

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 54 of 2017**

**STATE**

**V**

**KALISITO KALOUGATA**

**Counsel** : Ms. S. Naibe for the State.  
: Ms. V. Diroiroi and Mr. R. Filipe for the Accused.

**Dates of Hearing** : 10, 11, 12, 15 February, 2021

**Closing Speeches** : 16 February, 2021

**Date of Summing Up** : 16 February, 2021

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**SUMMING UP**

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*(The name of the complainant is suppressed he will be referred to as "W.L")*

Ladies and Gentleman Assessors

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

**ROLE OF JUDGE AND ASSESSORS**

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

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

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

### **BURDEN OF PROOF AND STANDARD OF PROOF**

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

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

### **INFORMATION**

13. The accused is charged with four counts of unnatural offences, and six counts of rape (a copy of the amended information is with you).

#### **COUNT ONE**

##### **(Representative Count)**

##### ***Statement of Offence***

**Unnatural Offences:** Contrary to Section 175 of the Penal Code.

##### ***Particulars of Offence***

Kalisito Kalougata between the 1<sup>st</sup> day of January, 2007 to the 31<sup>st</sup> day of December 2007 at Nadi in the Western Division, had carnal knowledge of "W.L" against the order of nature.

**COUNT TWO**

**(Representative Count)**

***Statement of Offence***

**Unnatural Offences:** Contrary to Section 175 of the Penal Code.

***Particulars of Offence***

Kalisito Kalougata between the 1<sup>st</sup> day of January, 2008 to the 31<sup>st</sup> day of December 2008 at Nadi in the Western Division, had carnal knowledge of “W.L” against the order of nature.

**COUNT THREE**

**(Representative Count)**

***Statement of Offence***

**Unnatural Offences:** Contrary to Section 175 of the Penal Code.

***Particulars of Offence***

Kalisito Kalougata between the 1<sup>st</sup> day of January, 2009 to the 31<sup>st</sup> day of December 2009 at Nadi in the Western Division, had carnal knowledge of “W.L” against the order of nature.

**COUNT FOUR**

**(Representative Count)**

***Statement of Offence***

**Unnatural Offences:** Contrary to Section 175 of the Penal Code.

***Particulars of Offence***

Kalisito Kalougata between the 1<sup>st</sup> day of January, 2010 to the 31<sup>st</sup> day of December 2010 at Nadi in the Western Division, had carnal knowledge of “W.L” against the order of nature.

**COUNT FIVE**

**(Representative Count)**

***Statement of Offence***

**Rape:** Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

***Particulars of Offence***

Kalisito Kalougata between the 10<sup>th</sup> day of February, 2010 to the 31<sup>st</sup> day of December 2010 at Nadi in the Western Division, had carnal knowledge of “W.L” a child under 13 years.

**COUNT SIX**

**(Representative Count)**

***Statement of Offence***

**Rape:** Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

***Particulars of Offence***

Kalisito Kalougata between the 10<sup>th</sup> day of February, 2010 to the 31<sup>st</sup> day of December 2010 at Nadi in the Western Division, penetrated the mouth of “W.L” with his penis, a child under 13 years.

**COUNT SEVEN**

**(Representative Count)**

***Statement of Offence***

**Rape:** Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

***Particulars of Offence***

Kalisito Kalougata between the 1<sup>st</sup> day of January, 2011 to the 31<sup>st</sup> day of December 2011 at Nadi in the Western Division, had carnal knowledge of “W.L”, a child under 13 years.

**COUNT EIGHT**

**(Representative Count)**

***Statement of Offence***

**Rape:** Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act 2009.

***Particulars of Offence***

Kalisito Kalougata between the 1<sup>st</sup> day of January, 2011 to the 31<sup>st</sup> day of December 2011 at Nadi in the Western Division, penetrated the mouth of “W.L” with his penis, a child under 13 years.

**COUNT NINE**

**(Representative Count)**

***Statement of Offence***

**Rape:** Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

***Particulars of Offence***

Kalisito Kalougata between the 1<sup>st</sup> day of January, 2012 to the 31<sup>st</sup> day of December 2012 at Nadi in the Western Division, had carnal knowledge of “W.L”, without his consent.

**COUNT TEN**

**(Representative Count)**

***Statement of Offence***

**Rape:** Contrary to Section 207 (1) and (2) (c) of the Crimes Act 2009.

***Particulars of Offence***

**Kalisito Kalougata** between the 1<sup>st</sup> day of January, 2012 to the 31<sup>st</sup> day of December 2012 at Nadi in the Western Division, penetrated the mouth of “W.L” with his penis, without his consent.

14. As you are aware, after the prosecution closed its case, this court had ruled that the accused had a case to answer in respect of counts one and two being unnatural offences and also that the accused had a case to answer in respect of counts seven to ten being for the offence of rape. Therefore, you are to only concentrate on counts one, two and seven to ten you are to disregard counts three, four, five and six.

**REPRESENTATIVE COUNTS**

15. You will note that all the counts are representative counts, which covers a period between the 1<sup>st</sup> day of January, 2007 and the 31<sup>th</sup> day of December, 2012. By a representative count the prosecution alleges that more than one offence as described in the information was committed during the period specified in the counts. The law says that it shall be sufficient for the

prosecution to prove that between the specified dates mentioned in the all counts at least one offence was committed.

16. To prove counts one and two the prosecution must prove the following elements of the offence of unnatural offences beyond reasonable doubt:
  - (a) The accused;
  - (b) Had carnal knowledge of the complainant "W.L";
  - (c) Against the order of nature.
17. In this context carnal knowledge means the penetration of the penis into the anus or the mouth of the complainant.
18. In this trial the accused has denied committing unnatural offences as alleged. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the anus or the mouth of the complainant with his penis. For this offence consent is not an issue the offence is complete upon penetration.
19. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
20. The second element is the act of penetration of the complainant's anus or the mouth with the penis.
21. The final element of "against the order of nature" means penetrative intercourse including oral or anal sex.
22. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the complainant's anus or mouth then you must find the accused guilty as charged.

23. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the two counts of unnatural offences, then you must find the accused not guilty.
24. The slightest of penetration of the complainant's anus or mouth by the accused penis is sufficient to satisfy the act of penetration.
25. To prove counts seven and eight the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Had carnal knowledge and penetrated the mouth of the complainant "W.L" with his penis;
  - (c) "W.L" was below the age of 13 years.
26. In this context carnal knowledge means the penetration of the penis into the anus of the complainant.
27. The slightest of penetration of the complainant's anus or the mouth by the accused's penis is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case the complainant was 12 years of age in respect of counts seven and eight at the time of the alleged offending. I therefore direct you that consent of the complainant is not an issue in regards to these two counts.
28. The first element of the offence is concerned with the identity of the person who allegedly committed the offences.
29. The second element is the act of penetration of the complainant's anus or the mouth with the penis.



30. The final element of the offence is the age of the complainant. It is not in dispute that the complainant was 12 years in 2011 which establishes that he was below the age of 13 years at the time of the alleged incidents in counts seven and eight.
31. If you are satisfied that the accused had penetrated the anus or the mouth of the complainant with his penis then you must find the accused guilty of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape in counts seven and eight then you must find the accused not guilty of the offence of rape.
32. In this trial the accused has denied committing the offence of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the anus or the mouth of the complainant with his penis.
33. To prove counts nine and ten the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
- (a) The accused;
  - (b) Had carnal knowledge and penetrated the mouth of the complainant “W.L” with his penis;
  - (c) Without his consent;
  - (d) The accused knew or believed the complainant was not consenting or didn’t care if he was not consenting at the time.
34. Carnal knowledge in this context means penetrating the anus of the complainant with the penis. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the anus or the mouth of the complainant with his penis without the complainant’s consent and the accused knew or believed the complainant was not consenting or didn’t care if he was not consenting at the time.

35. The first element of the offence is concerned with the identity of the person who allegedly committed these offences.
36. The second element is the act of penetration of the complainant's anus or the mouth with the penis.
37. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of his own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
38. If you are satisfied that the accused had penetrated the anus or the mouth of the complainant with his penis and he had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if he was not consenting at the time.
39. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
40. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the complainant's anus or mouth without his consent then you must find the accused guilty as charged.
41. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty.

42. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
43. In this case, the accused is charged with more than one offence, you should bear in mind that you are to consider the evidence in respect of each offence separately from the other. You must not assume that because the accused is guilty of one offence that he must be guilty of the other as well.
44. I will now remind you of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

### **PROSECUTION CASE**

45. The prosecution called three witnesses to prove the charges against the accused.
46. The complainant informed the court that from the years 2003 to 2017 he lived at Utulei settlement in Nadi with the accused who is his uncle by virtue of his marriage to his paternal aunt. The complainant was born on 31<sup>st</sup> July, 1999.
47. In 2007 the complainant was 8 years of age, he recalled on one occasion the accused asked him and his younger brother to accompany the accused to get firewood. After cutting the firewood the accused asked the complainant's brother to go home.

48. When the complainant was alone the accused would take the complainant to the nearby mangroves and tell him to remove his pants. The complainant was scared of the accused he did as told by the accused. The accused then inserted his penis into the anus of the complainant when the accused did this he felt pain. According to the complainant the accused had also inserted his penis into his mouth.
49. The complainant did not do anything to defend himself but to submit to what the accused was doing to him because he was a child. When the accused was doing this, the complainant was embarrassed, he also did not scream and run away because he didn't know where to go since he was staying at the house of the accused.
50. On another occasion the complainant went with the accused to get firewood but at a different spot. After the firewood was cut the accused told the complainant to remove his pants and then inserted his penis into the complainant's anus for about 3 to 4 minutes.
51. After the accused had finished he would tell the complainant to get home first and then he will follow. The complainant did not tell anyone at home about what the accused had done to him because the accused had told the complainant not to tell anyone and if he did the accused will do something to him.
52. In the year 2008 sometimes in the night at about 9 to 10 pm when the accused came home from work he would come into the complainant's bedroom and lie beside him. After waking the complainant the accused would tell the complainant to remove his pants and then inserted his penis into his anus. The complainant's aunt and her children would be sleeping in another bedroom.

53. The complainant would take off his pants as told by the accused he would feel embarrassed by what the accused would do to him. Although the complainant felt pain he did not scream since he was scared the accused might do something to him.
54. On another occasion in 2008 the complainant went with the accused to get firewood after cutting firewood the accused would tell the complainant to remove his pants after the complainant did this, the accused would insert his penis into the complainant's anus. The complainant was ashamed of what the accused was doing to him since the complainant was always scared of the accused he did not shout or run away from the house of the accused.
55. In 2009 the complainant left the house of the accused and went to Natabua to stay with his aunt Usenia. Here he was attending Natabua Primary School he came to Natabua to finish his primary school. After finishing his primary school he moved back to Nadi to the house of the accused and his family. Nothing happened to the accused in the years 2009 and 2010 since he was away from the accused.
56. In 2011 the complainant was 12 years of age and in form 3 he moved back to the house of the accused from Natabua. In the night the accused would come and harass him by removing his pants and inserting his penis into the anus of the complainant, after the accused was done he would tell the complainant to sleep.
57. The complainant's aunt and her children would be sleeping in the other bedroom. When the accused inserted his penis into his anus the complainant felt ashamed, he was scared and embarrassed so he would not do anything. The complainant was so embarrassed that he did not tell his aunt Melania about what the accused had done to him. According to the complainant the accused might do something to him.

58. In 2011 apart from doing the above, the accused would take his penis and insert it in the complainant's mouth. On these occasions the accused would tell the complainant not to tell anyone.
59. In 2012 the complainant was in form 4 he recalled during the latter part of the year the complainant would go with the accused to get firewood. After cutting firewood the accused would tell the complainant to remove his pants thereafter he would insert his penis into the complainant's anus for about 3 to 4 minutes. The complainant removed his pants because he was scared of the accused. When the accused would do this the complainant would be scared and ashamed.
60. After the accused had finished he would tell the complainant to go home first and then he would follow. On another occasion in 2012 the accused had inserted his penis into the mouth of the complainant. The complainant was ashamed and scared so he did not tell anyone at home about what the accused had done to him. The complainant did what he was told to do by the accused because he was scared that the accused might do something to him.
61. When the complainant was residing in Natabua with his aunt he was embarrassed to tell his aunt about what the accused had done to him when he was in classes 5 and 6 that is in the years 2007 and 2008.
62. When the complainant was at the house of the accused in 2011 and 2012 he did not tell his aunt Melania about what the accused had done to him because he was embarrassed to tell her.
63. Finally in the year 2017 when the complainant was in form 6, one morning his grandmother came and asked him if he was having an affair with his aunt Melania. The complainant denied this and then he told his grandmother about what the accused had been doing to him. The complainant's grandmother then told his aunt Melania.

64. In cross examination by defence counsel the complainant agreed that in 2007 he was in class 4 and when he would go with the accused to get firewood he was not forced to remove his pants.
65. The complainant also agreed that on 15<sup>th</sup> February, 2017 he had given his police statement, he was referred to paragraph 3, line 7 on page 1 which was read as follows:
- “As soon as Vilimone gone my uncle threatens me to move closer to him whereby he grabbed my hands, forcefully removed my clothes and forcefully make me bend down with my head facing downwards and penetrated his erected penis inside my anus.”*
66. The complainant stated that in court he had mentioned that he had removed his pants but in his police statement it was stated that the accused had forcefully removed his clothes. When asked to explain the inconsistency the complainant said that when he was giving his police statement he was not in his right state of mind. The complainant after getting his medical examination done when going back to the police station realized this omission but his police statement had already been taken by then.
67. The complainant did not give another police statement and agreed that when he told the police that the accused had forcefully removed his clothes that was not the truth. The complainant also agreed that he had told the court that the accused would take him to the mangroves after cutting firewood but when he was giving his police statement he did not tell this to the police.
68. The complainant agreed that there were two incidents in 2007 when it was suggested that the second time around he went to get firewood with the accused was because the accused had never inserted his penis into his anus. The complainant disagreed and stated that he was not able to do anything because he was staying at the house of the accused and whatever the accused told the complainant he would do it.

69. The complainant agreed that the accused had told him not to tell anyone about what he was doing to him otherwise the accused would do something. According to the complainant the accused did not tell him what exactly he was going to do to him.
70. The complainant was again referred to his police statement page 2, line 1 which was read as follows:
- “He threatened me not to tell anyone or he will chased my brother and me from his house and also do something harder to me that I will never forget for the rest of my life.”*
71. The complainant agreed that he told the above to the police but in his evidence he had told the court that he was not told by the accused what the accused was going to do to him if the complainant told someone. When asked to explain the difference the complainant said he did not have any answer.
72. The complainant stated that in the year 2007 he would be scared to sleep alone in one bedroom but he had no choice because the other bedroom was occupied by the complainant’s aunt and her children and his brother slept in the sitting room. He did not alert his aunt who was sleeping in the other bedroom about what the accused was doing to him because he was embarrassed to tell her. The complainant agreed that he did not tell the police about the incident happening at home.
73. The complainant stated that when he went to his aunt Usenia’s house in Natabua he did not tell her about what the accused had done to him.
74. The complainant was referred to paragraph 3, lines 1 to 4, page 1 of his police statement which was read as:



*“I could clearly recall that in year 2007 when I was in class 5 till year 2012 when I was in Form 4, where my uncle Kalisito raped me by forcefully penetrated his erected penis inside my anus and also forcefully penetrated his erected penis inside my mouth after I felt that some white liquid came out of his penis.”*

75. The complainant agreed that this is what he had told the police in 2017 when it was put to the complainant that he had told the court that the accused did not do anything to him in 2009 and 2010 the complainant agreed. When asked to explain why he had told the police that the accused had sexually abused him from 2007 to 2012 the complainant did not have any answer. The complainant also did not have any answer when it was put to him that he was not truthful about his allegations from the year 2007 to 2012.

#### Ladies and Gentleman Assessors

76. The learned counsel for the accused in this regard was cross examining the complainant about some inconsistencies in the statement he gave to the police when facts were fresh in his mind with his evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant with his evidence given in court. You are allowed to take into consideration the inconsistency in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
77. It is obvious that passage of time can affect one’s accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
78. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you’re considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying

reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.

79. The complainant agreed it was only in 2017 when he was questioned by his grandmother about him having an affair with his aunty Melania that he came out with the allegations against the accused and at this time he was not embarrassed to tell his grandmother.
80. When it was put to the complainant that the only reason he had come up with the allegations against the complainant was because his grandmother had questioned him about his affair with his aunt Melania, the complainant stated that when he denied about the affair his grandmother asked him about his relationship with the accused and at this time he told his grandmother about what his uncle was doing to him.
81. The complainant denied making this allegation against the accused to save himself from the allegation about the affair. The complainant confirmed that the accused had done all that he told the court but he did not tell his aunt Melania because he was ashamed of what the accused had done to him.
82. The complainant denied that he did not tell the truth about the allegations he made against the accused and that he did not make up the allegations after his grandmother had asked about his affair with his aunt Melania. The complainant also denied that he had raised the allegations to save himself or find a way out of the allegation of affair with his aunt Melania.
83. The complainant agreed that he was not truthful to the police in 2017 and was also not truthful to the court in 2021.
84. In re-examination the complainant clarified that the reason why he said “yes” that he would never have said anything about what the accused had done to him until he was questioned by his grandmother was because he is a shy

person, he does not talk about things that happen to him. He did not tell anyone but when his grandmother had asked him he told her the accused would suspect that he was having an affair with her aunt. The accused would even come at night and shine the torch on him to see where he was sleeping.

85. The complainant had no answer when he was asked to explain why he had agreed that he was not being truthful to the police in 2017 and now to the court in 2021.
86. The next witness Elenoa Kirisitiana the grandmother of the complainant informed the court that the complainant had been residing at the house of the accused and his family since he was 3 years old after the death of his parents. The accused is married to her daughter Melania, in the month of December, 2016 she came from Taveuni and stayed with the accused and his family where the complainant was living.
87. In January, 2017 the witness overheard the accused and her daughter talking, the accused mentioned the name of the complainant and at this time she suspected that the accused was jealous of the complainant. On this day the complainant didn't go to school, so the witness asked the complainant if he has harassed his aunt Melania.
88. The complainant upon hearing this cried and told the witness that the accused had been harassing him since he was in class 5. Thereafter, both started crying when Melania came home from work the witness told Melania about what the complainant had told her and then asked that the matter be reported to the police.
89. Upon hearing this Melania went into her bedroom where the accused was sleeping and told the accused if what she has heard was true he should pack his clothes and leave. The accused packed his clothes and left.

90. The witness said the complainant had told her that the accused would take him to get firewood then remove his clothes and do forceful acts on him such as remove his pants and do to his anus.
91. During her stay the witness had observed that the complainant would not talk much and he will just sit alone. When the complainant was relaying his story he was crying and there was no eye contact.

#### Ladies and Gentleman Assessors

92. Complainants of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
93. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in January, 2017 told his grandmother about what the accused had done to him after his grandmother had questioned him about having an affair with his aunt.
94. This is commonly known as recent complaint evidence. The evidence given by Elenoa is not evidence of what actually happened between the complainant and the accused since Elenoa was not present and did not see what had happened between the complainant and the accused.
95. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness.

96. The prosecution says the complainant after the death of his parents was brought over to stay with the accused and his aunt.
97. When the first allegation came up the complainant was only 8 years of age and considering the fact that the complainant was ashamed and embarrassed of what was happening he did not have the courage to tell anyone namely his aunts Melania and Usenia, his grandmother or anyone. Furthermore, the complainant was living in the house of the accused and he had nowhere to go and the fact that he was only a child he could not defend himself against what was happening to him. The complainant was scared of the accused and was also threatened by the accused not to tell anyone about what the accused was doing to him.
98. The prosecution is asking you to also consider that the complainant was a shy and a quiet person who would not be expected to easily tell his problems but would keep all his matters to himself. Had the complainant's grandmother not questioned him with a serious allegation such as having an affair with his aunt and then asked about his relationship with the accused the complainant would not have relayed what he was happening to him.
99. Finally, the prosecution is saying that you will also have to consider the passage of time between the first alleged incident in 2007 and the last incident in 2012. It is not expected that the complainant would remember everything in detail about what the accused had done to him, what the complainant told his grandmother was sufficient to relay the message that the complainant had been abused in some way by the accused and therefore he is more likely to be truthful.
100. On the other hand, the defence says the complainant was 13 years of age in the year 2012 when the last incident had allegedly happened. At this time the complainant was a more matured person to raise any complaint against the accused. His grandmother used to visit him every month so there was no reason why he could not have told his grandmother any earlier than 2017.

101. Although when he was in form 3 he wanted to go back to Taveuni with his grandmother this was the opportunity for the complainant to tell his grandmother about what was happening but he did not.
102. The defence is also asking you to consider the substantial delay in reporting the incidents to his grandmother which only came about after the grandmother had questioned the complainant about his affair with his aunt. The last incidents allegedly happened in 2012 and after 5 years in 2017 the complainant tells his grandmother of the allegations is unbelievable. The delay if taken from the first allegation of 2007 is about 10 years ago and these allegations would never have come up until his grandmother had questioned the complainant about his alleged affair with his aunt and about his relationship with the accused.
103. The defence is also asking you to consider that the complainant was growing up he went from primary school to high school and had also stayed at the house of aunt Usenia in 2009 and 2010 yet he did not say anything to anyone.
104. Finally, the defence says the complainant would not have said anything had it not been for his grandmother questioning him about his affair when the complainant came to know that his affair would be exposed the complainant had no option but to make false allegations against the accused.
105. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to his credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in his conduct and in his explanation of it.

106. In cross examination by the defence counsel the witness stated that she used to visit the complainant every month. When the complainant was in form 3 the complainant had requested her to take him to Taveuni.
107. The witness denied that she did not like the accused and stated that she liked Melania and the accused equally and treated him like her son and she had a good relationship with the accused and that she did not interfere in the family matters of the accused.
108. According to the witness the complainant is very close to his aunt Melania and he considers his aunt as his mother and he would converse and share jokes. When further questioned the witness stated that the complainant would only talk with his aunt and then after that he would go and sit alone.
109. The final witness Melania Cagi the aunt of the complainant informed the court that the accused was her husband. In January, 2017 when the witness returned home from work she saw her mother and the complainant were sitting in the house and the accused was sleeping in the bedroom.
110. When she saw the complainant and her mother they looked confused, then her mother told her about what had happened to the complainant. The witness then went into the bedroom where the accused was sleeping. She went and kicked the accused to wake him up, when the accused woke up the witness asked him *"Kali what is it have you been harassing the complainant"*. The accused only responded by saying *"yes"*. At this time the witness told the accused to pack his clothes and leave the house. The accused stood up and left.
111. According to the witness the accused had admitted to what he had done to the complainant and he left. From the time the complainant had come to stay with the witness in 2003 and when in form 3 and form 4 the witness noticed that the complainant was not that close to her like before but their daily conversations were the same such as the witness assisting in the

complainant's school work and so on. The witness had allowed the complainant to live with her after the complainant's parents had passed on.

112. In cross examination the witness agreed that when she had asked the accused if he had harassed the complainant the response received was he had. When questioned whether the witness had told this to the police the witness said she had not. The witness had forgotten to tell this to the police because she only wanted to take the complainant to give his statement to the police and at this time she did not think of telling the police that the accused had admitted the allegations. It was only after the report was lodged when she returned home then she remembered that she should have told the police about the accused admission.
113. The witness did not go back to the police to inform them because she thought if the complainant had lodged his report then that was it she did not think she was required to give another statement to the police.

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114. In respect of what the witness told the court and her omission to tell the police about the above you are to refer to the direction I had given earlier in respect of inconsistency between evidence in court and police statement, the same principle applies here as well.
115. The witness denied that as a couple they used to argue with each other in fact they loved each other. According to the witness the relationship between the accused and the complainant was normal and didn't show any sign that something was going on between them. The witness could not recall that on the day she came to know about the allegations she was having an argument with the accused in her bedroom.
116. When it was suggested that the allegations brought by the complainant only came after her mother had questioned the complainant about having an affair



with her. The witness stated that she was only hearing this in court because the reason for the separation was that the accused had harassed the complainant.

117. This was the prosecution case.

### **DEFENCE CASE**

118. At the end of the prosecution case you heard me explain options to the accused he has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination.

119. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath which you must take into account when considering the issues of fact you are determining.

120. The accused informed the court that he is married to Melania Cagi and they have two children. In 2007 he was staying at Korovuto, Nadi with his family namely his wife, their children, wife's sister and her family, the complainant, the complainant's brother Vilimone and his mother in law.

121. Since the accused was working at Malolo Island he would work for 11 days and then spend 3 days at home. When at home he would converse with his wife, get to know their children, look at their school work and also he would go and get firewood for cooking.

122. When going to get firewood the accused would be accompanied by the complainant, complainant's brother and both his children. The accused

would cut the firewood and the children would pile up and after tying it up the firewood would be taken home.

123. According to the accused the complainant, the complainant's brother and the accused two sons and his sister in law's son were sleeping in the living room. The accused and his wife would mostly argue because of their children, in respect of his relationship with his mother in law they did not talk to each other and most of the time his mother in law would give him bad looks.
124. Before 2017 the accused was suspicious of Melania and the complainant by their behaviour most of the time he would tell the complainant to sit properly and sometimes the accused would tell his wife to go and dress appropriately.
125. In the morning of January, 2017 the accused was sleeping and he got a shock when Melania came and kicked him. Melania then asked the accused whether he had done what the complainant had alleged the accused had said "yes". Upon hearing this, the accused was told to leave the house which he did.
126. The reason why the accused said "yes" was because he was hurt due to arguments he was having with his wife. When he heard what his wife had said he did not know what to do. After two days of leaving the house he was arrested and taken to the remand centre.
127. The accused further stated that his arguments with his wife started in 2016 because of his suspicion about his wife and the complainant having an affair when he speaks to his wife about this issue his mother in law would interfere. Melania would tell the accused to shut up and also swore at him.
128. The accused denied all the allegations he stated that he was ashamed and embarrassed to learn about what the complainant was saying about him. The court should believe the accused because what he said was all that he did.

129. In cross examination by the state counsel the accused agreed that from 2003 to 2017 he and his family with the complainant resided at Utulei Settlement. At that time he had two children from Melania, his first child was born in 2006 so in 2007 his eldest child was 1 year old. His second child was born on 2010 so in 2011 his second child was 1 year old.
130. The accused agreed that in his evidence he had said that he would go and collect firewood with the complainant, the complainant's brother Vilimone and his two children, however, when further questioned the accused said it was Melania's child who used to go with him and not his children. The accused said that what he told the court in his evidence was not correct but he treated Melania's child as his own.
131. The accused agreed that when his counsel was questioning the complainant and Melania she had not put to these witnesses whether his sister in law and her family were residing with the accused and his family. When further questioned the accused changed his position to say that most of the time his sister in law would come home and their house was near to his house.
132. In the year 2017 the accused relationship with the complainant was good and there was no enmity between the two, however, most of the time he had to speak to the complainant since the complainant was a quiet child who would just sit there. According to the accused the complainant slept in the living room whereas his mother in law and sister in law slept in one bedroom and he and his wife slept in the other bedroom.
133. The accused agreed that the fact that his mother in law and his sister in law occupied one bedroom was not put to the prosecution witnesses by his counsel. The accused also agreed that during the cross examination of Melania his counsel had not asked her about him not liking her dressing.
134. The accused agreed his counsel had not put to the complainant about the accused telling the complainant to sit properly on the chair while Melania

would be cooking. When it was suggested that most of the things he told the court in his evidence was made up because it was not put to the respective prosecution witness the accused disagreed. The accused did not agree that his mother in law would visit them once a month.

135. The accused stated that he had asked Melania and the complainant about what he was suspecting but both had denied. The accused agreed this proposition was also not put to the complainant and Melania by his counsel. The accused denied that he was making up a story in court.
136. Furthermore, the reason why he had left the house in January, 2017 was because when he saw them hurt he thought of leaving and was thinking of coming back after 3 days but the police came to arrest him before that. When it was suggested that he was arrested and interviewed by the police on 2<sup>nd</sup> February, 2017 the accused could not recall. The accused mentioned that he was in a shock when he was kicked by Melania and he was thinking about what was happening to his family that is why he had said “yes” to what Melania had asked him. The accused denied committing the offences alleged by the complainant.
137. This was the defence case.

### **ANALYSIS**

138. The prosecution alleges that the complainant was living with the accused from the year 2003 when he was 4 years of age. In 2007 the complainant was 8 years of age when the accused started to sexually abuse the complainant by inserting his penis into the anus and the mouth of the complainant on different dates and at various places namely after the cutting of firewood and inside his house.
139. The prosecution further states that counts one and two in 2007 and 2008 are known as unnatural offences. The prosecution submits that it was the

accused who had penetrated the anus and the mouth of the complainant with his penis. The complainant was of such an age that he was ignorant about what was happening to him. The fact that the complainant removed his pants and/or opened his mouth to allow the accused to penetrate his mouth or he did not shout or defend himself is understandable considering the age and the circumstances of the complainant for all the alleged offences.

140. The fact that the complainant was living with the accused in his house and that he was afraid of the accused and the threat by the accused not to tell anyone otherwise he will do something to the complainant was also the reason why the complainant kept quiet.
141. In addition to the above, the complainant's nature was such that he was a quiet person who did not talk much and kept everything to himself. The opportunity came his way when his grandmother questioned him about his affair with his aunt and upon his denial he was asked about his relationship with the accused that is when the complainant told his grandmother what he had been going through.
142. In respect of the counts of rape the prosecution says the penetration of the complainant's anus or mouth by the penis of the accused in the year 2011 was sufficient. The complainant was under 13 years so consent is not in issue.
143. It was in 2012 the complainant had attained 13 years hence consent is in issue in respect of counts nine and ten. The prosecution says it was the accused who had penetrated the anus and the mouth of the complainant without the consent of the complainant. The accused was a person in authority he was the complainant's uncle and the complainant was living in the house of the accused so the complainant had no choice but to listen to the accused. The complainant was also embarrassed to tell anyone about what the accused was doing to him.

144. The delay in reporting should not be taken against the complainant his circumstances have to be taken into account for all the counts. The observations of the grandmother about the complainant when he was narrating his story to her shows that the complainant had finally broken the culture of silence he had been carrying with him for years.
145. On the other hand, the defence states that all the allegations are not true but a made up story, the allegation dates back to 2007 which was only reported in 2017 after about 10 years. Although the complainant was living with the accused and his family he was growing up going to school from primary school to high school yet he did not tell anyone cannot be believed.
146. The complainant was close to his aunt telling her funny stories and joking with her and with his grandmother visiting him every month there is no reason for the complainant to be ashamed and embarrassed in telling his grandmother what the accused had done. If the allegations were true he would have definitely told his aunt or grandmother or better still when he went to Natabua away from the accused and he was there with his aunt Usenia for two years. The complainant even did not hesitate to go back to the house of the accused from Natabua in 2011.
147. Ten years is a long time from the first allegation and 5 years after the last allegation in 2012 the complainant did not tell the truth he has made up the allegations against the accused to save himself and to divert the attention of everyone away from him to the accused. In respect of the incidents in the house the complainant's aunt and her children were sleeping in the next bedroom which did not have any doors the complainant had the opportunity to alert her aunt but he did not.
148. The defence contention is that you should not believe the complainant since the accused had not done anything to the complainant, the evidence given by the complainant is not possible.

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149. You have seen all the witnesses give evidence keep in mind that some witness react differently when giving evidence.
150. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witness is reliable and which one is not. You observed all the witnesses give evidence in court. You decide which witness was forthright and truthful and who was not. Which witness was straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
151. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
152. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with the other witnesses. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
153. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.

154. If you accept the version of the defence you must find the accused not guilty of either or all the counts. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
155. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
156. As I have mentioned earlier, in this case the accused is charged with more than one offence you should bear in mind that you are to consider the evidence in respect of each offence separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.
157. Your possible opinions are:-

Count One:           **UNNATURAL OFFENCES:**  
                              ACCUSED - GUILTY OR NOT GUILTY.

Count Two:           **UNNATURAL OFFENCES:**  
                              ACCUSED - GUILTY OR NOT GUILTY.

Count Seven:       **RAPE:**  
                              ACCUSED - GUILTY OR NOT GUILTY.

Count Eight:       **RAPE:**  
                              ACCUSED - GUILTY OR NOT GUILTY.

Count Nine:         **RAPE:**  
                              ACCUSED - GUILTY OR NOT GUILTY.

Count Ten:          **RAPE:**  
                              ACCUSED - GUILTY OR NOT GUILTY.



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158. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.
159. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



A handwritten signature in blue ink, appearing to read "Sunil Sharma".

**Sunil Sharma**  
**Judge**

**At Lautoka**

16 February, 2021

Solicitors

**Office of the Director of Public Prosecutions for the State.**  
**Office of the Legal Aid Commission for the Accused.**