

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 351 OF 2015

STATE

vs

JOSAIA DAU

Counsel : **Ms M. Chowdhury and Mr S. Shah** for the **State**
: **Ms V. Filipe and Ms. L. Manulevu** for the **Accused**

Dates of Trial : **23rd and 24th January 2017**

Summing Up : **26th January 2017**

SUMMING UP

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 judgment, 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 that 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 offences 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 afternoon, 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 by the prosecution or for the accused. 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. Whether the accused has given evidence or not is immaterial as he has no burden upon him to prove his innocence. It is not his task to prove his innocence. I shall direct you further on this at a later stage of this summing up.
- [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

JOSAIA DAU on the 31st day of October 2015 at Jittu Estate in the Central Division raped **LUSIANA ADIWAQANITOGA** by penetrating the

vagina of **LUSIANA ADIWAQANITOGA** with his fingers without her consent.

SECOND COUNT

Statement of Offence

SEXUAL ASSAULT : Contrary to Section 210 (1)(a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

JOSAIA DAU on the 31st day of October 2015 at Jittu Estate in the Central Division, unlawfully and sexually assaulted **LUSIANA ADIWAQANITOGA** by sucking her breast.

- [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 Lusiana Adiwaqanitoga or the complainant's vagina, with his fingers. 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 Sexual 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 Sexual 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 Sexual 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.
- [43] In our law, no corroboration is needed to prove an allegation of Sexual Offence. The offences of Rape and Sexual Assault are obviously considered as Sexual Offences.
- [44] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [45] The parties have agreed the following facts have already been proved beyond a reasonable doubt:

1. *It is admitted that LUSIANA ADIWAQANITOGA is JOSAI DAU's nephew's wife.*
2. *It is admitted that on the 31st Day of October 2015, JOSAI DAU sucked the breast of LUSIANA ADIWAQANITOGA.*
3. *It is admitted by both parties that the following documents are to be tendered with consent and form part of the bundle of agreed documents:*
 - (i) Caution Interview of the Accused dated 31st October 2015;
 - (ii) Medical report of LUSIANA ADIWAQANITOGA dated 31st October 2015.

Case for the Prosecution

[46] **Evidence of the complainant**

- (i) *It is her evidence that she knew the accused as one of her husband's relation. She knew his name as "Joseva Dau" and used to call him uncle.*
- (ii) *The complainant said that on the morning of 31st October 2015, which was a Saturday, she went to work. At her work place she learnt about*

cancellation of work and had thereafter decided to go home. Having boarded a bus she got off at Samabula. The house was in a “mess”. Although she has planned to clean her house and take beddings to Kalabu to launder them, she slept in it for a while.

- (iii) The accused too was there in the house. It was a one room house of 12X12 feet. She slept in one side while the accused also laid there on the other side, facing the door. There was a curtain in between them. This was in the morning of that day and there was bright light.*
- (iv) During her sleep, she felt someone touching her. At that time she was lying on her stomach and had her legs spread apart. She woke up when she felt it. It was the accused who was touching her and he touched her “front private part”. He put his fingers inside her “front private part” for about 10 minutes. She told him to stop and also swore at him. But the accused continued with his act.*
- (v) The accused had then pushed a pillow at the back of her head and, while holding her head down, he pulled out her breast and sucked it for about 10 minutes. She then pushed him out and got up. Thereafter she took her bag and had gone straight to the Police Station to report.*

[47] Evidence of Dr. Elvira

- (i) This witness, after her M.D. degree from a university in Philippines, has 31 years of experience as a medical officer. She had residential training at the Obstetrics and Gynaecology Department of that university. She was practicing medicine at Medical Services Pacific since 2012.*
- (ii) On 31st October 2015, she examined the complainant at 12.30 p.m. after her consent was obtained. She also recorded the history from the complainant and then had examined the complainant.*
- (iii) Upon her examination of the complainant’s genital area, she observed that her hymen (the tissue around the vaginal opening) was not intact. She also noted that the complainant’s labia minora of both sides had fresh superficial lacerations. She also had observed similar lacerations on the vaginal wall close to vaginal opening.*
- (iv) In relation to the question what could have cause such lacerations, she was of the opinion that it could be due to insertion of fingers, or*

similar object in to the vagina. She also said that the history given by the complainant is consistent with the injuries she observed in her vagina.

- (v) *The report prepared by the medical witness was tendered as **P.E. No. 1A.***

[48] Evidence of DC 4645 Pauliasi

- (i) *This witness is the investigation and interviewing officer in this matter.*
- (ii) *On 31st October 2015 he interviewed the accused under caution at Raiwaqa Police Station. The interview commenced at 5.35 p.m. and continued on the next day until its conclusion at 1.45 p.m.*
- (iii) *The interview was conducted in iTaukei language and a hand written record was made by him. Only the witness and the accused were there during the interview, during which the accused was taken back to the house for scene reconstruction. In recording the interview of the accused, the witness did not force, threaten, induce the accused to make admissions and did not offer any false promises. The accused also did not complain of anything before, during and after his interview. The witness and accused have placed their signatures on all pages of the record of the interview.*
- (iv) *The hand written record of the caution interview in iTaukei was tendered as **P.E. No. 2A.** Its typed version is marked as **P.E. No. 2B** while the handwritten English translation and its typed version are marked as **P.E. No. 2C** and **2D** respectively.*

- [49]** 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.

Analysis of all evidence

- [50]** The prosecution relied on the evidence of the complainant, the medical officer who examined her and the Police officer who interview the accused under caution to prove its case, while the accused, in exercising his legal right opted not to give or call evidence on his behalf.

- [51] Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events as 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 Sexual 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, Sexual Assault and also the identity of the accused beyond a reasonable doubt.
- [52] 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.
- [53] In relation to considering the consistency of the prosecution evidence, I shall first direct you with the relevant evidence. The prosecution elicited evidence that soon after the act the complainant had reported the incident to Police and later on the same day, told the examining doctor as to how the incident took place. What this consideration is whether the complainant consistently made the allegation of sexual aggression with the evidence she gave in this Court. You could also consider whether the complainant made the complaint of the alleged acts by the accused, without a reasonable delay. However, as already directed in this summing up, I must caution you that a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint.
- [54] The prosecution lead evidence from the medical witness that the complainant did describe the alleged acts of sexual aggression to her at the time of medical examination. The history given by the complainant is recorded in **D10 of P.E. No. 1** and you may peruse that.
- [55] 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.
- [56] 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.

- [57] 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.
- [58] 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. However, inconsistencies in evidence should be considered as contradictions.
- [59] 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.
- [60] The inconsistencies of the prosecution evidence as highlighted by the accused will be discussed on the following paragraphs.
- [61] You would recall that during her cross examination, the complainant said “yes” when it was suggested to her that she did not shout because the accused did not insert his fingers in to her vagina. This position is in total conflict with her claim made during her examination in chief that the accused did insert his fingers into her “*front private part*”. In re-examination, she offered no explanation for this inconsistency. In answering the next suggestion put to her that the accused sucked her breast with her consent she answered with a “No”. It is for you to decide whether she made a mistake and if not, as to the extent to which this contradiction in her evidence affects her truthfulness and reliability in relation to the element of penetration.
- [62] One of the other inconsistencies off the complainant's evidence, as highlighted by the accused, was in relation to the reason she decided to go to the house at Jittu Estate. In examination in chief, she said that her work was cancelled and then she decided to go to Jittu Estate to collect her bedding. During cross examination, it was

elicited that she told Police that she came to Suva market to buy vegetables. Then the complainant admitted that what she told the Police was the correct version.

- [63] Another inconsistency highlighted by the accused was in relation as to at what time she reached the house at Jittu Estate. Having denied when suggested that she reached there at 9.00 a.m., the complainant later admitted that it was at 9.00 a.m., she reached Jittu Estate when shown the inconsistency in her statement.
- [64] Another inconsistency in her evidence is that the complainant said during her cross examination that her hands were constrained during the act. She did not say that in her examination in chief.
- [65] 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 prosecution wants you to believe that some of these inconsistencies are on peripheral matters and were also due to lapses in memory. The accused wants you to believe that these inconsistencies made her evidence unreliable. It is for you to consider the explanation by the prosecution and decide whether it is acceptable and whether these inconsistencies make her evidence unreliable and not truthful.
- [66] I also mentioned to 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 requested to repeat certain questions and pausing before answering some others which were put to her during cross examination. You could also consider the other two witnesses' demeanour as well in deciding their truthfulness and reliability
- [67] 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.
- [68] The evidence of the prosecution is that the accused, having inserted his fingers into the "*front private part*" of the complainant, pressed her head down with a pillow, took out her breast and sucked it. He took 10 minutes on each of these two acts which are attributed to him. You would recall how the complainant, with the help of dolls, demonstrated the relative positions of them and how she laid herself on the floor at that time. She also demonstrated to you how he pulled her breast over her shoulder before sucking it.
- [69] In challenging the prosecution version of events on relative probability, the accused wants you to consider the fact that whether it is probable to suck her breast, the way she demonstrated in Court. He also wants you to consider that whether it is possible

for the accused to insert his fingers into her vagina, suck her breast and push her head down with a pillow at the same time with two hands.

- [70] In addition, the accused wants you to consider the probability of the version of the complainant that she had gone to the house in Jittu Estate by walking 3 ½ Km, just to collect some dirty bedding, where she no longer lived and paid no rent.
- [71] The accused also invited your attention to consider the probability of her version as her hands and legs were free and she had no injuries anywhere on her body. In the absence of evidence in relation to her clothing at that time, the accused also wants you to consider the probability of penetration of her vagina and sucking of her breasts without her consent.
- [72] Having considered these probabilities, if you find that the probabilities as highlighted by the accused raises a reasonable doubt in your minds, then you must find him not guilty of the charges of Rape and Sexual Assault, since the prosecution has failed to prove its case. If you reject the position of the accused that he sucked her breast with her consent and total denial of penetration by fingers; 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.
- [73] We could now turn to consider the truthfulness and reliability of the version of the accused.
- [74] You are already familiar with the prosecution's version of events presented through the complainant. The version of events, as advanced through questions put to the complainant in cross-examination by the accused, is that he sucked her breast with her consent and the penetration never happened.
- [75] The accused has chosen not to give evidence in support of his version of events. However, I need to explain how this is relevant to your consideration of the case.
- [76] You must remember that the accused has a perfect right not to give evidence and to require the prosecution to prove its case. Simply because of his decision not to offer evidence you cannot jump to the conclusion that his silence proves the case against him. It does not. The burden remains on the prosecution to prove its case beyond a reasonable doubt.
- [77] However, the accused's silence is relevant to your consideration of the case in this respect; that is, there is no evidence before you capable of contradicting, undermining or explaining the evidence for the prosecution. Although what the accused said in interview is evidence of his version of events when he was first

challenged by the police with this allegation, it is not capable of being evidence that he sucked her breast with consent and did not insert his fingers into her vagina. It is simply an assertion made by the accused on an occasion when he was not giving evidence.

[78] The prosecution tendered the caution interview statement of the accused marked as **P.E. Nos. 2A, 2B, 2C and 2D**. When you peruse his caution statement you will notice that while denying that he penetrated the complainant, he stated that he sucked her breast with her consent. You may peruse questions and answers for Q37 to Q55 and also Q68.

[79] Now I shall explain to you how to consider the contents of his statement.

[80] The whole contents of the accused's interview are admissible as evidence, both the admission and the denial. You have to consider his caution statement as a whole in deciding where the truth lies. You may consider the fact that the accused was unlikely to admit sucking breast of the complainant unless that admission was true. As to the claim of the accused of the consent of the complainant in sucking her breast and his denial of inserting his fingers into her vagina, you will appreciate that he was not giving evidence under oath, has decided not to support it in oral evidence, and has not had his account tested in cross-examination. On the other hand, the complainant has given evidence and her account has been examined in detail on behalf of the accused. The value to be placed on any part of the evidence, including the accused's interview, is a matter for you to decide.

[81] With these cautions 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 he asked the complainant whether they could have sexual relations and when she refused him, he had then sucked her breast and she consented for that act by the accused. Please consider the probability of such an event.

[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 sucked her breast with her consent and did not penetrate her vagina by insertion of his fingers. That is wrong. He is under no duty to disprove the case for the prosecution. I repeat that 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 only sucked her breast with consent and did not penetrate her vagina with fingers, 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 Sexual Assault, beyond a reasonable doubt.

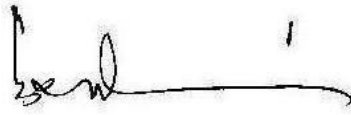
- [84] The prosecution has also relied upon the evidence of the medical witness. This kind of evidence is given to help you with scientific matters about the witness has expertise. As you have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, 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 superficial lacerations on *labia minora* on both sides and the also near the vaginal opening of the complainant. She was of the opinion that this could be due to penetration of vagina by an object like a finger or as clarified by the accused, by scratching or after having a session of “*rough sex*”. 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.
- [86] 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 inserting fingers into the complainants vagina and sucking her breasts as two separate offences. The accused also approached the issue on two fronts. He maintains when he sucked the complainant’s breast he had her consent for it. In relation to the insertion of fingers into her vagina, his position is that of a total denial.
- [87] Let us consider the charge of Rape first. As already noted the complainant had clearly stated that the accused inserted his fingers into her “*front private part*”. The prosecution claims that the medical evidence supports her claim of penetration. The prosecution wants you to believe the evidence of the complainant in which she clearly said that she did not consent to the act of the accused. She says that she told him to stop and in addition she swore at him. Then the accused pressed her head down with a pillow. However, during cross examination she admitted that he did not insert his fingers into her vagina. Consider these legal provisions in the light of the evidence presented by the prosecution whether there was penetration, in view of her admission to the contrary, and whether she consented for the digital penetration of her vagina by the accused.

- [88] 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] 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.
- [91] If you are not sure that the accused 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.
- [92] The accused is also charged with the offence of Sexual Assault as the 2nd Count on the Information. In proving an allegation of Sexual 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 sucking 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.
- [93] The accused claimed consensual sexual activity cannot form the basis for imposition of criminal liability in relation to this charge. If you do not accept the accused's claim; then, in considering whether the act attributed to the accused as indecent,

you have to consider whether they would be considered by right minded persons as an indecent act.

- [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 sucking the breast of the complainant by the accused as to be indecent, then you may find the accused guilty to this offence. The accused claims that she consented. If you are not satisfied with the prosecution evidence, then you must find the accused not guilty to this charge.
- [95] 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 sexually assault the complainant, then you must find the accused not guilty of Rape and Sexual 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 morning.
- [96] 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 Sexual Assault beyond a reasonable doubt then you may find the accused guilty of Rape and Sexual Assault. If not, then you must find the accused not guilty of Rape and Sexual Assault. If you find him guilty to one charge that 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.
- [97] 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.
- [98] Any re directions the parties may request?
- [99] Ladies 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.

[100] I thank you for your patient hearing.



ACHALA WENGAPPULI
JUDGE



At Suva

This 26th Day of January 2017

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