

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC. 330 of 2015**

**STATE**

**V**

**SAILOSI KADANAVATU**

**Counsel** : Ms. L. Bogitini for State  
Ms. T. Kean for the Accused

**Dates of Hearing** : 17<sup>th</sup> May to 18<sup>th</sup> May 2016

**Date of Summing Up:** 19<sup>th</sup> May 2016

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as TT)

**SUMMING UP**

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies for this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty.
2. During this summing up, if I express my opinion on the evidence or if I appear to do so, you are not bound accept such opinion. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
3. Evidence is what the witnesses said from the witness box in this court room and the admitted facts. Your opinion should be based only on the evidence presented inside this

court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard such information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. You heard the opening address and you heard the closing addresses. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. Your opinion should only be based on what you heard from the witnesses in this case who gave evidence from the witness box and the admitted facts. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
6. Please remember that I will not be reproducing the entire evidence of the case in this summing up. I would only refer to the evidence which I consider important to explain the case and the applicable legal principles. If I do not refer to certain evidence which you consider as important, you should still consider that evidence and give it such weight you may think fit.
7. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the two witnesses, the complainant and the accused give evidence before this court; how they conducted themselves in the witness box; how they answered the questions during examination-in-chief, cross-examination and re-examination. Applying your day to day life experience and your common sense as representatives of the society, you should decide whether you can believe what each witness said in court. Having listened to the evidence of a witness and having seen how he/she gave evidence, you may decide that the entire evidence of that witness can be believed; or you may decide to believe only a part of the evidence and reject the other



part; or you may reject the entire evidence of a witness if you decide that the entire evidence is not capable of being believed.

8. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment.
9. In assessing the credibility of a witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. You may have a difficulty in believing someone who is not consistent. In dealing with inconsistencies, first you have to be satisfied that in fact there is an inconsistency. If you are satisfied that there is an inconsistency, then you should consider whether that inconsistency is material and relevant or insignificant and irrelevant. If you find the inconsistency to be material and relevant, then you must consider whether there is any explanation given by the witness in question with regard to the inconsistency. If there is no such explanation or if you are not satisfied with the explanation, again you have two options. You may either conclude that that witness is generally not to be relied upon or you may decide to disregard only part of his/her evidence which you consider unreliable.
10. On the other hand, if you consider the inconsistencies to be insignificant and irrelevant, or if you are satisfied with the explanation given, then you may consider such witness as a reliable witness notwithstanding the inconsistency.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what he/she said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
12. You heard that the complainant, TT is now 10 years old. The main task before you in this case therefore is to judge whether this child witness has told the truth and whether the account of the events she gave is reliable. You may have come across children of that age. You will have an idea of the way they think, the way they talk and the way they describe things. With your life experience, you have to decide whether TT was a credible witness and whether you can rely on the evidence given by her.

13. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. A victim's reluctance to complain could also be due to shame coupled with the cultural taboos existing in the society in talking about matters of sexual nature with elders.
14. Based on the evidence, you decide what facts are proved and what inferences you can properly draw from those facts. What a witness told you about what he/she saw or heard may directly prove certain facts. In addition to those facts you would consider as directly proved, you may also draw inferences from those facts. For example, when you walk out of this court room, if you see rain water around and it was not raining when you came inside, even though you did not see, you can draw the reasonable inference that it had rained while you were inside the court room. Bear in mind that the inferences you draw should be based on facts proved by the evidence and you may only draw reasonable inferences. You should then apply the law as per my directions to those facts and inferences, to form your opinion as to whether the accused is guilty or not guilty of the offences he is charged with.
15. You are not required to decide every point which has been raised by the lawyers in this case. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges have been proved.
16. When I say 'proved', as a matter of law you should remember that the burden of proof always lies on the prosecution. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. Under our criminal justice system, an accused person is presumed to be innocent until proven guilty.
17. The next question is; what is the standard of proof or to what extent the prosecution should prove the guilt of an accused? The standard of proof in criminal trials is one of proof beyond reasonable doubt. You must be sure of the accused person's guilt.
18. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. Therefore, if you have a reasonable doubt in respect of any element of an offence the accused is charged with, as to whether the prosecution has proved that element, then



you must find the accused not guilty of that offence. However, if you find that the prosecution has proved all the elements of a particular offence beyond reasonable doubt, you should find the accused guilty of that offence. I will deal with the elements of the offences in a short while.

19. In this case, the accused is charged with two offences. Therefore you should bear in mind to consider each count separately. You must not assume that the accused is guilty of the other count just because you find him guilty of one count. You must be satisfied that the prosecution has proved all the elements of both counts in order for you to find the accused guilty of both counts.
20. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion where all three of you agree on whether the accused is guilty or not guilty; but it is not necessary. May I also inform you that, according to our law, I am not bound to conform to your opinion and the final decision on the facts rests with me. Nevertheless, as you are the representatives of the society, your opinion will assist me immensely to arrive at my final decision.
21. Let us now look at the Information. DPP has charged the accused for the following offences;

***COUNT ONE***  
*Statement of offence*

**Rape:** Contrary to Section 207 (1) and (2)(b) and (3) of the Crimes Decree, No. 44 of 2009.

*Particulars of offence*

**SAILOSI KADANAVATU** between the 1<sup>st</sup> day of July 2014 to the 31<sup>st</sup> day of December 2014 at Nasinu, in the Central Division, penetrated the vagina of TT, a child under the age of 13 years with his tongue.

***COUNT TWO***  
*Statement of offence*

**Rape:** Contrary to Section 207 (1) and (2)(b) and (3) of the Crimes Decree, No. 44 of 2009.

*Particulars of offence*

**SAILOSI KADANAVATU** on the 27<sup>th</sup> of February, 2015 at Nasinu, in the Central Division, penetrated the vagina of TT, a child under the age of 13 years with his tongue.

22. The following facts are admitted facts in this case and you should consider these facts as proven beyond reasonable doubt;

1. *The complainant is ..., 9 years of age as of 02/03/15, she was born on the 1st of April, 2006.*
2. *The accused is Sailosi Kadanavatu, 27 years of age as at 16/10/15.*
3. *The accused is the step father of the complainant.*
4. *The accused has been married to the complainant's mother, Taina Vakatokoi Via since 2010.*
5. *The accused was working for Kartika construction from July to December, 2014.*
6. *The accused and the complainant were staying at Lot 119 Nakasi Road from July to December 2014 with his wife's family.*
7. *The complainant resided with the accused at his home in Naidiridiri settlement from December 2014 to the end of February 2015.*
8. *There is a double bunk at the accused home in Naidiridiri settlement.*
9. *On the morning of the 27th of February 2015, the complainant was sleeping on the lower bed of the double bunk bed with her younger brother, Timoci.*
10. *On the morning of the 27th of February 2015 the accused lay beside the complainant.*

23. Accused is charged with two counts of rape under section 207(2)(b) and (3) of the Crimes Decree 2009 ("Crimes Decree"). To prove the offence of rape under section 207(2)(b) and (3) of the Crimes Decree, the prosecution must prove the following elements beyond reasonable doubt;

- a) the accused
- b) penetrated the vagina of TT with his tongue to any extent
- c) TT is below the age of 13 years

24. In this case, the accused does not dispute his identity and it is an admitted fact that TT was born on 01<sup>st</sup> April 2006 which establishes that she was below the age of 13 years at the time of the alleged incidents. Therefore you should consider that the elements (a) and (c) above are proven beyond reasonable doubt in respect of both counts.



25. The issue you should decide in respect of each count is whether or not the accused penetrated the vagina of TT with his tongue. A slightest penetration is sufficient to satisfy this element.
26. If you are satisfied beyond reasonable doubt that the prosecution has proved that the accused penetrated the vagina of TT with his tongue, then you must find the accused guilty of rape. If you have a reasonable doubt with regard to that element, then you should find the accused not guilty of rape.
27. Law says that when a person is charged with rape and the court is of the opinion that he is not guilty of rape but guilty of a lesser or alternative sexual offence, the court may find him guilty of that lesser or alternative offence. Accordingly, I direct you that, if you find the accused not guilty of the offence of rape because you are not sure whether there was penetration; you should then consider whether the accused is guilty of sexual assault which is an offence contrary to section 210(1)(a) of the Crimes Decree.
28. The elements of the offence of sexual assault are;
  - a) the accused
  - b) unlawfully and indecently
  - c) assaulted TT
29. Again, there is no dispute over the identity of the accused.
30. The word “unlawfully” simply means without lawful excuse.
31. An act is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent.
32. Assault is the use of unlawful force. You should also ask yourself, firstly, whether you consider the force which was used could have been sexual because of its nature; and if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.
33. If you find the accused not guilty of rape as charged, but if you are satisfied that the prosecution has proved all the above elements of the offence of sexual assault beyond reasonable doubt, then you must find the accused guilty of the offence of sexual assault.

However, if you have a reasonable doubt in respect of any element, you should find the accused not guilty of sexual assault.

### **Prosecution Case**

34. The complainant said she is 10 years old. She was living at her grandfather's house in Nakasi during July 2014 and December 2014 with her mother, brother and the accused who is her stepfather. She said that the accused licked her vagina during the aforementioned period. According to her, this happened when she and her brother came back after school and her mother was out at work. She said the accused sent her brother outside to pick up rubbish and told her to take off her clothes and lie down on a mattress. Then he licked her vagina. Accused was kneeling down when he did this. She said she felt bad when this was happening and her private part was paining.
35. She said she lived at accused's father's house at Naidiridiri from December 2014 to February 2015. On 27<sup>th</sup> February 2015, when she was sleeping with her brother on the lower bed of the double bunk bed in that house, the accused licked her vagina again. She said this happened in the morning while it was still dark outside and at that time a tube light was switched-on. She said when the accused licked her vagina, she was lying on the bed and the accused was kneeling. She said the accused was a bit drunk on the 27<sup>th</sup> February 2015. She said the accused used his tongue to lick her vagina on both occasions.
36. At one point when she was asked what the others were doing when this happened, she said everyone was having tea at the shed and the accused called her from the shed and did that to her. When she was reminded that she was giving evidence about the incident which took place when it was still dark outside, she said some were still sleeping at that time. She said she shouted and then her mother woke up and saw what happened. Her mother got angry after talking to the accused. She said the accused had a fight with her mother, and subsequently they settled.
37. After that incident her mother told her to go to her aunt's place at Manuka, Nakasi. Aunt's name is Dani. Her brother told aunt Dani the story. According to her, Aunt Dani reported the matter to the police.



38. During cross examination, she said she did not tell Timoci or her mother about the incident because she was scared that he will beat her. She said she did not tell anyone at the house at Naidiridiri about what the accused did to her. When she was asked, did she tell her mother she said 'yes'. She said she was sleeping with her brother on 27/02/15 on the bunk but she doesn't know where her brother was when the accused licked her vagina. She said she doesn't know whether her mother got angry because the accused came home drunk.
39. Then it was pointed out to her that she gave evidence about 3 incidents, but she had told the police only about 2 incidents. She said there were 3 incidents, one at Nakasi, one at Naidiridiri and another after the morning tea. She said she did not mention about the incident which took place after tea because she was not asked about it. When she was told that the accused says that he did not do the things she says that he did, she said the accused is lying.
40. During re-examination, she said she did not say anything to her mother.
41. That was the case for the prosecution.

#### **Defence Case**

42. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give sworn evidence.
43. Accused in his evidence said that he resided at Nakasi between 01/07/14 and 31/12/14 and nothing happened during that period. He said the complainant is her step daughter.
44. He said he resided at Wainibuku as at 27/02/2015, and his step children including the complainant resided at Nakasi. According to him, on 27/02/2015 he came home around 2.00am after drinking with his friends. He said he was really drunk when he reached home, he looked for a place to sleep and then he slept on the bunk inside the house. He said he can't recall whether anyone else was there on the bunk. He did not sleep near his wife because as he came in, she gave him an angry look, she swore at him and then she turned the other side facing the wall and went to sleep. He said nothing else happened. Around 5.30am he had a fight with his wife because his wife thought that he

was having an affair. He said he does not know where his step children were during this fight.

45. During cross examination he said during the period between 01/07/14 and 31/12/14 he was not at home when the complainant and her brother would return home after school. He denied the suggestion that he inserted his tongue into the complainant's vagina during the above period. He said he can't recall whether the complainant and her brother were sleeping on the double bed at Naidiridiri settlement on 27/02/15, because he was drunk at that time. He denied that he inserted his tongue into the complainant's vagina.

### **Analysis**

46. In respect of count 1, the complainant said that the accused licked her vagina during the period between 01<sup>st</sup> July 2014 and 31<sup>st</sup> December 2014. According to the complainant, this happened on one day during the said period when she and her brother came home after school.
47. The accused denied this allegation and he further said that during that period he was not at home at the time the complainant and his brother would return from school as he was working.
48. Was the complainant a credible witness and can you rely on her evidence regarding the first count? The defence says that the complainant is not a credible witness. According to the defence there were inconsistencies in her evidence. I have already directed you on how to deal with inconsistencies. Considering how she gave evidence, what she said in evidence and my directions you should decide whether the complainant was a credible witness.
49. If you consider the complainant to be a credible witness, then in relation to the first count, you should decide whether you can rely on the account she gave regarding what the accused did to her during the period between 01<sup>st</sup> July 2014 and 31<sup>st</sup> December 2014. If you decide that you can rely on the said evidence she gave, then you should consider whether that evidence is sufficient to establish beyond reasonable doubt that the accused penetrated her vagina with his tongue during the relevant period. The



complainant's evidence was that the accused licked her vagina. To establish the disputed element, there should be evidence of penetration.

50. If you are satisfied beyond reasonable doubt that the prosecution has presented evidence to make you sure that the accused penetrated the complainant's vagina with his tongue during the period relevant to the first count, then you should find the accused guilty of the first count.
51. If you are not satisfied that there was penetration, then you should find the accused not guilty of the first count and then should consider whether the elements of sexual assault have been proved beyond reasonable doubt. That is, whether the licking of the complainant's vagina was an act which is unlawful, indecent and sexual in nature. If you are satisfied beyond reasonable doubt that the elements of the offence of sexual assault have been proved beyond reasonable doubt considering the evidence relevant to the first count, then you should find the accused guilty of the lesser and alternative offence of sexual assault.
52. Now let us look at the 2<sup>nd</sup> count. The complainant said that the accused licked her vagina in the morning on the 27<sup>th</sup> February 2015 at the accused's father's house. The accused denied the allegation and further said that the complainant was not residing at that house as at 27<sup>th</sup> February 2015. Accused also gave an account on what happened from the evening on 27<sup>th</sup> February 2015 to the following morning. However, according to the admitted facts, it is admitted that the complainant was sleeping on the lower bed of the double bunk bed in the accused's house on the morning of 27<sup>th</sup> February 2015 and that the accused lay beside the complainant that morning.
53. Again the first question is, was the complainant a credible witness. I have already given you some guidance on deciding the credibility of the complainant. The next question is whether you can rely on the account the complainant gave on what the accused did to her on 27<sup>th</sup> February 2015. If you decide that you can rely on the said evidence she gave, then you should consider whether that evidence is sufficient to establish beyond reasonable doubt that the accused penetrated her vagina with his tongue during the relevant period. The complainant's evidence was that the accused licked her vagina. To establish the disputed element, there should be evidence of penetration.

54. If you are satisfied beyond reasonable doubt that the prosecution has presented evidence to make you sure that the accused penetrated the complainant's vagina with his tongue on 27<sup>th</sup> February 2015, then you should find the accused guilty of the second count.
55. If you are not satisfied that there was penetration, then you should find the accused not guilty of the second count and then should consider whether the elements of sexual assault have been proved beyond reasonable doubt. That is, whether the licking of the complainant's vagina was an act which is unlawful, indecent and sexual in nature. If you are satisfied beyond reasonable doubt that the elements of the offence of sexual assault have been proved beyond reasonable doubt considering the evidence pertaining to the second count, then you should find the accused guilty of the lesser and alternative offence of sexual assault.
56. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
57. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that it is always the prosecution who should prove the case.
58. Generally, an accused would give an innocent explanation regarding the offences he is charged with and one of the three situations given below would then arise in respect of each count;
- i) You may believe him and, if you believe him, then your opinion must be that the accused is 'not guilty';
  - ii) Without necessarily believing him you may think, 'well that might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty';
  - iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether



prosecution has proven all the elements of the offence beyond reasonable doubt. If you are sure that the prosecution has proven all the elements, then your proper opinion would be that the accused is 'guilty'.

59. Any re-directions?

Prosecution – No

Defence – No

60. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

61. Your possible opinions would be;

First Count: Rape - guilty or not guilty

*If not guilty;*

Sexual Assault - guilty or not guilty

Second Count: Rape - guilty or not guilty

*If not guilty;*

Sexual Assault - guilty or not guilty



Vincent S. Perera

JUDGE

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