

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

**Criminal Case No.: HAC 120 of 2015**

**STATE**

vs.

**JAMES ANTHONY NAIDU**

**Counsels** : Ms. S. Kiran for the State  
: Mr. K. Tunidau for the Accused

**Dates of Hearing** : 12, 17, 19, 20 October, 2016  
**Closing Speeches** : 21 October, 2016  
**Date of Summing Up** : 26 October, 2016

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**SUMMING UP**

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*(The name of the complainant is suppressed, the complainant will be referred to as "HD").*

Ladies and Gentleman Assessors

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

**ROLE OF JUDGE AND ASSESSORS**

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

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

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

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.

12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsels and the court they are not evidence unless the witness accepts or has adopted the question asked.

### **INFORMATION**

13. The accused is charged with the following offences: (a copy of the information is with you).
14. After the close of the prosecution case it was decided to proceed with Counts One and Three only.

### **COUNT ONE**

#### *Statement of Offence*

**RAPE:** Contrary to Section 207 (1) and (2) (c) of the Crimes Decree No. 44 of 2009.

#### *Particulars of Offence*

**JAMES ANTHONY NAIDU** on the 1<sup>st</sup> day of May 2015 at Lautoka in the Western Division penetrated the mouth of “**HD**” with his penis, without her consent.

### **COUNT THREE**

#### *Statement of Offence*

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

#### *Particulars of Offence*

**JAMES ANTHONY NAIDU** on the 1<sup>st</sup> day of May 2015 at Lautoka in the Western Division penetrated the vagina of “**HD**” with his finger, without her consent.

15. To prove Count One the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
- (a) The accused;
  - (b) Penetrated the mouth of the complainant “**HD**” with his penis;
  - (c) Without her consent;
  - (d) The accused knew or believed the complainant “**HD**” was not consenting or didn’t care if she was not consenting at the time.

16. To prove Count Three the Prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - a) The Accused;
  - b) Penetrated the vagina of the complainant “**HD**” with his finger;
  - c) Without her consent;
  - d) The accused knew or believed the complainant “**HD**” was not consenting or didn’t care if she was not consenting at the time.
17. The first element of the offences is concerned with the identity of the person who allegedly committed the offence. The complainant says it was the accused and no one else. According to the evidence there is no dispute that the complainant and the accused had met on 1<sup>st</sup> May, 2015 they went to buy liquor then went to the seawall with Meli and Sara.
18. The second element is the act of penetration of the complainant’s mouth and vagina by the accused with his penis and his finger respectively.
19. The slightest of penetration of the complainant’s mouth and vagina by the accused’s penis and finger is sufficient to satisfy the act of penetration.
20. In respect of the third element that is of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
21. If you are satisfied that the accused had penetrated the mouth and the vagina of the complainant with his penis and his finger respectively and she had not consented to any of the acts of the accused, you are then required to consider the last element of the offence.
22. That is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
23. You will have to look at the conduct of both the complainant and accused at the time and the surrounding circumstances to decide this issue.
24. In this trial the accused has denied all the elements of the offences of rape he has been charged with. It is for the Prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the mouth, and the vagina of the complainant with his penis and finger without her consent and the accused knew or believed the complainant was not

consenting or didn't care if she was not consenting at the time that is 1<sup>st</sup> of May, 2015.

25. In this case, the accused is charged with two (2) counts of rape, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
26. If you are satisfied beyond reasonable doubt that the prosecution has proved beyond reasonable doubt that the accused has inserted his penis into the complainant's mouth without her consent then you must find the accused guilty of the first count of rape. Likewise if you are satisfied beyond reasonable doubt that the prosecution has proved beyond reasonable doubt that the accused has inserted his finger into the complainant's vagina without her consent then you must find the accused guilty for the second count of rape. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the two offences of rape, then you must find the accused not guilty of either or both the offences.
27. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.

### **PROSECUTION CASE**

28. The prosecution called five (5) witnesses to prove its case against the accused.
29. The first witness was the complainant. On 1<sup>st</sup> May, 2015 at around 7pm the complainant who was 16 years of age, a Form 5 student and Sara were picked by the accused in his car. The complainant knew the accused who was a family friend. She accompanied Sara since it was her school holidays. Sara had an employment opportunity at the Motel owned by the accused.
30. In the car the complainant saw Meli a worker of the accused. The accused drove the car to the City from Ram Asre Road to a liquor shop he gave Meli some money to buy alcohol. After buying Tribe beer all went to Marine Drive seawall. At the seawall all except the accused drank liquor. After a while Sara and the accused went somewhere in the accused's car when they

returned after about half an hour later Sara informed the complainant that the accused wanted to talk to her in private about her wages.

31. The complainant went with the accused in his car she was seated in the front passenger seat. The accused drove the car to Navutu to a vacant land. The accused stopped the car locked the door of the car pulled down his three quarter pants and told the complainant to suck his penis. The complainant was scared and so shocked she had nowhere to go she could not escape because the door was locked. The accused took her head and pushed it towards his penis.
32. As the complainant was sucking the penis of the accused, the accused pulled down the skirt of the complainant and then started to play around with her vagina and then inserted his finger into her vagina. This continued for 5 minutes. Other than the above the accused did not do anything else to her.
33. The complainant further informed the court that she had not allowed the accused to do what he did to her. The complainant was wearing a skirt and mini shorts that evening. At this time the accused received a phone call hence he pushed her head up.
34. After this the accused drove the complainant back to Marine Drive, however, Meli and Sara were not there. At Marine Drive the accused told the complainant to go to the back seat of the car and not to tell anyone about what had happened he threw \$20.00 at her. The accused called Meli on his phone and asked Meli where he was.
35. After picking Meli and Sara the accused dropped the complainant and Sara home. Next day the complainant met her best friend Janet. Janet wanted to know how the complainant's work was since the previous night before being picked by the accused, the complainant had informed Janet that she was going to JJ's Motel by accompanying Sara.
36. According to the complainant she was not her normal self she was just nodding her head not saying anything. This made Janet suspect something was wrong so Janet continued asking questions.
37. The complainant then told Janet everything that had happened to her the previous night.

38. In cross examination by Defence Counsel a letter dated 14<sup>th</sup> March, 2016 was shown to the complainant. This letter is marked as Defence Exhibit no. 1. The complainant informed the court that she signed and typed that letter. The letter was brought to her whilst she was in school by her father. However, the content of the letter was covered by an envelope so she could not see the content of the letter only the signature part of the letter was shown to her.
39. The complainant also said that her father had tricked her but she signed the letter because it was her father who had asked her to sign the letter and whatever he says she will follow.
40. Furthermore the letter was given to her by her father when she was on her way to the High Court to give evidence. Her father told her to lie about the letter but she does not want to listen to him.
41. As the cross examination continued the complainant denied that she had typed the letter dated 14<sup>th</sup> March, 2016.
42. The complainant maintained that the letter was typed by her father all she did was sign it. She also informed the court that as a result of this letter she gave another statement to the Police where she denied the contents of the letter.
43. The complainant denied she was threatened by the Police against changing her earlier Police statement. She also denied that she was making up stories against the accused. She denied the suggestion that on the night of the alleged incident Sara and the complainant had asked for \$200.00 from the accused for clubbing which was refused by him. The complainant further denied that after the accused refused to give \$200.00 both Sara and the complainant asked for \$800.00 for shopping which was also refused by the accused.
44. In re-examination the complainant clarified that the accused and Sara had left the seawall for somewhere and after Sara returned she went with the accused.
45. The next witness was Saraseini Nawa (PW2). She informed the court that in May, 2015 she was living with the complainant and her family at Ram Asre Road. On 1<sup>st</sup> May, 2015 in the evening she was going to work at JJ's Motel and she took the complainant for job experience both were picked up by the accused in his car.

46. Sara has a New Zealand Diploma in Business and she was going to be a Marketing Officer at the Motel and it was going to be her first night at work. The accused was accompanied by Meli upon picking Sara and the complainant the accused said there will be no work that night since the business was slow.
47. According to Sara it was the complainant who requested her to ask the accused to buy some drinks instead. The accused gave money to Meli and drinks were bought. At the seawall Sara, Meli and the complainant were drinking Tribe beer. After drinking the accused dropped Sara and the complainant home.

#### Ladies and Gentleman Assessors

48. From this point onwards you would have noticed that this witness who was called by the prosecution had started giving evidence adverse to the prosecution case. I will address you in more detail about this a bit later in my summing up.
49. Upon cross examination by the State Counsel Sara informed the court that the complainant's family had not told her what to say in court, however, she said that whatever is mentioned in the second half of her police statement dated 15<sup>th</sup> May, 2015 was a result of influence by the complainant's family and also she was forced by a Police Officer namely Irene. She was influenced since she was living with the complainant and her family at the time.
50. Sara agreed that in her second police statement dated 8<sup>th</sup> April, 2016 she did not mention anything about telling the Police that her first police statement was not correct.
51. In cross examination by the Defence Counsel Sara maintained that the second part of her police statement dated 15<sup>th</sup> May, 2015 in particular line 34 on page 1 and onwards was not true since it was as a result of influence by the complainant and her family. The police statement given by Sara dated 15<sup>th</sup> May, 2015 is marked as Defence Exhibit no. 2 and the police statement given by Sara dated 8<sup>th</sup> April, 2016 is marked as Defence Exhibit no. 3.
52. Sara also informed the court that the complainant and her family had intimidated her that if she did not tell the police whatever they wanted her to say then they will tell everyone that she is the one who caused the rape



and that she sells little girls to Businessmen. Sara was also told to leave the house with her younger sister if she was not going to listen to what had been told to her.

53. According to Sara at the Police Station she had been intimidated and told by a Police Officer Irene that she will be a suspect if she did not give her police statement.
54. When Sara gave her second police statement dated 8<sup>th</sup> April, 2016 she was living at Veiseisei and had completely detached herself from the complainant and her family and as a result she went to the Police to tell the truth and withdraw her statement.
55. Furthermore Sara told the court that she overheard the complainant and the entire family except her father talking about monetary gain when they win the case.
56. Upon questioning by the court Sara stated that she left the house of the complainant one week after giving her first police statement on 15<sup>th</sup> May. She did not report the influence or intimidation by the complainant and her family to the Police. The reason why she did not report this to the Police was because she was scared of the Police when she went to try and withdraw her first police statement. According to her she was not properly treated by the Police Officers hence she decided to withhold from the Police the information of influence by the complainant and her family.
57. The third prosecution witness was Janet Cathy (PW3) who recalled going to church on 3<sup>rd</sup> May, 2015 with the complainant. On the way to church the complainant was talking to Janet about her work saying that everything was fine until they reached the church. At this time the complainant told Janet that she went in the car with the accused he stopped the car and asked the complainant to suck his "dick" meaning his private part. The accused used his hands and fingers to touch her private part. The accused gave her \$30.00. When the complainant was telling Janet this the complainant looked sad. After hearing this, Janet told her mother despite the complainant asking her to keep her secret.
58. In cross examination by Defence Counsel Janet informed the court that she was in the same class as the complainant and she believed the complainant for what she had told her. If the complainant had lied to her she would not have believed her.

Ladies and Gentleman Assessors

59. Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for a child of 16 years to not complain fully to her best friend. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness when talking about matters of sexual nature.

Ladies and Gentleman Assessors

60. You will remember this witness Janet was recalled by the court after some issues were brought to the attention of the court after she had given her evidence. Under the law the court is permitted to take such a course.
61. After being recalled as a witness Janet informed the court that she had written two letters to the court one dated 11<sup>th</sup> October, 2016 and the other dated 18<sup>th</sup> October, 2016. She told the court that she had wanted to withdraw her statement from the Police reason being after a few days of giving her police statement the complainant had told her that everything the complainant had said about the accused to her was a lie.
62. Janet had informed the court that she went to the Lautoka Police Station after a few days of giving her police statement with her mother and was told by a Police Officer Maciu that she could not withdraw her statement.
63. According to Janet her mother was told off by Police Officer Maciu who did not write anything. Janet did not tell the court about the lie when she had earlier given her evidence because she never got the chance to give her letter in court at the time of giving evidence.
64. In cross examination by the State Counsel Janet agreed that she could have informed the court that the complainant had lied to her when she gave her evidence in court the first time. Janet also agreed that she had been coming to court from Wednesday 12<sup>th</sup> October when the trial started. Since her first letter to the court was dated 11<sup>th</sup> October, 2016 she had not taken any steps to inform the court or file it in the court registry before writing the second letter dated 18<sup>th</sup> October. Janet further stated that the reason why she had written another letter to the court was because after giving evidence on Monday 17<sup>th</sup> October she had an argument with her mother at home

after she told her mother that she could not get a chance to give the first letter to the court.

65. The witness denied she was pressured either by her mother or that her aunty Bulou who is the nanny looking after the son of the accused had pressured her mother to get her to change her story.
66. Upon cross examination by the Defence Counsel the letter written by the witness dated 11<sup>th</sup> October, 2016 was marked as Defence Exhibit no. 4 and the letter dated 18<sup>th</sup> October, 2016 was marked as Defence Exhibit no.5.
67. After three or four days of giving her police statement on 15<sup>th</sup> May, 2015 the complainant and her sister Salome came to her home since they wanted some Fijian medicine. While the complainant's sister Salome was talking to her mother the complainant was talking to her and during the conversation the complainant asked Janet to tell her what Janet had told the Police in her police statement. After telling the complainant what she had told the Police the complainant told her that everything was a lie.
68. Janet informed her mother and together they went to the Police Station where they saw Police Officer Maciu and told him that she wanted to withdraw her statement and also told him the reason for doing so.
69. According to Janet, Police Officer Maciu did not write down anything and informed her that she was not able to withdraw her statement. Before going to Police Officer Maciu they had seen W.D.C Irene Singh.
70. Janet informed the court that Police Officer Irene had written a police statement of what she had told her. According to Janet this statement was signed by her and countersigned by the Police Officer Irene. The statement was also read back to her and she was asked whether the contents were true.
71. As a result of the evidence given by Janet the complainant was recalled by the court and she told the court that she had not told Janet that she had lied about her allegation against the accused.

Ladies and Gentleman assessors

72. You would recall that Woman Detective Constable Irene Singh was summoned by the court in view of the evidence given by Janet. Under the law the court has powers to do so.

73. W.D.C Irene Singh has 11 years of experience as a Police Officer she recalled recording the police statement of Janet Cathy (PW3) on 15<sup>th</sup> May, 2015. Witness agreed that Janet and her mother had approached her about the withdrawal of her police statement a few weeks after the case was pending in court.
74. According to W.D.C Irene Singh, Janet and her mother had given her no reason for the withdrawal of her statement and since the case was pending in court she had no authority to record Janet's withdrawal statement.
75. Janet and her mother had seen W.D.C Irene Singh about 3 or 4 times in regards to the withdrawal and at no time had she recorded a further statement from Janet.
76. Upon cross examination by the State Counsel W.D.C Irene Singh said once the investigation is complete and the file is sent for court they await instructions from prosecution before acting upon court pending files.
77. Upon cross examination by the Defence Counsel W.D.C Irene Singh had not asked Janet and her mother the reason they wanted to withdraw her statement and she did not see it important to refer Janet to the Police Prosecution or the Office of the Director of Public Prosecution.
78. W.D.C Singh had sought advice of Crime Officer Inspector Maciu and was told to inform Janet and her mother that the case was in court. Furthermore W.D.C Singh informed the court that it was only after the accused was charged that Janet and her mother started approaching her in regards to the withdrawal of her statement.
79. W.D.C Singh disagreed that by not informing the Police prosecution or the Office of the Director of Public Prosecution about the intention of Janet to withdraw her statement she had concealed vital information from the prosecution and defence in the conduct of fair trial.
80. The fourth prosecution witness was Salome Dunn (PW4) the sister of the complainant who informed the court that on 14<sup>th</sup> May, 2015 she was walking along the road when Janet's mother called her to her house and asked her if she knew what had happened to the complainant.
81. When Salome went home she told her mother and her sisters what Janet's mother had told her. Upon the complainant's return from school Salome asked her if what the accused had done to her was true. The complainant

81. When Salome went home she told her mother and her sisters what Janet's mother had told her. Upon the complainant's return from school Salome asked her if what the accused had done to her was true. The complainant started crying and said that the accused forced her to suck his "dick" and also put his hand up her private part and anus.
82. Upon hearing this Salome called the accused who came home. At home Salome told him what the complainant had told her. The accused denied any wrongdoing. The accused went to the porch of the house at the back and wanted to do a settlement with her mother. According to Salome the accused wanted her mother not to report the matter to the Police but to discuss it. Salome said she disagreed to this and called the Police who came and took the accused away.
83. In cross examination Salome denied that her family including her was going to make money from this allegation she also denied the allegation was concocted with the view to making money from the accused.
84. The last witness for the prosecution was Alanieta Dunn (PW5) the complainant's mother who recalled that on 14<sup>th</sup> May, 2015 Salome told her what Sereana (Janet's mother) had said about the complainant. When the complainant came home from school she asked her what the problem was.
85. The complainant started to cry telling the witness that the accused had told her to suck his "ball" that is his private part and the accused also touched her private part in front. Alanieta upon hearing this hugged the complainant and asked her why she didn't tell her first. The complainant told the witness that she felt ashamed to tell her mother such a thing.
86. Alanieta met the accused when he came to her house the accused wanted to reconcile she told the accused that she trusted him and that she cannot believe that he will do such a thing to her daughter. The next day the son of the accused and his workers came to her house and informed her that the accused got money.
87. Alanieta refused saying she cannot take any money since the matter was in court and with the Police. In cross examination Alanieta was shown her police statement dated 15<sup>th</sup> May, 2015 she agreed that she had given the statement to the Police when everything was fresh in her mind. She also agreed that there was no mention by her in the police statement that she told the accused that she trusted him and she cannot believe that he will do

88. Alanieta denied that she made up the story of her daughter being sexually assaulted by the accused in order to get money out of the accused.
89. This was the end of the prosecution case.

Ladies and Gentleman assessors

90. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.

He could have remained silent but he chose to give sworn evidence and be subjected to cross-examination.

### **DEFENCE CASE**

91. The accused informed the court that on 1<sup>st</sup> May, 2015 he met Sara who wanted to come and work in the Motel owned by the accused and his partner. Sara had asked the accused to pick her in the afternoon to talk about her employment in detail. Prior to this Sara had already been to the Motel and did some orientation. Between 6pm to 7pm that evening after picking Meli he went and picked Sara and the complainant from Ram Asre Road. According to the accused he did not know that the complainant was going to accompany Sara. On their way Meli said that they wanted to have some drinks so he drove to the City to buy some drinks. The accused gave some money to Meli and after buying alcohol he drove all of them to the seawall at Marine Drive. After parking the car all got out Meli, Sara and the complainant started drinking. The drinking took place for about 45 minutes to an hour the accused did not go anywhere from the seawall and the allegation against him was a lie.
92. In cross examination the accused said that Sara was not actually working for him she was in the process of and this was the first time he tried to get someone employed in his family business. He had not seen Sara's credentials such as her Diploma, Curriculum Vitae since he took Sara's word for it. The accused further said that it was not normal for him to buy drinks for his potential employees, however, in this case he bought the drinks for Sara and others.
93. The accused knew the complainant's family well and he did not question the complainant why she was in the car since Sara had told him that the complainant was looking for part time job in his Motel. At the seawall he

did not discuss anything with the complainant but overheard Sara and the complainant talking about work at the Motel.

94. The accused further stated that it was not true that he took the complainant to the seawall and that he did not stop her from drinking since he wanted to take advantage of the situation and had committed the offences as alleged. The accused further stated that he had nothing to do with the complainant's drinking of liquor at the seawall since he had no control over who was drinking.
95. The second Defence witness was Meli Tauvoli he used to do some work for the accused such as car washing and grass cutting at his house. On 1<sup>st</sup> May, 2015 he was unemployed the accused came and picked him in his car from his home thereafter they went together to pick Sara and the complainant. They went to buy drinks and after buying drinks all went to the seawall at Marine Drive. It was the accused who had given him money to buy the drinks. At the seawall it was only the accused who was not drinking he was inside his car but at times came out and spoke to the girls about wanting to work at the Motel of the accused. The accused did not drive away with the complainant alone that evening.
96. In cross examination the witness informed the court that he has been working for the accused since he left school about 5 years ago. At the seawall the accused was explaining to Sara about working at the Motel. The witness stated that the accused never buys drinks for potential employees and he knows the accused and his family very well and he is close to them. The Police contacted him for a statement on 18<sup>th</sup> April, 2016.
97. The final witness for the Defence was Sereana Likusalusalu who was Janet's mother. She told the court that Salome nicknamed "Mina" and the complainant came to her home after 15<sup>th</sup> May, 2016 asking for Fijian herbal medicine and during the conversation Salome told the witness if the complainant wins this case the accused can give money, house and a car to the complainant. After the complainant and her sister Salome left Janet had told the witness that whatever the complainant had told her was a lie. After 3 or 4 days the witness told Janet to go to the Police Station to withdraw her statement.
98. When the witness and Janet went to Lautoka Police Station they saw Police Officer Irene this Police Officer wrote a police statement which Janet had signed furthermore the statement was read to Janet by Police Officer Irene. The witness said they had gone to the Police Station once only and after

Janet's statement was recorded they were sent to see Inspector Maciu who started saying things to her which she did not like.

99. In cross examination by State Counsel the witness said that it was Janet who had told her about what the complainant had said. After the complainant had given her police statement the witness stopped going to the house of the Dunn family and were not in talking terms.
100. The witness maintained that both Salome and the complainant had come to her house to get herbal medicine. The witness further informed the court that when Salome came to her they were still in talking terms but straight after they left that was the end of their relationship. The reason why they went to the Police Station 3 or 4 days after having knowledge of this information was because she had no fare to go to the Police Station furthermore she did not report the behaviour of Inspector Maciu to any senior officer.
101. This was the Defence case.

### **ANALYSIS**

Ladies and Gentleman Assessors

102. You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.
103. The Prosecution says in respect of the two counts of rape that the accused forced the complainant to suck his penis after he drove her to a vacant land in his car in the evening of 1<sup>st</sup> May, 2015. The accused had locked the door of the car pulled down his three quarter pants and took the complainant's head and forced it towards his penis.
104. The complainant was scared and shocked she had nowhere to go since the door was locked. As the complainant was sucking the penis of the accused he pulled down her skirt and started playing with her vagina and then inserted his finger into the vagina.
105. The complainant stated in her evidence that she did not consent to the accused to force her to suck his penis and to insert his finger into her vagina. She also informed the court that before going to pick Meli and Sara



from the seawall the accused told her to go to the back seat of the car and also not to tell anyone about what had happened and he threw \$20 at her.

106. The accused on other hand says that nothing happened as alleged by the complainant. After the complainant, Sara and Meli had finished their drinks at the seawall he dropped Sara and the complainant home. He further says that the allegation is a made up and/or a concocted story against him. The complainant has lied.
107. According to the complainant it was the next day she informed her best friend Janet Cathy of what the accused had done to her. Janet told the court that when the complainant was telling her what happened to her the complainant looked sad, however, the complainant had asked Janet to keep it a secret.
108. This is commonly known as recent complaint. The evidence given by Janet is not evidence as to what actually happened between the complainant and the accused since Janet was not present and did not see what happened between them.
109. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says that the complainant's complaint to her best friend shortly after the alleged incident is consistent with her account of both the alleged incidents and therefore she is more likely to be truthful.
110. On the other hand the Defence says that the evidence of Janet Cathy after she was recalled as a witness shows that the complainant was not truthful. Janet informed the court that after she had given her police statement about what the complainant had told her 3 or 4 days later the complainant came to her home with her sister Salome.
111. During conversation the complainant told her that everything she had told Janet about the allegation against the accused was a lie. Thereafter Janet and her mother went to Lautoka Police Station and gave a statement to W.D.C Irene Singh. W.D.C Singh had written a police statement which was read back to Janet signed by her and counter signed by the Police officer.

Ladies and Gentleman Assessors

112. You will recall that W.D.C Irene Singh was called by the court to give evidence in view of the new information brought to the attention of the court.
113. W.D.C Singh informed the court that Janet and her mother had approached her with the view to withdrawing her statement, however, she had no authority to do so since the matter was pending in court. Furthermore W.D.C Singh in her evidence informed the court that no police statement was recorded from Janet in regards to her intention to withdraw.
114. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.
115. The next witness was Saraseini Nawa this witness has been referred throughout the trial as Sara. She was called by the prosecution, however, she started giving evidence adverse to the prosecution case. The State Counsel in her closing speech used the phrase "hostile" witness to describe this witness. "Hostile" witness means an adverse or unfavourable witness.
116. Sara was called by the prosecution but gave evidence which did not support the prosecution case about what happened at the seawall and thereafter. The prosecution was therefore allowed to treat Sara as a "hostile" witness – a witness who had in effect "changed sides" – and to cross examine her to show that she had given an account on a previous occasion which was inconsistent with the account she gave in court.
117. Sara gave her police statement on 15<sup>th</sup> May, 2015 which is marked as Defence Exhibit no. 2. In this police statement Sara had told the Police that the accused told her that he wanted to talk to her in private and for her to get in the car with him. She then sat in the front passenger seat and the accused drove up Marine Drive.
118. After a while the accused took her back to Marine Drive where the complainant and Meli were. The accused told Sara that he wanted to speak to the complainant about her wages. Upon reaching Marine Drive Sara told

the complainant that the accused wanted to talk to her. The complainant followed the accused to his car and then the accused drove away.

119. The explanation given by Sara was that she and her younger sister were living at the house of the complainant with her family and that she was influenced to tell the Police what they wanted her to say. Sara informed the court that the complainant and her family had intimidated her that if she did not tell the Police what they wanted her to say then they will tell everyone that she was the one who caused the rape and that she sells little girls to businessmen. Sara was also told to leave the house with her younger sister if she was not going to listen.
120. Moreover Sara also said that at the Police Station she had been intimidated by W.D.C Irene Singh in that she will be treated as a suspect if she did not give her police statement.

Ladies and Gentleman Assessors

121. You will have with you Defence Exhibit no. 2 the police statement of Sara dated 15<sup>th</sup> May, 2015 which may help you to place in context the inconsistencies between the statement and what Sara has said in court. When considering whether you should reject Sara's evidence altogether or can rely upon it I must warn you that contents of that statement is not evidence you can consider it only to determine the credibility and reliability of the evidence given by Sara. In doing so you are to consider her explanation for the inconsistencies.
122. Salome Dunn the sister of the complainant came to know about the allegation from Janet's mother she informed her mother and rest of her family.
123. The last witness for the prosecution was Alanieta Dunn the mother of the complainant who informed the court the accused was called to her house after it became known that the complainant had made an allegation against him. According to this witness the accused wanted to reconcile she told the accused that she had trusted him and that she cannot believe that he will do such a thing to her daughter. This witness was shown her police statement dated 15<sup>th</sup> May, 2015 and she agreed that she had given that statement to the Police when everything was fresh in her mind. She agreed there was no mention by her in the statement that she told the accused that she trusted him and that she could not believe that he will do such a thing

to her daughter. The reason why she did not tell the Police was because there was a rush at the time.

124. I will now explain to you the purpose of considering the previously made statement of the witness with her evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
125. It is obvious that the passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
126. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue you are considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

Ladies and Gentleman Assessors

127. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath and also decided to call witnesses in his defence. The accused is not obliged to give evidence. He is not obliged to call any witnesses. He does not have to prove his innocence in effect he does not have to prove anything.
128. However, the accused decided to give evidence and also to call witnesses on his behalf. You must then take into account what the accused and his witnesses adduced in evidence when considering the issues of fact which you are determining.
129. It is for you to decide whether you believe the evidence of the accused and his witnesses. If you consider that the account given by the defence through the evidence is or may be true, then you must find the accused not guilty of either or both counts.
130. The accused in his evidence told the court that in the evening of 1<sup>st</sup> May, 2015 he did not know that the complainant was going to accompany Sara. He did not question the presence of the complainant, he wanted to talk to

130. The accused in his evidence told the court that in the evening of 1<sup>st</sup> May, 2015 he did not know that the complainant was going to accompany Sara. He did not question the presence of the complainant, he wanted to talk to Sara in detail about her employment opportunity at his Motel. He paid for the drinks and after buying drinks all went to the seawall at Marine Drive.
131. At the seawall Sara, Meli and the complainant were drinking he did not go anywhere from the seawall and the allegation against him was a lie. The accused further stated that he had nothing to do with the complainant's drinking of liquor at the seawall since he had no control over who was drinking.
132. The second Defence witness was Meli Tauvoli who used to do some work for the accused such as car washing and grass cutting. The accused had picked him from his home and at the seawall at Marine Drive the accused was not drinking. Meli was drinking with Sara and the complainant. The accused was inside his car but at times would come out and speak to the girls about wanting to work at the Motel of the accused. The accused did not drive away with the complainant alone that evening. Meli knows the accused and his family very well and he's close to them.
133. The final witness for the defence was Sereana Likusalusalu in her evidence she told the court that Salome and the complainant came to her house after the 15<sup>th</sup> May to get herbal medicine. During the conversation Salome told the witness if the complainant wins this case the accused can give her money, house and a car.

#### Ladies and Gentleman Assessors

134. You will recall that there was a letter dated 14<sup>th</sup> March, 2016 which is marked as Defence Exhibit no 1. In this letter it is stated that the allegation against the accused was a lie in that there was no sexual assault on the complainant. The letter is signed by the complainant she has not denied signing this letter but says she was tricked by her father who had covered the contents of the letter. It is up to you as judges of facts what weight you wish to give to this exhibit in determining the credibility and reliability of the complainant's evidence.
135. As explained earlier your decision must be based exclusively upon the evidence which have been heard in this court. The Defence Counsel in his closing speech made some comments about the Office of the Director of Public Prosecutions as to what they should do or ought to have done. It is

Ladies and Gentleman Assessors

136. You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
137. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthwith and truthful and which were not. Which witnesses were evasive or straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
138. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
139. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt.
140. In this case, the accused is charged with two (2) counts of rape, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
141. Your possible opinions are:-

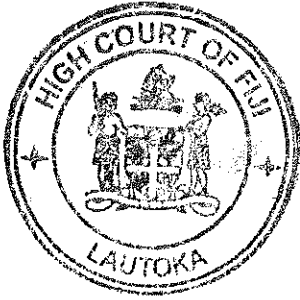
Count One: **RAPE**: GUILTY OR NOT GUILTY


Count Three: **RAPE**: GUILTY OR NOT GUILTY

Ladies and Gentleman Assessors

142. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.

143. Before you do so, I would like to ask Counsel if there is anything they might wish me to add or alter in my summing up.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

26 October, 2016

**Solicitors**

**Office of the Director Public Prosecutions for the State**

**Kevueli Tunidau Lawyers for the Accused**