

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

**CRIMINAL CASE NO.: 009 OF 2012**

**STATE**

**-v-**

**USAIA LUTUNAIVALU VUNISA**

**Counsels : Mr. S. Babitu for the State**

**The accused in person**

**Date of Trial : 14 October -17 October 2013**

**Date of Summing Up : 18 October 2013**

(Names of the victims are suppressed. They are referred to as KN and CB)

**SUMMING UP**

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me – as the Judge who presided over this trial – to sum up the case to you on law and evidence. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.

4. In other words you are the Judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the accused made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the accused. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
12. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.

13. I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinions. That is – as you could hear from evidence – this case involved an alleged incident of rape and indecent assault of two children. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law, to which every one of us is subject to. I will deal with the law as it is applicable to the offences with which the accused-person is charged, in a short while.

14. In this case the prosecution and the defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of court time.

15. The agreed facts of this case are:

It is agreed that there are two (2) victims in this case, one is **KN**, 4 years of age on 01/01/12, yet to attend school (**Victim 1**) and two is **CB**, 7 years of age on 01/01/12, class 2 student (**Victim 2**), both of Busabusa, Vesaru, Ba.

It is agreed that the **Accused person** in this case is **Usaia Lutunaivalu Vunisa**, 37 years of age of Johnson Road Matawalu, Lautoka, Labourer.

It is agreed that both Victims named in paragraph 1 above are related to the Accused person through the wife of the Accused person Inise Nabati.

It is agreed that Victim 1, KN's father and CB's paternal grandfather are brothers. It is agreed that Victim 1, KN's father and Victim 2, CB's paternal grandfather are first cousins with Inise Nabati's father.

It is agreed that Victim 1, KN is related to the Accused's wife Inise Nabati as cousins.

It is agreed that Victim 2, CB is related to the Accused's wife Inise Nabati as niece and aunty respectively.

It is agreed that Victim 1 lives with her parents at Busabusa, Vesaru, Ba.

It is agreed that Victim 2 lives with her paternal grandparents Makelesi Nai and Ramesh Kumar at Busabusa, Vesaru, Ba.

It is agreed that on the 1<sup>st</sup> day of January 2012, Victim 1 and Victim 2 as well as the Accused person are at Busabusa, Vesaru, Ba.

It is agreed that on the 1<sup>st</sup> day of January 2012, the Accused person, his son one Waisake and both Victim 1 and Victim 2 went for a swim in a river in Busabusa, Vesaru, Ba.

It is agreed that on the 1<sup>st</sup> day of January 2012, there was a complaint made to the Ba Police Station by the parents and guardian of Victim 1 and Victim 2 against the Accused person after their swim in the river as per paragraph 9 supra.

It is agreed that on the 04<sup>th</sup> day of January 2012, the Accused person was interviewed under caution at the Ba Police Station.

It is agreed that on the 04<sup>th</sup> day of January 2012, the Accused person was charged at the Ba Police Station.

It is agreed that on 02<sup>nd</sup> January 2012, both Victim 1 and Victim 2 were medically examined at the Ba Mission Hospital, Ba and both obtained a medical report each thereafter.

It is agreed that the admissibility of the following document are not in dispute between the Prosecution and both the Accused and will be tendered by consent as Prosecution evidence:-

- i. The Birth Certificate of Victim 1.
- ii. The Birth Certificate of Victim 2.

16. The charges against accused are as follows:

**COUNT 1**

***Statement of Offence***

**INDECENT ASSAULT**: Contrary to Section 212 (1) of the Crimes Decree, 2009.

***Particulars of Offence***

**USAIA LUTUNAIVALU VUNISA**, on the 1<sup>st</sup> day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **KN**, in that **USAIA LUTUNAIVALU VUNISA** licked the vagina of **KN**, a 4 year old.

## **COUNT 2**

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

**INDECENT ASSAULT**: Contrary to Section 212 (1) of the Crimes Decree, 2009.

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

**USAIA LUTUNAIVALU VUNISA**, on the 1<sup>st</sup> day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **KN**, in that **USAIA LUTUNAIVALU VUNISA** rubbed his penis against the vagina of **KN**, a 4 year old.

## **COUNT 3**

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

**INDECENT ASSAULT**: Contrary to Section 212 (1) of the Crimes Decree, 2009.

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

**USAIA LUTUNAIVALU VUNISA**, on the 1<sup>st</sup> day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **CB**, in that **USAIA LUTUNAIVALU VUNISA** licked the vagina of **CB**, a 6 year old.

## **COUNT 4**

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

**RAPE**: Contrary to Section 207 (1), (2)(a) and (3) of the Crimes Decree, 2009.

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

**USAIA LUTUNAIVALU VUNISA**, on the 1<sup>st</sup> day of January 2012, at Ba in the Western Division, raped **CB**, in that **USAIA LUTUNAIVALU VUNISA** used his penis to penetrate the vagina of **CB**, a 6 year old.

## **COUNT 5**

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

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

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

**USAIA LUTUNAIVALU VUNISA**, on the 1<sup>st</sup> day of January 2012, at Ba in the Western Division, raped **CB**, in that **USAIA LUTUNAIVALU VUNISA** used his right fore-finger to penetrate the anus of **CB**, a 6 year old.

## ALTERNATE COUNT

### *Statement of Offence*

**INDECENT ASSAULT**: Contrary to Section 212(1) of the Crimes Decree, 2009.

### *Particulars of Offence*

**USAIA LUTUNAIVALU VUNISA**, on the 1<sup>st</sup> day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **CB**, in that **USAIA LUTUNAIVALU VUNISA** rubbed his right fore-finger along the anus of **CB**, a 6 year old.

17. I will now deal with the elements of the offences. The offence of rape is defined under Section 207 of the Crimes Decree. Section 207(1) of the Decree makes the offence of rape an offence triable before this court. Section 207 (2) states as follows:

A person rapes another person if:

- (a) The person has carnal knowledge with or of the other person without other person's consent; or
- (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
- (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

18. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man of the vagina of a woman to any extent. So, that is rape under Section 207 (2) (a) of the Crimes Decree.

19. If a person penetrates the vagina to any extent with a part of another's body, which is not the penis of that person, without the consent of the woman, that is rape under Section 207 (2) (b).

20. So, the elements of the offence of Rape in this case are that the accused **either penetrated the vagina of victim to some extent with penis or any other thing or penetrated the anus of victim to some extent with anything** which means that the insertion of a penis or any other thing fully into vagina or anus is not necessary.

21. Other parts of the offence are irrelevant to the facts of this case.

22. Consent as defined by Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a woman with a necessary mental capacity to give such consent. A woman under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The girls in this case were only 7 years of age and, therefore, they did not have the capacity under the law to consent. So, the prosecution does not have to prove the absence of consent on the part of the girls because law says that they, in any event, cannot consent.

23. I will now deal with the elements of the offence of Indecent assault. The offence of indecent assault is defined under Section 212 of the Crimes Decree:

A person commits indecent assault if:

- (a) Unlawfully and indecently;
- (b) Assaults another person.

24. For the assault to be indecent it must be accompanied by a circumstance of indecency. Conduct is indecent when it is as such that ordinary people would so describe it, in light of prevailing standards of morality and, more specifically, in light of whether the victim has consented to the conduct in question.

25. Apart from the elements of the offence, the identity of the person who alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person and connect him to the offence that he alleged to have been committed.

26. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. In this case, for example, the each alleged victim was witness who offered direct evidence, if you believe her as to what she saw, heard and felt.

27. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, Medical Reports are an example if you believe that such a record was made. Then you can act on such evidence. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time on the document upon examination of the victims.

28. Expert evidence is also important to borne in mind. Usually, witnesses are not allowed to give opinion. They are allowed to give evidence on what they saw, heard or felt by their

physical senses only, as described earlier. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions express on a particular fact to aid court and you to decide the issues/s before court on the basis of their learning, skill and experience.

29. The doctor in this case, for example, came before court as an expert witness. The doctor, unlike any other witness, gives evidence and tells us her conclusion or opinion based on examination of the victim. That evidence is not accepted blindly. You will have to decide the issue of rape and indecent assault before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if such opinion is reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence in the case.

30. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

**Test of means of opportunity:** That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically created just out of a case against the other party.

**Probability and Improbability:** That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case. Or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

**Belatedness:** That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

**Spontaneity:** This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

**Consistency:** That is whether a witness telling a story on the same lines without variations and contradictions. You must see whether a witness is shown to have given a different version elsewhere. If so, what the witness has told court contradicts with his/her earlier version. You must consider whether such contradiction is material and significant so as to



affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another for example by a police officer in recording the statement where the witness is alleged to have given that version.

You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.

You must also consider the issue of omission to mention something that was adverted to in evidence on a previous occasion on the same lines. You must consider whether such omission is material to affect credibility and weight of the evidence. If the omission is so grave, you may even consider that to be a contradiction so as to affect the credibility or weight of the evidence or both.

In dealing with consistency you must see whether there is consistency *per se* and *inter se* that is whether the story is consistent within a witness himself or herself and whether the story is consistent between or among witnesses. In deciding that, you must bear in mind that the evidence comes from human beings. They cannot have photographic or videographic memory. All inherent weaknesses that you and I suffer, insofar as our memory is concerned, the memory of a witness also can be subject to same inherent weaknesses.

Please remember that there is no rule in law that credibility is indivisible. Therefore, you are free to accept one part of a witness's evidence, if you are convinced beyond doubt and reject the rest as being unacceptable.

31. You need to consider all those matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.
32. I will now deal with the summary of evidence in this case.
33. Prosecution called Doctor Ana Maisema as the first witness. She is a doctor with 7 years experience. She gave evidence on two medical reports of the victim prepared by Doctor Shalendra Nath, who had resigned and now lives in New Zealand. According to report of KN she was examined on 2.1.2012 at 6.45 p.m. at Ba Mission Hospital. There was redness on her vaginal opening and hymen was not intact. This could have been result of licking and

putting finger to vagina. Also rubbing penis against vagina could cause the same. The medical report was marked as P1.

34. Same doctor had examined CB on same day at 7.00 p.m. Medical finding were redness in the vaginal orifice, hymen torn at 9 o'clock to 4 o'clock position, redness in the anal orifice. Penile penetration or penetration of other thing to vagina is compatible with these findings. There is high possibility of penetration of vagina and anus. The injuries were fresh. Medical report was tendered marked P2.
35. The doctor is an independent witness. If you believe her evidence there is evidence of redness of the vaginal orifice of KN which could have been a result of recent licking of vagina, putting a finger to vagina or rubbing penis on vagina. There is evidence of recent vaginal penetration and redness of the anal orifice on CB.
36. The next witness for the prosecution was Cpl. Pramesh who prepared the rough sketch of the scene on 3.1.2012. He marked and produced the same as P3. According to him the scene was an isolated place with no houses nearby. In cross examination he admitted that no photographs were taken of the scene.
37. Prosecution called KN as the third witness. She was 4 years old at the time of the incident. She was living in Vesaru with her family. She stated that Usaia (Accused) came to her, Waisake and CB and asked them to go and have a bath. At the river they have removed the cloths. The accused had told her one with big hole will eat Pineapple and one with small hole will not get Pineapple. The accused rubbed his balls in her fish. Fish is between her thighs. He also put his finger in her fish. Accused had put his tongue into her fish. There were no others at the river. She saw the accused rubbing his balls on CB's goat. She had told about this to mom. She identified the accused as Usaia.
38. Under cross examination she stated that CB came to her house to watch movies and when they were playing with toys under the Guava tree Waisake came there. Then accused came and told them to go and bath. She further told that when Inise came to take them home she did not tell what happened to Inise. She said no one told her tell like this.
39. You watched her giving evidence in court. What was her demeanour like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept

the evidence of KN beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charges No. 1 & 3.

40. The next witness for the prosecution was the mother of the victim KN. On 1.1.2012 she had invited the accused's family to have lunch at her house. After lunch they were watching movies and fell sleep. She woke up when Inise's mother is calling Inise to go and look for children. Inise had told her to heat the food for dinner and she will go and look for children. She had seen them coming back. She had scolded KN for going out without asking her. KN had told her that she went to bath with accused, CB and Waisake. When she was about to have dinner CB came and told her that her grandmother wants to see her. When she went there Grandmother had asked her whether KN told anything to her. She said 'No'. Then Grandmother had told her that CB had told her that Usaia did something bad to them at the river.
41. She had asked the victim KN what Usaia did to her at the river. The victim had replied that Usaia made her lie down, he used his tongue on her vagina and rubbed his penis on her vagina. KN had referred to vagina as fish. She had gone home and had called Inise and Usaia. She had told Usaia about what two kids told her. Usaia had denied doing such thing. She had asked him to wait and called the police. By the time police came Usaia was gone.
42. Under cross examination she admitted that she did not see what happened. She denied that she and police made up the story.
43. You saw her giving evidence in Court. She had given prompt answers to questions put to her by the accused. It is up to you to decide whether you could accept her evidence beyond reasonable doubt. If you accept her evidence it corroborates the evidence of the victim regarding recent complaint.
44. The next witness for the prosecution was CB. She was 7 years at the time of the incident. She said that she went to watch movies at KN's house and then went to play with toys at Guava tree. Waisake too had come there. Usaia had called them. They have gone to river for a bath. Usaia had asked them to remove cloths. Usaia had told that whoever with a big hole will get Pineapple and whoever with small hole will not get Pineapple. Then Usaia had used his finger and his tongue on her fish. He had rubbed his balls as well. It was painful and she had cried. She had seen Usaia licking KN's fish. Usaia had touched her bump with his hands. She identified the accused in court. After going home she had told mom about this.
45. Under cross examination she stated that her grandmother did not know that she went to river. When accused asked 'I used my hand on your back side, Do you agree?' She said

'Yes'. She said that accused did not use his finger on her back side. She further said no one teach her to give the statement to police.

46. You watched her giving evidence in court. What was her demeanour like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of CB beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charges No. 3,4,5 & 6.
47. Prosecution called mother of CB as the next witness. On 1.1.2012 after lunch CB had requested whether she could go and watch movies at KN's house. She had allowed. She had come back after 5.00 p.m. When inquired she had told 'something big happened.' She had further told that 'at the river Usaia had made her to lie down, lifted her thigh and used his tongue and finger on her fish and rubbed his penis on her fish.' She had called KN's grandmother and inquired about this. Then they have told Inise about this and called police. Usaia had gone missing after that.
48. Under cross examination, she admitted that she did not see what happened. She denied that everything she said is made up story. Her position was that it was told to her by CB. She admitted that accused denied the allegation when they inquired.
49. You saw her giving evidence in Court. She had given prompt answers to questions put to her by the accused. It is up to you to decide whether you could accept her evidence beyond reasonable doubt. If you accept her evidence it corroborates the evidence of the victim CB regarding recent complaint.
50. The next witness for the prosecution was WPC Sereana. She had recorded the statements of the two victims on 2.1.2012. The mothers of victims were present at that time. She had escorted them to doctor.
51. Under cross examination she said that CB's statement was taken twice as she was shocked on the first day. Further she admitted that CB did not tell her that the accused put his thumb into her backside. She denied that the two statements of the victims are made up.
52. Prosecution called WDC Miriama as next witness. She was the interviewing officer. She had conducted the caution interview at the crime office of the Ba Police Station. It was commenced at 12.30 p.m. on 4.1.2012 and was conducted in I-Taukei language. The

accused was given his rights. He was not assaulted, threatened or intimidated before, during or after the interview. There was no complaint from the accused. A reconstruction was done during the interview. There were no visible injuries on the accused. She identified the original notes of the interview, the translation and the accused.

53. When cross examined, she denied that the statement of CB is a made up. She admitted that there is no mention in CB's statement that accused used his thumb or fore finger on her back. She further stated that she had to ask about the clothes worn by KN as KN had mentioned about different clothes.
54. It is up to you to decide whether the accused made a statement under caution voluntarily to this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of each charge are proved by this statement.
55. The last witness for the prosecution was DC Tomasi Nakeke. He is the investigating officer of this case. The report was received on 1.1.2012. He had taken steps to record the statements of the victims and to take them for medical examination. Steps were taken to arrest the accused and he identified the accused. He produced the two birth certificates of the victims marked P5 (A) & (B).
56. After the prosecution case was closed you heard me explaining the accused his rights in defence.
57. The Accused elected to give evidence. His position was that he took Waisake for a bath after 4.00 p.m. The two victims who were playing with Waisake had joined him. He had told them to remove clothes and swim. He had gone home to get his fishing material. As he could not find those he had come back in 30 minutes. They were still bathing in the river. Fifteen minutes later his wife Inise had come. She had taken children home. He had gone to his house to change clothes.
58. Inise had come and told him that Makelesi wants to talk to them. At there, Inise had told him, Makelesi wants to ask about something happened to kids at the river. He was shocked regarding the thing happened to kids at the river. He had told that he don't know anything that happened to kids. He was told that they will call police. May be something had happened to them and the blame is on him. He really don't know what happened.

59. Under cross examination he said that Waisake is his step son. He admitted that he did not ask victims about the fact that he went home while they were bathing. He denied all the sexual acts. When he was asked, were you at home on 1.1.2012 night, he replied that he went to Tavarau to get his stuff as he knew that he will be arrested. He had left just after he was asked by Mirisene. He said that what he told police was due to assaults. He admitted that he did not have any problem with the victim's families before 1.1.2012 and his family was invited for lunch that day by KN's family.
60. You watched the accused giving evidence in court. What was his demeanour like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? The position taken up by the accused in giving evidence in the court is different from his caution interview statement and the position taken up by him at the time of cross examination of prosecution witnesses. In other words his version is inconsistent. It is up to you to decide whether you could accept his version and his version is sufficient to establish a reasonable doubt in the prosecution case. If you accept his version accused should be discharged. Even if you reject his version still the prosecution should prove it's case beyond reasonable doubt.
61. The accused called his wife Inise to give evidence. She said when she came to river after 4.00p.m the two victims, the accused and Waisake were there. The children were swimming in the swallow part of the river and the accused was swimming in top of the river. The two victims did not tell her anything when she took them home. She further stated that there was no bad feeling between her and the families of the two victims.
62. Under cross examination she said that after police came, Waisake told her that he saw everything accused did to CB. She further said that she will never leave Waisake at the river alone as he could get drowned. The accused never told her that he left Waisake and other children at the river.
63. I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
64. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:
- (i) You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offences.

- (ii) Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.
- (iii) The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offences. The situation then would be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offences then the proper opinion would be Guilty.

65. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should remind yourselves of all that evidence and from your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.

66. Please remember, there is no rule for you to look for corroboration of victim's story to bring home an opinion of guilty in a rape case. The case can stand or fall on the testimony of victim depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the victim's evidence if you think that it is safe to look for such supporting evidence. Corroboration is, therefore, to have some independent evidence to support the victim's story of rape.

67. In dealing with the issue of penetration, medical evidence may be helpful. You may consider the issue of penetration in light of doctor's findings that he saw redness of the vaginal orifice of KN which is fresh. It is entirely a matter for you to be satisfied that the redness in the vaginal opening was caused as a result of accused licking KN's vagina and/or rubbing his penis against KN's vagina. Further doctor's finding was that there was redness in vaginal and anal orifice of CB and her hymen was torn at 9 o'clock to 4 o'clock position. Again it is entirely a matter for you to be satisfied that these observations are as a result of accused penetrating the vagina and anus of CB. Please remember medical evidence is not essential and/or indispensable for you to come to the finding that the penetration, in fact took place. If you believe the evidence of KN and CB on those points beyond reasonable doubt and disbelieve the accused that would suffice for you to come to that finding.

68. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt.

69. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of each charge you must find him guilty for each charge. **You have to consider evidence against each charge separately.** If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged. The fact that accused is guilty of one charge does not mean that he is guilty of other charges as well.

70. Your possible opinions are as follows:

- |       |   |                              |
|-------|---|------------------------------|
| (i)   | First count Indecent Assault                | Accused Guilty or Not Guilty |
| (ii)  | Second count of Indecent Assault            | Accused Guilty or Not Guilty |
| (iii) | Third count of Indecent Assault             | Accused Guilty or Not Guilty |
| (iv)  | Fourth count of Rape                        | Accused Guilty or Not Guilty |
| (v)   | Fifth count of Rape                         | Accused Guilty or Not Guilty |
|       | If not guilty for the fifth count           |                              |
| (vi)  | Sixth alternative count of Indecent Assault | Accused Guilty or Not Guilty |

71. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

72. Any re-directions?

Sudharshana De Silva  
**JUDGE**

**AT LAUTOKA**  
**On 18 October 2013**

**Solicitors for the State:**  
**Solicitors for the Accused:**

**Office of the Director of Public Prosecution**  
**In Person**