

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 276 of 2019

STATE

V

PECELI NACEBE

Counsel : Ms. Moira Konrote for the State
Ms. Lice Manulevu with Ms. Kathryn Gupta for the Accused

Dates of Trial : 1-3 February 2021

Summing Up : 4 February 2021

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "TD".

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 and the admissions made by the parties by way of admitted 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 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, TD, was 15 years and 10 months old at the time of the alleged incident, and was 17 years old when she testified in Court (Her date of birth being 10 August 2003). 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 offence 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 perceive (or know) in any other way 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]** 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 could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [18]** A statement made to the Police by a witness can only be used during cross-examination to highlight inconsistencies or omissions. That is, to show that the relevant witness on a previous occasion had said something different to what he or she said in Court (which would be an inconsistency) or to show that what the witness said in Court was not stated previously in the statement made to the Police (which would be an omission). You have to bear in mind that a statement made by a witness out of Court is not evidence. However, if a witness admits that a certain portion in the statement made to the Police is true, then that portion of the statement becomes part of the evidence.
- [19]** 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.
- [20]** 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.

- [21] Madam Assessors 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.
- [22] 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.
- [23] 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.
- [24] 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.
- [25] 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.
- [26] 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. This is also referred to as circumstantial 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.

- [27] 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 of this Court room. 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.
- [28] 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.
- [29] 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.
- [30] 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.
- [31] 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?
- [32] 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.
- [33] 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.
- [34] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant in this case 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 also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.

[35] I must also explain to you as to the reason for the use of screen, when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. 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. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

[36] The same applies for permitting a closed court proceedings when the complainant gave evidence in this case. I wish to reiterate once again that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

[37] Let us now look at the charge contained in the Information.

[38] There is one charge preferred by the Director of Public Prosecutions (DPP), against the accused:

[COUNT]

Statement of Offence

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

Particulars of Offence

PECELI NACEBE, on the 26th day of June 2019, at Koro Island, in the Eastern Division, penetrated the vagina of **TD**, with his penis, without her consent.

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

[40] Let me now explain to you the elements of the charge.

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

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

[42] Section 207 (2) (a) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

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

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

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

(2) A person rapes another person if —

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

[44] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile-vaginal sexual intercourse with that other person or having sexual intercourse whereby the man penetrates his penis into the vagina of the woman.

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

- (i) the accused;
- (ii) on the specified day (in this case the 26 June 2019);
- (iii) at Koro Island, in the Eastern Division;
- (iv) penetrated the vagina of the complainant TD, with his penis;
- (v) without the consent of the complainant; and
- (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[46] Let me now elaborate on these elements in respect of the charge.

[47] 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.

[48] The second element relates to the specific day 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.

[49] The fourth element involves the penetration of the complainant's vagina; with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

[50] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.

[51] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[52] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[53] 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 15 years and 10 months of age at the time of the alleged incident, and therefore, she had the mental capacity to consent.

[54] 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.

[55] If you are satisfied beyond any reasonable doubt that the accused, on 26 June 2019, at Koro Island, penetrated the complainant's vagina with his penis, without her consent, and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the count of Rape.

[56] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of the charge.

[57] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[58] 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 "*Admitted Facts*" without placing necessary evidence to prove them:

1. The complainant (PW1) in this matter is TD, 15 years old, student, resides at Kade Village, Koro Island.
2. Peceli Nacebe is 49 years old, farmer, at the time of the offence resided at Kade Village, Koro Island.
3. Peceli Nacebe and the complainant are known to each other.
4. On 17th July 2019, the accused was interviewed under caution by PC 3752 Ilaitia Drauna at Koro Community Post.
5. On 22nd July 2019, the accused was charged by PC 4242 Isireli Pareti at Koro Community Post.

[59] Since the prosecution and the defence have consented to treat the above facts as "*Admitted Facts*" without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[60] The prosecution, in support of their case, called the complainant (TD), who was the sole witness for the prosecution.

[61] Evidence of the complainant TD

- (i) *The complainant testified that she currently resides at Kade in Koro Island, Lomaiviti. She has been residing there since childhood. She has 2 brothers and 2 sisters (she said 3 sisters including her). She's the oldest in the family, with the youngest sibling being 9 years old.*

- (ii) *She said that in 2019, she was schooling at Nasau Secondary School in Koro Island. She was in Form 4.*
- (iii) *She testified that her date of birth is 10 August 2003.*
- (iv) *The complainant testified that the accused is her grandfather. She said her maternal grandfather is a cousin of the accused. She refers to the accused as Tukai Peceli. She has known the accused since childhood.*
- (v) *In 2019 the accused had also been staying at Kade in Koro Island. When asked how far his house was located she said: "My house, there is another house and then next is his house." The witness indicated a distance of between 50 to 70 metres as the distance between her house and the accused's house.*
- (vi) *The complainant testified that she used to see the accused regularly – every time.*
- (vii) *The witness first testified to the incident which took place on 25 June 2019. She said around 6.00 in the evening that day she had gone to the accused's house to borrow his phone, to call her grandmother in Suva. She said she wanted to call her grandmother (her paternal grandmother) because her father was sick.*
- (viii) *The complainant said that the accused had asked her if she had a relationship with boys. She had said yes. When the accused had asked for the name of the boy she had said Bale. The accused had then said that he is better than Bale and had asked her if she could sleep with him that night. The complainant had said no.*
- (ix) *Thereafter, the accused had gone to the shop to buy some food. The witness said that the accused had locked her inside the house at the time. Later she explained that he had locked the front door from outside. She had then opened the back door and run outside. She had then returned home and gone to sleep.*
- (x) *The complainant next testified to the incident which allegedly took place on 26 June 2019. She said that around 7.00 p.m. that day she had again gone to the accused's house to borrow his phone as her father was sick. She said: "Because my father and mother are separated. I stay with my father. I look after my father. Because my father is sick, I did not know what to do. I had to borrow Tukai Peceli's phone."*
- (xi) *The witness testified that the accused had given her the phone. She had then gone to the farm road to go and make the call, because there was no connection inside the house. She had crossed over to the road and then gone up a hill to reach the farm road. The witness said the farm road was about 300 metres away from their houses.*
- (xii) *The complainant testified that while talking to her grandmother over the phone, she had felt someone touch her shoulder from behind. On looking back she had seen that it was the accused. She had seen him from the light of the phone. She said the time was around 7.30 p.m.*

(xiii) *She had continued talking to her grandmother. She had been sitting down on a big stone. The accused had then grabbed the phone from her hand. She said she stood up and talked to the accused and asked him what was wrong with him. She had then pushed the accused away.*

(xiv) *The complainant had then told the accused that she wants to go home.*

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

Q. *Then what did you do?*

A. *Then I put one step in front. Tukai Peceli hooked my t-shirt. Then I told Peceli what's wrong with him. Then he told he wants sex with me.*

Q. *Then what happened?*

A. *I told Peceli you are my grandfather.*

Q. *And then what happened?*

A. *Then he told me to have a relationship like a dog.*

Q. *What happened after that?*

A. *And Tukai Peceli took my heads and legs and put me down.*

Q. *When he took your head and legs and put you down was he standing in front of you or behind you??*

A. *Behind me.*

Q. *What happened after he put you down?*

A. *He tied my legs and my hands and my mouth.*

Q. *What did he use to tie you?*

A. *He stuffed a t-shirt in my mouth and tied my hands and legs with a string.*

Q. *What kind of string did he use to tie your hands and legs?*

A. *Small.*

Q. *And you know where he got the string from?*

A. *From the tree.*

Q. *Which tree?*

A. *Mango tree.*

Q. *How far away was the mango tree from where you were sitting?*

A. *The witness showed a distance of about 2 metres.*

- Q. *While all this was happening what were you doing?*
A. *I laid down. I was on the ground already.*
- Q. *What did he do first?*
A. *He tied my mouth first.*
- Q. *This was when you were already on the ground?*
A. *Yes.*
- Q. *Were you facing upwards or were you facing downwards?*
A. *I was facing upwards.*
- Q. *After he stuffed the t-shirt in your mouth what did he do?*
A. *If I shout or run Tukai Peceli was going to kill me.*
- Q. *Did he tell you he was going to kill you?*
A. *Yes.*
- Q. *How did this make you feel?*
A. *I was afraid.*
- Q. *Did he tie your hands first or your legs first?*
A. *He tied my hands first.*
- Q. *Can you show where did he tie you on your hands?*
A. *Witness showed her wrists – palms faced together.*
- Q. *Where on your legs did he tie the rope?*
A. *Witness pointed towards her ankles. Witness got down from the witness box and demonstrated by keeping her feet together (side by side).*
- Q. *When Tukai Peceli told that he wants to have sex with you, did you tell anything to him?*
A. *Yes.*
- Q. *What did you say to him?*
A. *I told Tukai Peceli you are my grandfather.*
- Q. *Did you say anything else to him?*
A. *He said to have a relationship like a dog.*
- Q. *What did you say to him?*

- A. *Tukai Peceli said: "Don't think of him as her grandfather."*
- Q. *Then what did you say to him?*
- A. *I said I want to go home and Tukai Peceli said don't go.*
- Q. *Then what happened?*
- A. *Then he had already tied my hands, my legs and my mouth. Then he pulled my legs up.*
- Q. *What were you wearing that night?*
- A. *Sulu-vaka-toga (wrap around) and tights.*
- Q. *What were you wearing on top?*
- A. *T-shirt.*
- Q. *What was Peceli wearing?*
- A. *Black trousers.*
- Q. *And on top?*
- A. *A green t-shirt.*
- Q. *Which t-shirt did he use to stuff in your mouth?*
- A. *Tukai Peceli's t-shirt.*
- Q. *Is this the same green t-shirt he was wearing?*
- A. *Yes.*
- Q. *You said he pulled up your legs – can you describe the position he was in, how was he and where were you lying?*
- A. *I was facing upwards. He was standing in front of me.*
- Q. *Can you tell us what happened?*
- A. *Tukai Peceli put the trousers away and he inserted his penis into my vagina.*
- Q. *When he inserted his penis into your vagina how long did he do this for?*
- A. *One hour.*
- Q. *How did you know it was one hour?*
- A. *Because he gave his phone to me.*

.....

- Q. *Whose trousers did he put down?*
A. *He took his own trousers.*
- Q. *You said Tukai Peceli took his own trousers down?*
A. *Yes, and he took out my trousers and my panty.*
- Q. *When did he take off your trousers and panty – after he had tied your hands and legs or before?*
A. *After he had tied my legs.*
- Q. *What did he do after that?*
A. *He put my legs up.*
- Q. *How did he put your legs up – can you describe?*
A. *Witness demonstrated in Court how this happened.*
- Q. *What did he use to put your legs up like that?*
A. *Hand.*
- Q. *Was it one hand or both hands?*
A. *Both hands.*
- Q. *You are lying on your back, he has pushed both your legs up with his hand. Can you tell us what did he do after?*
A. *Then he put his penis into my vagina.*
- Q. *While he was doing this what were you doing?*
A. *I did not do anything because he had tied me up.*
- Q. *How did it make you feel when he was doing this to you?*
A. *Some boys came and Tukai Peceli stopped.*
- Q. *How did it make you feel when he was inserting his penis into your vagina?*
A. *Tired.*
- Q. *How did you feel emotionally?*
A. *I was afraid.*
- Q. *What happened after the boys came?*
A. *Tukai Peceli took the t-shirt off my mouth and then ran away.*

Q. When you were asked how long did Tukai Peceli insert his penis into your vagina and you said one hour.

A. Yes.

Q. Is this one hour for the whole of the incident from the time you went up the mountain and he tied your hands – does this one hour include that time as well?

A. During the time he inserted his penis into my vagina – that was one hour.

Q. You said whilst he was inserting his penis into your vagina some boys came and he took his t-shirt from your mouth and ran away. What happened after that?

A. I bit the string on my hands using my mouth. After that I pulled out my strings on my legs, wear my trousers and panty and go home.

(xvi) The complainant testified that after returning home she had her bath and went to sleep. She said she had not told anyone at home about the incident. When asked why she did not tell anyone she said: “Because my father has pressure.” When asked to explain further she said: “He can come and punch Tukai Peceli.”

(xvii) The witness said that on the next day she had told her uncle Sevuloni of what had happened to her last night. Her uncle had informed both her father and mother about the incident. She said her parents were angry with the accused.

(xviii) Thereafter, the witness said that her mother had gone and reported the matter to the police.

(xix) The complainant identified the accused in the dock as Tukai Peceli.

(xx) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.

(xxi) The complainant agreed that she had given her statement to the Koro Community Post on the 11 July 2019.

(xxii) The Defence highlighted certain inconsistencies and omissions in the testimony given in Court by the witness vis a vis her statement made to the Police:

i. In her testimony in Court, the witness said that the accused had locked her inside the house on 25 June 2019. However, no mention has been made of this fact in her statement made to the Police.

ii. In her testimony in Court, the witness said that when some boys came the accused had taken the t-shirt from her mouth and run

away. However, no mention has been made of this fact in her statement made to the Police.

- iii. In her testimony in Court, the witness said that on hearing the boys coming, the accused had removed his t-shirt from her mouth and run away and that she had then bit the string on her hands using her mouth, after which she had pulled out the strings on her legs, worn her trousers and panty and gone home.*

However, in her statement made to the Police, it is recorded as follows:

“He thrashed it inside and out, while he was doing it repeatedly some youths came along where we were and he released me and we both hid.”

The complainant agreed that she had said so in her Police Statement.

- iv. In her testimony in Court, the witness said that the accused had told her that if she shouts or runs that he will kill her. However, no mention has been made of this fact in her statement made to the Police.*
- v. In her testimony in Court, the witness said that she had informed her uncle Sevuloni the very next day about what happened to her the previous night. However, no mention has been made of this fact in her statement made to the Police.*

(xxiii) It was suggested to the complainant that she had never visited the accused’s house on 25 June 2019 as stated by her. It was also suggested that the accused had never locked her inside the house that day. The complainant denied these suggestions.

(xxiv) It was further suggested to the complainant that the accused had never inserted his penis into her vagina without her consent on 26 June 2019. The complainant denied this suggestion.

(xxv) It was further suggested that the accused had never stuffed her mouth with a t-shirt, or tied her hands with strings or tied her feet with a string on 26 June 2019. The complainant denied these suggestions.

(xxvi) In re-examination, the State Counsel clarified from the witness the answers given by her in cross examination.

[62] That was the case for the prosecution. At the end of the prosecution case, this 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

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

[64] Evidence of Peceli Nacebe

- (i) *The accused testified that he currently resides at Vuci in Nausori. He is 50 years of age (His date of birth is 31 March 1970). He is currently working at Pac-n-Save Supermarket at Nausori.*
- (ii) *He said that he is originally from Kade in Koro Island.*
- (iii) *The witness testified that at around 6.00 p.m. on the 25 June 2019 he was in the village. He denies that the complainant came to his house that evening.*
- (iv) *The witness said on the 26 June 2019 at around 7.00 p.m. he had been making a call to Suva. He had been standing and talking near the church, where the reception was said to be good. He had been talking to one 'Bau' who was residing in Suva. They had been discussing about the farm and the labourers. The witness said that he was the Manager of their farm. They were harvesting yaqona.*
- (v) *When he was on the call, he said that the complainant had come and asked to use the phone to call her grandmother. He had told her to go away and not to disturb him as he was discussing things about the farm. The witness said that after he told her to go away she had come back and kept pestering him to use the phone. The witness said that after having spoken to Bau for quite some time, he had given his phone to the complainant.*
- (vi) *When asked why he had given the phone to the complainant, the witness said: "I just gave her the phone because after telling her to go away twice she kept on coming back and because I feel sorry for her since she wants to call her grandmother."*
- (vii) *The accused said that after he gave the phone to the complainant they were standing together. He had waited for her to use the phone and for her to give it back to him. The complainant was not on the call for too long as there was not much funds-credit left on the phone.*

- (viii) After completing the call the complainant had given back the phone to him and asked him to pay her boat fare, since she will be leaving with one of her cousins to travel to Suva. However, he had refused to pay her boat fare.*
- (ix) The witness said that thereafter, the complainant went back to her house and that he had returned home. After a few days he heard a rumour in the village that he had done something to the complainant.*
- (x) The witness totally denied that the complainant had visited his house on the 25 June 2019 and asked for his phone, or that he had locked the complainant inside his house that day. However, the witness said that sometimes before the 25 June 2019, the complainant had come to his house to ask for his phone.*
- (xi) The accused totally denied the allegation of rape made against him by the complainant. He totally denied that he had tied the complainant's hands and legs and thereafter penetrated her vagina with his penis without her consent, on the 26 June 2019.*
- (xii) The accused was cross-examined by the State Counsel and the Prosecution version of events was suggested to him. However, the accused denied all the suggestions put to him in relation to the alleged incident.*

Analysis

- [65]** The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, TD. The defence relied on the evidence of the accused himself.
- [66]** 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.
- [67]** In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [68]** 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.
- [69]** I have already explained to you 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 given by the witness 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.

- [70] However, if there is no acceptable explanation given by the witness 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 inconsistencies and 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 (in this instant the complainant) is generally not to be relied upon; or, that only a part of her evidence is inaccurate. In the alternative, you may accept the reason she provided for the inconsistency or omission and consider her to be reliable as a witness.
- [71] The accused has testified in Court and totally denies the charge against him. He totally denies that he penetrated the complainant's vagina with his penis, without her consent, as set out in the Information.
- [72] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witness, 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.
- [73] 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 its 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.
- [74] 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.
- [75] 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.
- [76] 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 has been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[77] Any re directions the parties may request?

[78] 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 charge of Rape 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.

[79] Your possible opinions should be as follows:

Count

Rape- Guilty or Not Guilty

[80] I thank you for your patient hearing.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 04th Day of February 2021

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