- [86]** You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the element of the offence, beyond any reasonable doubt.
- [87]** It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider his evidence also for its consistency and also the probability of their version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case.
- [88]** If you neither believe the evidence adduced by the defence nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charge.
- [89]** However, I must caution you that even if you reject the evidence of the defence as not truthful and also unreliable that does not mean the prosecution case is automatically

proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.

[90] In summary and before I conclude my summing up let me repeat some important points in following form:

- i. If you believe the evidence of the defence, then you must find the accused not guilty of the charge of Rape;*
- ii. If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charge of Rape;*
- iii. If you reject the version of the defence, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Rape;*
- v. If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Rape have been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
- vi. As an alternative to the charge of Rape, you may consider whether the accused is guilty or not guilty of the lesser charge of Sexual Assault.*

[91] Any re directions the parties may request?

[92] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately on the charges against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[93] Your possible opinions should be as follows:

Count One

Rape- Guilty or Not Guilty

If not guilty,

In the alternative,

Sexual Assault- Guilty or Not Guilty

[94] I thank you for your patient hearing.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 17th Day of February 2020

Solicitors for the State : **Office of the Director of Public Prosecutions, Suva.**
Solicitors for the Accused : **Volavola Lawyers, Nasinu.**