

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO. HAC 200 OF 2015**

**STATE**

**VS**

**SANJEEV SINGH**

**Counsel** : **Ms S Lodhia and Ms S Navia** for the **State**  
: **Mr S Singh** for the **Accused**

**Hearing** : **24<sup>th</sup> October – 27<sup>th</sup> October 2016**

**Summing Up** : **28<sup>th</sup> October 2016**

*(Name of complainant is permanently suppressed and will be referred to as A.B.)*

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## **SUMMING UP**

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Ladies and Gentleman Assessors,

[1] We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear more. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused have addressed

you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the presiding judge, it is my task is to ensure that the trial is conducted fairly and according to law. As a part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give you on matters of law. It is also important to note that, if I give you a caution, you have to take it also into consideration, in coming to your opinion.
- [3] It is your duty to decide all questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of fact, first you must decide what evidence you accept as truthful and reliable. You will then apply relevant law, to the facts as revealed by such credible evidence. In that way you arrive at your opinion.
- [4] During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent view.
- [5] In forming your opinion, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] It is also important to note that, in forming your opinion on the charges against the accused, it is desirable that you reach a unanimous opinion; that is, an opinion on which you all agree, whether he is guilty or not guilty. However, the final decision on questions of fact rests with me. I am not bound to conform to your opinion. However, in arriving at my judgement, I shall place much reliance upon your opinion.
- [7] I have already told you that you must reach your opinion on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] The evidence is what the witnesses said from the witness box, the documents, the things received as prosecution or defence exhibits and any admissions made by the parties.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration.

The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have heard in this Courtroom also are not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The addresses made by the Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, another matter which will be of concern to you is the determination of truthfulness of 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 correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting. Consider also the likelihood or probability of the witness's account.
- [14]** The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every victim has her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15]** The experience of the Courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not

complain or go to authority for some time. Victim's reluctance to report the incident could be also due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. There is, in other words, no classic or typical response by victims of Rape.

- [16] A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in this matter before us, the promptness or lateness of the complaint and what weight you attach to it.
- [17] Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question.
- [18] In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Credibility concerns honesty. Reliability may be different. A witness may be honest enough, but have a poor memory or otherwise be mistaken.
- [19] Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.
- [20] Ladies and gentleman, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [21] Having placed considerations that could be used in assessing credibility of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.

- [22] When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [23] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [24] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of Primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [25] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [26] In order to illustrate this direction, I will give you an example. Imagine that when you walked into this Court room this morning, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [27] It does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.

- [28] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove. That burden rests on the prosecution to prove the guilt of the accused.
- [29] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. The fact that the accused has given evidence, or immaterial as he has no burden upon him to prove his innocence. It is not his task to prove his innocence. When he does offer evidence it is your duty to evaluate then apply the same standards.
- [30] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or level of proof, as expected by law?
- [31] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond reasonable doubt. This means that in order to convict, you must be sure that the prosecution has satisfied beyond reasonable doubt of every element that goes to make up the offences charged. I will explain these elements later.
- [32] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences and the other matters of which you must be satisfied, such as identity, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such doubt, then your duty is to find the accused guilty.
- [33] You should dismiss all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion has any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinion.
- [34] Let us now look at the charges contained in the information.
- [35] There are two charges preferred by DPP, against the accused:

### **FIRSTCOUNT**

#### ***Statement of offence***

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

***Particulars of Offence***

**SANJEEV SINGH** on the 14<sup>th</sup> day of February 2015 at Wainadoi, Navua in the Central Division penetrated the vagina of a girl, namely A.B., with his fingers without her consent.

**SECOND COUNT**

***Statement of Offence***

**INDECENT ASSAULT** :Contrary to Section 212 (1) of the Crimes Decree No. 44 of 2009.

***Particulars of Offence***

**SANJEEV SINGH** on the 14<sup>th</sup> day of February 2015 at Wainadoi, Navua in the Central Division unlawfully and indecently assaulted A.B.

- [36] I shall first deal with the elements of the offence of Rape. In order to prove a charge of Rape, the prosecution must prove beyond reasonable doubt that the accused penetrated A.B's or the complainant's vagina, with his finger. The slightest penetration is sufficient to satisfy this element.
- [37] Then we must consider the important issue of consent. It must be proved that the accused either knew that she did not consent or was reckless as to whether she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting but carried on anyway when the circumstances known to him it was unreasonable to do so. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond reasonable doubt.
- [38] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was over 13 years of age and therefore, she had the capacity to consent. More directions on the issue of consent will be made as we proceed.
- [39] If you are satisfied beyond a reasonable doubt that the accused penetrated the complainant's vagina with his fingers without her consent then you may find him guilty of Rape.
- [40] A person commits Indecent Assault if he unlawfully and indecently assaulted the complainant. The word "*unlawfully*" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent.

- [41] Apart from the elements of the offence of Rape and Indecent assault, the identity of the person who is alleged to have committed these offences must also be proved by the prosecution. What it means is that it was this accused and none other had penetrated the complainant's vagina and committed Indecent Assault on her as per the date mentioned in the information. There must be positive evidence as to the identification of the accused.
- [42] If you find that the prosecution failed to establish any of these elements in respect of the two offences, then you must find the accused not guilty.
- [42] In our law, no corroboration is needed to prove an allegation of Sexual Offence. The offences of Rape and Indecent Assault are obviously considered as Sexual Offences.
- [43] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [44] The parties have agreed the following facts have already been proved beyond a reasonable doubt:
- 1.1 *The complainant is one A.B., a 15 year old girl of Wainadoi Settlement in Navua.*
  - 1.2 *The accused is one Sanjeev Singh, a 30 year old man of Wainadoi Settlement in Navua.*
  - 1.3 *On the morning of the 14<sup>th</sup> February 2015, the accused took the complainant's mobile phone to charge at the Police Post.*
  - 1.4 *On the morning of the 14<sup>th</sup> February 2015, the complainant went to sleep at her grandfather's house which is a few yards away from her parent's house.*
  - 1.5 *On the morning of the 14<sup>th</sup> February 2015, the accused went to the complainant's grandfather's house.*
  - 1.6 *The accused was interviewed under caution on the 14<sup>th</sup> February 2015 by Cpl. 2771 Aminand Prasad.*
  - 1.7 *The accused was formally charged on the 22<sup>nd</sup> February 2015 by DC 4349 Tevita.*
  - 1.8 *The complainant was medically examined on the 14<sup>th</sup> February 2015 at the Navua Hospital.*



## Case for the Prosecution

### **[45] Evidence of the complainant**

- (i) *It is her evidence that she was born on 18<sup>th</sup> June 1999 and currently lives with her grandfather in Wainadoi while her parents stayed in their old house in the same settlement, which is located about 6 meters away from where she lives.*
- (ii) *She knew the accused three months prior to the incident and has had a good relation with him. She also knew that he is a Police officer and at that time he was attached to Wainadoi Police post. Her mother knew the accused well as they grew up together since childhood.*
- (iii) *The complainant said that on 13<sup>th</sup> February 2015 at about 10.30 p.m. her mother received a call from the accused verifying with her as to who were there at home. He then called the complainant and asked the same. By this time, the complainant's father had returned home. Then the accused too arrived at about 11.00. p.m. with 4 bags of grog, a bottle of coke and a packet of cigarettes. Then the accused, her parents and the complainant's aunt and uncle had a session of grog. She was also there seated with them.*
- (iv) *They finished the grog session by about 2.00 a.m. and the accused then asked the complainant's phone in order to have it charged at the Police post. After he went, the complainant returned to her Grandfather's house with her aunt to sleep. The complainant then went to sleep on a bed in her room while her grandfather slept in the other.*
- (v) *At about 3.00 a.m. she felt her blanket being pulled and when she woke up, she saw the accused outside her window. He told her to come outside and take the phone. Then she went out through the main door of the house, the accused ran away keeping the phone with him. He told her to come and get it or he will sell it. She then ran after him along the Ram Sámi Road to get her phone back. Then he pulled her by hand and took her near a coconut tree. There were flower bushes and para grass.*
- (vi) *Describing the incident, the complainant said that he made her lie down by tapping her leg. Then he closed her mouth with one hand and with the other he touched her vagina. She wanted to kick him but*

couldn't. Then he touched her breast. The accused also inserted two fingers into her vagina and she felt pain. She could not shout as her mouth was covered by the accused. He pulled out his fingers when he heard the complainant's mother was calling her. Then the accused ran along the Ram Sámi Road.

- (vii) Her mother, along with her aunt and uncle, came to see her and at time she was standing on the road. She then told her mother that the accused put his fingers inside her vagina. Then they all went to Police post and the time is about 4.00 a.m. An officer called Tomasi took down her statement. She was then sent to Navua and also to its hospital. She told to the Doctor who examined her that the accused put two fingers into her vagina. Then again she was taken to Navua Police.

**[46] Evidence of Mere Cawagi**

- (i) This witness is the mother of the complainant. The complainant is one of her six children. She lived in Wainadoi with her husband. The complainant was schooling in Suva during this period at DAV College and was in Form 3. She knew the accused for over 30 years since her childhood. It was the witnesses who introduced the accused to her daughter 3 months before the incident. In February 2015, the complainant lived with her grandfather. His house was located about 300 meters away from where the witness lived.
- (ii) On 13<sup>th</sup> February 2015 at about 10.00 p.m. she was at home and had received a call from the accused. The accused wanted to know who were there at home. Then the accused also called the complainant and asked the same question. She replied that her father has just returned from work. At about 11.00, the accused came to her house with 4 bags of grog and a packet of cigarette. Thereafter, they had a grog session till 3.00 a.m.
- (iii) Then the accused wanted to have the complainant's phone. The complainant and her aunt had gone to fetch it from her grandfather's house and gave it to the accused. Then the complainant and her aunt went away and the witness too had gone to sleep.
- (iv) She was woken up when someone knocked on her door. It was the complainant's aunt and uncle. They told the witness that the complainant had gone down the bridge. She marked the location of

*this bridge on **D.E. No. 1**. The bridge is made of wood and its width is about the size of three wood planks put together. There were no light from street lamps near this bridge.*

- (v) The witness saw the complainant standing beside the bridge. She was crying and when asked what happened she told the witness that she went out to bring phone and the accused had closed her mouth and touched her vagina.*
- (vi) Then the witness and her husband proceeded to the Police post along with the complainant. When she called out the accused's name when she saw him there. They talked to officer Tomasi and then went to Navua Police, then to Hospital and again back to Navua Police.*

**[47] Evidence of Dr. Ripeka Kaurasi**

- (i) This witness after her M.B.B.S. degree has six years of experience as a medical officer. She had not specialised on any particular area in medicine but performed about 12 to 15 medical examinations on female genitalia. She was attached to Navua Hospital as a medical officer in February 2015.*
- (ii) On 14<sup>th</sup> February 2015, she examined the complainant at 9.00 a.m. under supervision of her senior. Complainant's mother was also present and consented for the examination.*
- (iii) Upon her examination of the complainant's genital area, she observed that her hymen (the tissue around the vaginal opening) was not intact and it was not a recent injury. It is her opinion that it may have been due to sexual intercourse. She also noted that the complainant's vagina had a mild laceration to the clitoral area at 4.00 o'clock position. She clarified clitoris is located in the vagina opening above the opening of urinary tract.*
- (iv) In relation to the mild laceration, she was of the opinion that it could be due to insertion of a finger, finger nail or similar object in to the vagina. She also said that the history given by the complainant is consistent with the injury she observed in her vagina.*
- (v) The report prepared by the medical witness was tendered as **P.E. No. 1A**.*

[48] That was the case for the prosecution. You then heard me explaining several options to the accused. I explained to him that he could give sworn evidence and or call witnesses on his behalf. He could also address Court. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests on prosecution at all times. He opted to give evidence and also called a witness on his behalf.

### **Case for the Accused**

#### **[49] Evidence of the Accused**

- (i) *The accused said in his evidence that he is 32 years in age and studied up to Form 2. He is married and had adopted a child of two years and 7 months old. At present he drives a truck. He joined Fiji Police in 2008 and served it for 7 years until his suspension over this incident. He was originally from Wainadoi and during February 2015, he was attached to its Police post and had served there for 8 to 10 months by then.*
- (ii) *He came to know her mother when he drank grog in her place and they used to visit his Police post often. He knew the complainant during this period and their relationship developed into an intimate relationship three months prior to the incident. When the accused did his afternoon shift, the complainant sometimes came alone to his Police post and also used to bring food for him.*
- (iii) *In explaining his intimacy with the complainant, the accused said that one day he had gone to her mother's place to drink grog. She had none. Then the accused along with the complainant went to Mary's cava shop in Wainadoi to buy grog. They walked there and on their way the complainant started teasing the accused, she held his hand.*
- (iv) *Upon their return and after having a grog session, the accused came out. The complainant asked him to wait for her in the vacant house. The accused pointed out the place where this house is located in the map, already marked as **D.E. No. 1**.*
- (v) *In that night at the vacant house the accused waited for the complainant. When she turned up, they sat on the terrace, talked and then kissed. Thereafter she went away.*

- (vi) *On another occasion, the accused had driven the complainant's family to Lami in a van. The complainant told him that she would return the next day. She did return on the next day and called the accused to her mother's house. She got into the house through a window as she had forgotten the house keys. They were alone and had consensual sex. On two subsequent occasions also the accused had sex with the complainant in the vacant house.*
- (vii) *She used to ask money from the accused to shop and also for her bus fare. There were times the accused also gave money without her asking for it as they were in a relationship. Whenever someone visits their house, she used to ask for Yaqona and cigarettes. Whenever there is a sitting in her place he gets invited and when the accused visited them he also took these items to them. He regularly visited her house when he was off duty.*
- (viii) *The accused knew that the complainant did not live with her parents only one month before this incident when they went to Lami. Her step father used to come home only during weekends. He hardly talked with the accused as he talks very little. During one weekend he called the accused asked him whether he is in a relationship with the complainant, as he heard rumours that had spread around in the village. The accused denied having a relationship as he already had a family.*
- (ix) *On 13<sup>th</sup> February 2015, he did the morning shift and at 3.15 p.m. he left the Police post. After a bath he went to his brother's place had some grog. Then he had some food. Then the complainant called him and when answered she gave it to her mother. She told the accused that her husband is coming home and the accused to bring grog. He then bought grog and cigarettes and took it to her house. When he reached there he found the complainants parents, uncle, aunt, and two others were already there. Then they started to have grog and when they finished it was about 3.00 a.m.*
- (x) *At that time the complainant's mobile phone was flat and she gave it to the accused to have it charged at his post and also to bring it back. Then he gave his phone to her so that she could call him to her mobile if she wanted to meet him. At that time he had his brown boots on. He brought back her phone at about 3.30 or 4.00 a.m. she was sleeping on her bed and her window was open. He woke her up and then she*

wanted him to come in to the house. He did not go in and wanted the complainant come out on to the road as her grandfather was there.

- (xi) *She came out and they walked towards the vacant house holding hands and shoulders. They had to jump over the fence and the accused's trouser got caught up in the fence. The complainant was wearing a sulu, a pair of tight pants and a tight vest. They went to the terrace as usual, sat down there, kissed, he put his hand inside her vest, she unzipped his trouser and held his penis, he put his hand inside her trousers and "played with her vagina". They had sex five days ago on the same place, but this day nothing happened.*
- (xii) *Then he saw a light coming towards the Police post and when it came closer, he saw Talatala and his wife are going and the accused and complainant took cover in the hedges. As it was coming to morning time the complainant returned to her house and the accused gone to his house.*
- (xiii) *When the accused was sleeping at his home, a Police vehicle came and they wanted the accused to come with them to Navua Police in civil clothes.*
- (xiv) *He denied that he woke her up by pulling her blanket, he denied the complainant ran after him to get her phone, he denied he tapped her legs and made her lie down, he denied he stepped on her hands with boots, he denied covering her mouth with hand and poking her vagina with the other, he denied inserting two fingers into her vagina, he denied that they met at the coconut tree and he denied that he ran away when her mother called out her name.*
- (xv) *He said in evidence that the complainant did not stop him on the three occasions they had sex, on the terrace she did not show that she did not like him touching her and she did not complain that she felt pain in her vagina.*
- (xvi) *The accused also said in evidence that he did not know her age and did not try to find it out either as she always "looked big" and always mingled with village women. He though she was "big". During their relationship, the accused did not know she was schooling and had he known that she was below 16 years in age he would not have any relationship with her.*

(xvii) *He tendered the map of the area marked D.E. No. 1.*

**[50] Evidence of PC/3592 Joseph**

- (i) *This witness was attached to Wainadoi Police post during February 2015 and the accused had worked with him. After the allegation his services were suspended.*
- (ii) *He knew the complainant as she used to come regularly to the post to meet the accused and at times she came in the night when there was no one around. She brought food parcels to the accused during his night shift and he had seen them together. When asked both denied having any relationship. She said they were just friends.*
- (iii) *He has seen her asking for money from the accused for her recharges and also for grog.*

**Analysis of all evidence**

- [51]** The prosecution relied on the evidence of the complainant, her mother and the medical officer who examined her to prove its case, while the accused after giving evidence, has also called a witness.
- [52]** Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty to the charges of Rape and Indecent Assault, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offences of Rape, Indecent Assault and also the identity of the accused beyond a reasonable doubt.
- [53]** At the beginning of this summing up, I described some considerations you might want to apply to the evidence in order to satisfy yourselves as to the truthfulness and reliability of the evidence. One such consideration is the consistency of the evidence.
- [54]** In relation to considering the consistency of the prosecution evidence, I shall first direct you with the evaluation of evidence on the aspect known as recent complaint. What this consideration is whether the complainant consistently made the allegation of sexual aggression to the person to whom she disclosed it for the first time since

the alleged incident. You could also consider whether she consistently maintained her allegation thereafter.

- [55] The prosecution lead evidence from the complainant that she did describe the alleged act of sexual aggression to her mother after it happened and implicated the accused as the person who did it. Evidence of her mother reveals that she complained to her, when she met the complainant beside the bridge that early morning, that the accused had closed her mouth and touched her vagina.
- [56] About four hours later the complainant again complained of the incident to the medical officer who examined her at Navua Hospital. The history given by the complainant is there in **P.E. No. 1**.
- [57] You could consider these items of evidence, in order to decide whether the allegation of sexual aggression is consistently made and also in what detail. However, I must caution you that these items of evidence should not be utilised by you to decide that they support the complainant's evidence led before this Court. You could only consider these items of evidence at this stage to consider whether the allegation is consistently made and made without undue delay, without leaving room for afterthought and fabrication.
- [58] In addition, it is your duty to consider the evidence led before this Court for its consistency. I shall first deal with the inconsistencies highlighted in the prosecution's case. Before I venture to refer to the inconsistencies, let me assist you by directing the manner in which you should consider these inconsistencies in determining truthfulness and reliability of a particular witness.
- [59] In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question.
- [60] You may have observed that when the complainant gave evidence, there were some inconsistencies between her evidence before this Court and the statement given to the police. What you have to take into consideration is only the evidence given by the complainant in Court and not what she said in any other previous statement. The reason is what she said to Police is not evidence. The portion of the statement to Police could only be used to consider whether she said something different to what she said in Court. These portions only assist to decide whether she was consistent in that particular issue.
- [61] In addition, the accused highlighted some inconsistencies between her evidence and the evidence of her mother. In this situation, the inconsistent parts are evidence of the two witnesses and will therefore, have equal value, and therefore,



considerations are quite different that to a portion of the statement to the Police and evidence.

- [62]** As I have already directed you earlier on in this summing up, in weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence.
- [63]** The inconsistencies of the prosecution evidence as highlighted by the accused will be discussed on the following paragraphs.
- [64]** One of the inconsistencies of the complainant's evidence as highlighted by the accused was in relation to her schooling. The inconsistency is based on the admission by the complainant that she was not schooling in February 2015 and her mother's evidence that she attended DAV College and she was in Form 3. She further said during this period the complainant was away in Suva schooling.
- [65]** Another inconsistency highlighted by the accused was in relation as to what was brought in by the accused when he came to the complainant's mother's house that night. The complainant said he brought 4 bags of grog, a bottle of Coke and a packet of cigarettes while her mother said he only brought grog and cigarettes.
- [66]** The inconsistency of the complainant's evidence that the accused wanted her phone when he got up to go back after the grog sessions with her mother's claim that the complainant went with her aunt to fetch the phone and then she gave it to him is also highlighted by the accused.
- [67]** In relation to her mention of the coconut tree in evidence, the accused marked an inconsistency that she did not mention about it in her statement to Police. He also highlighted that she also failed to mention about the fact that he tapped her leg making her lay on the ground, of para grass and flower bushes that surrounded the area and also the fact that she was crying when she met her mother at the wooden bridge.
- [68]** It is for you to decide whether these are inconsistencies and to the extent to which they affect the credibility of the basic version of the complainant and what weight you attached to her evidence. The complainant's explanation is that she did mention it to Police but they have failed to record it. It is also for you to consider her explanation and decide whether it is acceptable and whether these inconsistencies make her evidence false and unreliable.

- [69] Similarly, you have to consider the version of events as narrated by the accused for its consistency. The prosecution suggested that his claim of being in a relationship with the complainant and the fact that she consented for his touching were never mentioned in his statement. They also say that the accused, being a Police officer, should have known the importance of stating his side of story at the first opportunity. They further suggested he made up this claim only during trial. The accused said he was confused as to what happened, when he made his statement as the Police suddenly turned up at his house.
- [70] You will also recall the accused, during cross examination, suggested to the mother of the complainant that her daughter had a problem when she was 12 years old with a person, but did not put that position to the complainant, when she was giving evidence.
- [71] The prosecution wants you to consider that whether the presence of step father of the complainant at the grog session was also never put to the prosecution witnesses.
- [72] As you did with the prosecution evidence, you may consider these inconsistencies of the accused's case and decide whether to consider it as truthful and reliable version or not.
- [73] I also mentioned you that the manner of giving evidence is also an applicable consideration in evaluating witnesses for their truthfulness and reliability. You would have observed how the complainant and her mother have given evidence and faced cross examination. You would also consider how the accused faced his cross examination and his demeanour at the witness stand.
- [74] In addition to above mentioned considerations on evaluation of evidence; there is another factor in considering whether the evidence of the prosecution is truthful and reliable. That is the relative probability of the versions of event as presented by the parties.
- [75] The evidence of the prosecution is that the accused, having induced the complainant to come out of the house and to follow him to get her phone back, pulled her to a shrub under a coconut tree, made her lie down on the ground, covered her mouth with one hand and touched her vagina with the other. He also touched her breast and put two fingers into her vagina.
- [76] In challenging the prosecution version of events on relative probability on penetration, the accused wants you to consider the fact that when he stepped on to two hands of the complainant with his boots on why is that there were no tell-tale marks on her hands, when the Doctor examined her? He also wants you to consider if her mouth was covered by the accused as to why there are no marks around her mouth?

- [77] In addition, the accused wants you to consider the probability of his action, attributed to him by the complainant. The accused wants you to consider whether it is possible for him to cover her mouth with one hand and to touch and penetrate her vagina with the other, whilst keep on standing when she was lying on the ground?
- [78] On the other hand, the prosecution wants you to consider the probability of the position taken up by the accused during his cross examination of the complainant and Doctor by suggesting that the complainant's injury in her vagina may have caused when she jumped over the fence. However, when the accused in giving evidence, claimed that it was his trouser that got entangled with the fence and he did not see what happened to the complainant as it was dark.
- [79] Having considered these probabilities, if you find that the claim of the accused raises a reasonable doubt in your minds, then you must find the accused not guilty of the charges of Rape and Indecent Assault, since the prosecution has failed to prove its case. If you reject the claim of the accused that he merely touched her breast and played with her vagina with her consent and also thought that she was over 16 taken together with the fact of his total denial, that does not mean the prosecution case is automatically proved. They have to prove their case independently of the accused and that too on the evidence they presented before you.
- [80] With this caution in mind, we could proceed to consider the claim of the accused for its probability of the version. It is claimed by the accused, that due to prior intimacy between the two they went to the vacant house and having talked for a while they kissed. Then the complainant held his penis while he touched her breast and played with her vagina. He denied insertion of his fingers into her vagina. He maintains there was no indication that she did not like when he touched her.
- [81] The accused also wants you to consider that the complainant complained of Rape, as she was seen by her relations with the accused and to protect her reputation they complained to Police. When suggested by the accused this position in his cross examination, to the complainant's mother, she admitted it. It is your duty to consider the relative probability of the accused's version of events in the light of these items of evidence.
- [82] I must caution you over one important matter. When I present the accused's version, alongside the version of the complainant, you might get an impression that the accused must prove that he only "*played her vagina*" and did not penetrate it by insertion of his fingers. That is wrong. He is under no duty to disprove the case for the prosecution. He is not under a legal duty to offer evidence.
- [83] So far I have directed you on the assessment of credibility of the witnesses for the prosecution and the version of events as claimed by the accused. If you reject the

claim of the accused, that he merely played her vagina with her consent, and preferred to accept the prosecution evidence as truthful and reliable then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offences of Rape and Indecent Assault, beyond a reasonable doubt.

- [84]** The prosecution has also relied upon the evidence of the medical witness. This kind of evidence is given to help you with scientific matters about the witness has expertise. As you have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefits, and to express opinions about them, because they are used to doing that within their particular field of expertise. You will need to evaluate expert evidence for its strengths and weaknesses, *(if any)* just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [85]** You would recall that the medical witness said in evidence that she observed a mild laceration in the vagina of the complainant. She was of the opinion that this could be due to penetration of vagina by an object like a finger, finger nail or similar one. According to her, the injury seen on the vaginal vault of the complainant could have happened within the last 24 hours from the time of examination.
- [86]** The Accused, during his cross examination of the medical witness sought to clarify certain positions. In relation to the laceration in the vagina, the accused suggested that it could also be due to contact with a wire fence. The medical witness did not agree with this suggestion and said she would expect more injuries if that was the case. It is for you to decide whether to accept her opinion on these points and whether it supports the prosecution case or the accused position.
- [87]** It is time we consider whether the prosecution has proved the elements of the two offences they charged the accused with. They presented their case on the basis that the incidents of touching the complainants vagina and breast is one incident and insertion of his two fingers into her vagina is a separate incident. The accused also approached the issue on two fronts. He maintains when he touched the complainant's breast and played with vagina, he thought she was over 16 years of age and he had her consent for it. In relation to the insertion of two fingers into her vagina, his position is a total denial.
- [88]** Let us consider the charge of Rape first. As already noted the complainant had clearly stated that the accused poked his two fingers into her vagina. She felt pain. The prosecution claims that the medical evidence supports her claim of penetration.

If you accept it as sufficient proof of digital penetration of the complainant's vagina, then in addition, the prosecution must prove that it was the accused who had digital penetration and that he had no consent of the complainant or was reckless about it.

- [89] I shall direct you on the issue of consent, before proceeding to the issue of identity of the accused. It is our law that consent of the woman must freely and voluntarily be given. She must have the necessary mental capacity to give consent. It is important to note that mere submission to sexual act without physical resistance by the woman cannot be considered as consent. Even if there is consent, if that consent is obtained by force, threat, fear of bodily harm, or exercise of authority then also it cannot be considered as consent acceptable to law.
- [90] The prosecution wants you to believe the evidence of the complainant in which clearly said that she did not consent to the act of the accused. She was kept silent by the accused and she wanted to kick him but couldn't. Her hands were kept under the accused's booted feet. Consider these legal provisions in the light of the evidence presented by the prosecution whether the complainant has consented for the digital penetration of her vagina by the accused.
- [91] In relation to the issue of consent, there is another aspect you must consider. As I have already directed you earlier on my summing up, the prosecution must prove that there was no consent by the complainant or the accused was reckless about it. What that means is whether the accused realised that there was a risk that she was not consenting but carried on with his act anyway when in the circumstances known to him it was unreasonable to do so.
- [92] If you are not sure that he would have realised she was not consenting then you must proceed to consider whether the accused might have been reckless as to whether she consented. Then you must consider, whether he genuinely believed she was consenting, when you consider these circumstances I have mentioned to you just now. If you think so, then you must find the accused not guilty of Rape. If you do not accept that he thought she was consenting when you consider all the circumstances, then you could convict him of Rape if you find the other elements also have been proved.
- [93] The accused is also charged with the offence of Indecent Assault as the 2<sup>nd</sup> Count on the Information. In proving an allegation of Indecent Assault, the prosecution must prove beyond a reasonable doubt that the accused unlawfully and indecently assaulted the complainant. The word "*unlawfully*" simply means without lawful excuse. An act is "*indecent*" if right minded persons would consider the act indecent. As to whether the act of fondling of breasts of the complainant is indecent, you have to consider what right minded persons would think of this act.

Was the act so offensive to current standards of modesty and privacy as to be indecent? The word “*assault*” means the use of force unlawfully. Accordingly, a physical contact may constitute an act of assault, if it is done without a lawful excuse.

- [94] In considering these questions you may consider the general nature of the relationship between the accused and the age gap between them. If you find that right minded persons would consider the act of fondling breast of the complainant by the accused as to be an indecent, then you may find the accused guilty to this offence. If you are not satisfied, then you must find the accused not guilty to this charge.
- [95] The complainant said in her evidence that the accused touched her breast and vagina by putting his hands under her clothing in the early hours of a morning in darkness and under a coconut tree after closing her mouth with one hand. In considering whether these acts attributed to the accused as indecent, you have to consider whether they would be considered by right minded persons as an indecent act.
- [96] Before you determine whether the accused is guilty to the charge of Indecent Assault or not; there is another important area you must consider, in favour of the accused. You would recall, that the accused maintained that when he touched her breast and played with her vagina, she did not indicate that she did not like his touching of her body. On three earlier occasions they had consensual sex. In addition, he also said that she looked big, moved with women in village and he did not ask her age. He also did not know whether she was schooling or not at the time. In addition, he said in evidence, if he knew that she was below 16 years of age, he would not have had this relationship with her.
- [97] The law says that it is a defence in an Indecent Assault charge; if the accused has a reasonable cause to believe and, did in fact believe, that the complainant was over 16 and she consented for the act. When the accused claims this defence in his evidence, then the prosecution must prove beyond a reasonable doubt that the accused did not honestly believe, on reasonable grounds, that the complainant was above the age of 16 years.
- [98] The prosecution wants you to consider that the accused knew her mother from his childhood and as one of her children, the accused should know that the complainant was below the age of 16. They also want you to consider the nature of the close relationship he had with the mother of the complainant. They want you to consider because of this relationship their personal details would have been shared with and the accused would therefore be aware that she was under 16 years of age.

- [99] When you consider these evidence, if you consider that the prosecution has failed to prove beyond a reasonable doubt that the accused did not honestly believe on reasonable grounds, that the complainant was above the age of 16 years, then he should be found not guilty to the charge of Indecent Assault. If on the other hand, if you find that it has proved that the accused did not honestly believe, on reasonable grounds, that the complainant was above the age of 16 years, then you may convict him for the offence of Indecent Assault.
- [100] You will recall that I have already directed you on this topic by referring to the identity of the accused. It is a vital component of the prosecution case and if it had failed to prove the fact that it was this accused and no other had digital penetration of the complainant's vagina without her consent and or did not Indecently Assaulted the complainant, then you must find the accused not guilty of Rape and Indecent Assault. The prosecution primarily relied upon the evidence of the complainant to prove identity of the accused. However, there is no challenge by the accused to the complainant's claim that she identified the accused that night.
- [101] In summary and before I conclude my summing up let me repeat some important points. If the prosecution has proved all the elements of Rape and Indecent Assault beyond a reasonable doubt then you may find the accused guilty of Rape and Indecent Assault. If not, then you must find the accused not guilty of Rape and Indecent Assault. If you find him guilty to one charge does not automatically make the accused guilty of the other charge. You have to consider each charge separately with the relevant evidence and then to arrive at your conclusion on each of them.
- [102] If you have any reasonable doubt about the prosecution case as a whole or an element of any of these offences, then you must find the accused not guilty.
- [103] Any re directions the parties may request?
- [104] Madam and Gentleman assessors, this concludes my summing up of law and evidence. Now you may retire and deliberate together and may form your individual opinions. When you have reached your separate opinions on the two charges you will come back to Court, and you will be asked to state your opinion on them.
- [105] I thank you for your patient hearing.



**ACHALA WENGAPPULI**  
**JUDGE**



**At Suva**

**This 28<sup>th</sup> Day of October 2016**

***Solicitor for the State*** : ***Office of the Director of Public Prosecution, Suva***  
***Solicitor for the Accused*** : ***Shelvin Singh Law***