

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

**Crim. Case No: HAC 125 of 2017**

STATE

v.

'AA'

**Counsel:** Mr. T. Tuenuku for State  
Mr. L. Qetaki for Accused

**Hearing:** 28<sup>th</sup> June, 2017, 17<sup>th</sup>, 18<sup>th</sup> July 2017

**Summing Up:** 20<sup>th</sup> July 2017

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**SUMMING UP**

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1. The name of the victim and the accused are suppressed.
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
3. Our functions are different. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.

4. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
5. I may comment on the facts if I think it will assist you when 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 facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion. I say so because you are the judges of the facts.
6. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
7. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony and the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I form and deliver my judgment.



8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

### **Burden and Standard of Proof**

9. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
10. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
11. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

### **Information**

12. The accused is being charged with one count of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act. The particulars of the offence are before you, hence, I do not wish to reproduce them.

13. Section 207 (1) and 2 (b) of the Crimes Act states that:

*"A person rapes another person if-  
The person penetrates the vulva, vagina or anus of the other person to  
any extent with a thing or a part of the person's body that is not a penis  
without other person's consent"*

14. Section 207 (3) of the Crimes Act states that a child under the age of 13 years is incapable of giving consent.

15. Accordingly, the main elements of the offence of rape as charged are that:

- i) The Accused,
- ii) Penetrated the vulva of the victim with his finger
- iii) The victim is under the age of 13 years old.

17. You must bear in mind that offences of sexual nature do not need the evidence of collaboration. It means that if you are satisfied with the evidence given by the victim and accepts it as reliable and truthful, you are not required to look for any other evidence to support the account given by the victim. Other hand, if you are not satisfied or have any reasonable doubt with the evidence given by the victim, you are allowed to consider any other evidence that could collaborate the account given by the victim.

18. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.

19. Let me allow to explain you the element of penetration. Evidence of slightest penetration of the finger of the accused in to the vulva of the victim is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.



20. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

**Evidence of the Prosecution**

21. The first witness of the prosecution is Dr. Elvira Ongbit. She is a medical doctor. You heard that she explained about her professional qualifications and experiences. She is presently working as a Medical Doctor at the Medical Services Pacific. Doctor Elvira has conducted a medical examination of the victim on the 3rd of April 2017. She has conducted it in two ways. Firstly she had video recorded the victim and her responses to the queries made by the Staff Nurse during the examination. She then prepared a Medical Examination Form for the victim. Dr Elvira was supported by the Staff Nurse and the mother of the patient during the examination.
22. Dr. Elvira has found abrasions on the inner part of the *labia minora* of the vaginal area of the victim. She explained that the abrasion means a scraped area on the superficial layer of the skin. In order to access the inner part of the *labia minora*, you have to first open the *labia majora*. According to the professional opinion of Dr. Elvira, such abrasions could be caused by rubbing a finger. It should be a hard rub by a finger in order to cause such abrasion on the *labia minora*.
23. You have seen the video that was recorded by Dr. Elvira during the medical examination. She said that the victim kept on answering "Tai" when she was asked who hurt her.
24. During the cross examination Dr. Elvira said there may be number of causes that might have caused the abrasion on the *labia minora* of the vagina of the victim. Rubbing by finger is one of the possible causes. Dr. Elvira said that the victim herself might have caused it. But such a possibility depends on the age of the victim. She further said that the video was recorded before the matter was reported to the Police.

25. Dr. Elvira said that the abrasion was fresh and recent. The nurse asked the victim who did it again and again. The victim kept on answering "Tai". The nurse did not ask the victim to look at her mother.
26. In the re-examination, Dr. Elvira said that the abrasion was a mild abrasion.
27. The second witness of the prosecution is the victim. She gave evidence from a special room via skype. You have seen the way and the manner she answered to the questions posed to her by the counsel for the prosecution and the defence. She kept on answering "Tai" when she was asked where is the injury. The victim used a picture of a scarecrow to point out the place where she felt hurt in her body. She then said "yes" when she was asked "did Tai does the kaka?".
28. In the cross examination she said "yes" when she was asked whether she knows Tukai. She further said "yes" when she was questioned whether she calls Tukai as Tai. The victim then said yes when she was asked whether she has two grandfathers.
29. The third prosecution witness is the mother of the victim. The victim is the second child of her three children. They live at Vatudavila, Sawani. The accused is her uncle and also her father-in-law. The accused has six children including her husband. Two of them are living in Vatudavila. They are Nimati Qionimua (Junior) and Laitia Cama. Namati is married and has a baby girl who has not turned one year yet. They live with the accused at his house. The victim and her family live in another house in the same settlement. She said that they can see the house of the accused from their house.
30. The mother of the victim in her evidence said that she took her children including the victim to the nearby stream to do their washing on the 28th of March 2017. The victim was bathing with her elder sister. In a while she came crying and complain that her private part is painning .She pointed out inside of her private part and said pain. The victim told her mother that "Tai Kaka ike". The mother said that the victim calls her father-in-law as Tai



and no one else. The victim does not call any other child living in her house or the house of the accused as "Tai".

31. The mother then took the victim to Samabula Medical Center. The Doctor together with the nurse attended to her. They video recorded the conversation they had with the child.
32. In the cross examination, the mother said that the victim was one year old when this incident took place. The victim knows limited words. The daughter of the accused, Pasepa also lives in the same settlement. Her house is close to their house. There is a farm between the house of the accused and victim's, separating the two houses by around 200 to 300 meters. However, they can still see the house of the accused from there's.
33. The mother further said in cross examination that the accused always supported them financially whenever they needed. He always supported her children as well. He looks after her uncle, Takayawa Vuli who is sick and bedridden in his house. The victim knows only few words; however, she knows the name of all who are staying there including her mother and father. She does not refer Takayawa Vuli as Tai. Takayawa Vuli is also one of the grandfathers of the victim.
34. In the cross examination, the mother further said that the name of the accused came from the victim. Before this incident took place, the mother was in Suva for a week. During that time the victim was looked after by the grandmother and the grandfather.
35. The fourth witness of the prosecution is Jiokapeci Baledrokadroka. She is a Senior Counselor and Project Manager at the Empower Pacific. Ms. Jiokapeci in her evidence explained about her professional qualifications and experiences in detail. The victim was referred to her institution by the Fiji Police Force to conduct a medical examination, forensic testing and counseling. She did not able to get any information from the child during the first day of the counseling. The child had less concentration, therefore, she could not conduct any play or art therapy on the first day of her counseling.

36. According to the evidence given by Ms. Jiokapeci, she was able to conduct a play therapy with the victim for about sixty minutes on the 7th of June 2017. She then explained the procedure and the manner that she conducted this play therapy with the victim using dolls. The victim picked one black hair doll and pink hair doll from the seven dolls that were placed on the bed in front of her. She clutched the black hair one and kept the pink one close to her chest. When she was asked who is the black hair doll, she threw it away. When the counselor asked the victim what hurts her, she had pushed her finger in between the legs of the doll. She did it hard and her facial expression changed. Having done this play therapy using dolls, Ms. Jiokapeci concluded that "Tai" had done something bad to her as she pointed out. Accordingly she made a report, which was tendered as one of the prosecution exhibits.
37. Ms. Jiokapeci then explained about the cognitive abilities of the victim. At the age of two, a child starts to develop trust with the caregivers, parents and whoever is around them. The child uses language that allows the child to communicate with caregivers. They can put words together and form a sentence. However, the victim's development was quite slow as she gave answers word by word. During the therapy the parents neither involved nor interfered.
38. Once the play therapy was concluded, she played with the victim using leggo pieces. However, the child was not able to play with them and went and picked the dolls again. She wanted to breastfeed the dolls like a mother. She then lay her back and started to put her hand into her pants. Ms. Jiokapeci then took the child and carried her to the doctor. The child displayed her psychological, emotional, physical and sexual experiences during the therapy.
39. During the cross examination, Ms. Jiokapeci said that the report consists only the brief summary of what transpired during the therapy sessions. After the first sessions, there were few default sessions, where the parents were not able to attend the counseling sessions due to their financial difficulties.



40. Ms. Jiokapeci said that all two years old children are able to put words together or answer questions by one word. The victim communicated with her well enough for her to conclude her report. The victim illustrated and displayed something that she had felt and experienced. The victim did not repeat the same answer for all questions as she answered in different ways when she was asked different questions. If the child as of the age of the victim was always asked the same questions, she would give the same answer. The children at this age get their knowledge from the people who are surrounded them. Accordingly, if people who are surrounded a child refers to one person by a certain name, the child would also refer that person by the same name.

#### Evidence of the Defence

41. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted to give evidence on oaths. However, he advised the court that he does not wish to call any other witnesses for his defence.
42. The accused is 60 years old and a farmer. The victim is his namesake. From his house, he can see the house of the victim. His house is situated on the top. Hence, he usually goes out and calls the victim by "Yaca" (namesake). He said he loves his grandchildren. He brings them sweets and juices whenever he returns from Suva. They would come to his house to get them. The accused further said that he is busy and involves with community responsibilities in the settlement. His wife, two of his children, and an uncle of the mother of the victim live at his house. His daughter lives in another house that is closer to the house of the victim. His daughter got seven children. The youngest child is Tukai. He is named after the father of the accused, Alipate Sukuru. Tukai is in year one in the school. He is referred to as "Tai". The uncle of the victim's mother is also referred to as "Tai". His name is Takayawa Vuli. The accused explained that the victim cannot communicate well and she called Tukai and Takayawa as "Tai". She calls the accused as Tai or Yaca.
43. When the mother of the victim was in Suva for a week, the victim was with her father and uncle. The accused said that he has a good relationship with the mother of the victim. He denied this allegation.

44. During the cross examination, the accused said that the victim spend and grown up mostly with her mother. He said that he only called her by Yaca from his house, but never asked her to come up to his house. When he brought things from Suva, not only the victim, her siblings also come to his house to get them. They then spent sometimes at his house and go back. The victim comes to his house, but most of the time the accused was busy and away from house.
45. In respect of the video recording done at the Medical Center, the accused said that they were bothering the child with questions in the video. He further said that they kept on harming the child with questions. The child was only answering "ha ha ha". They then told her to look at the mother. The child then looked at the mother. Mother's face cannot be seen on the video. Hence, he did not know whether mother just told the child "Tai, Tai". Moreover, the accused said that it was not clear whether the child said "Tai" or "ha ha". The Doctor is a European and the child was one year old. The Doctor will say "Tai" only if someone told her.
46. I have summarized the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

### **Analysis**

47. The prosecution and the defence adduced evidence in the forms of direct, circumstantial, documentary and expert evidence.

### **Direct and Circumstantial Evidence**

48. Ladies and gentleman assessors, let me now explain you the direct and circumstantial evidence.



49. In some instances, you may find that some facts can be proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw or felt the accused was committing the offence; if there is a video recording of such an incident that plainly demonstrates his guilt; or if there is reliable evidence of the accused himself having admitted it, these would all be good examples of direct evidence against the accused.
50. On the other hand, it is often the case that direct evidence of all the elements of a crime are not available, and the prosecution relies upon circumstantial evidence to prove certain elements. In this case, the victim only said that she was hurt by 'Tai'. She then pointed out her private part as the place where she was hurt. There is no direct evidence that the accused penetrated the vulva of the victim with his finger. The prosecution relies upon the evidence of Doctor Elvira and Counselor Ms. Jiokapeci in order to establish the element of penetration. That simply means that the prosecution is relying upon evidence of various circumstances related to the crime and the accused, which the prosecution says, when taken together will lead to the sure conclusion that it was the accused who committed this crime.
51. Circumstantial evidence can be powerful evidence, indeed, it can be as powerful as, or even more powerful than, direct evidence, but it is important that you examine it with care, as with all evidence, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt, or whether on the other hand it reveals any other circumstances which are or may be of sufficient to cast doubt upon or destroy the prosecution case.
52. Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them.

### Documentary Evidence

53. The evidence presented in the form of documents is considered as documentary evidence. In this case, the prosecution tendered number of documents in the form of documentary

evidence such as the medical report of the victim, the report made by the Counselor in respect of the therapy sessions.

### Expert Evidence

54. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.
55. In this case you have heard the evidence of Dr. Elvira Ongbit. She is a medical doctor and gave her professional opinion about the injuries sustained by the victim.
56. Expert evidence is permitted in a criminal trial to provide you with scientific and professional information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to the injuries, the physical and medical condition of the victim subsequent to this alleged offence.
57. With regards to these particular aspects of the evidence you are not experts; and it would be quite wrong for you as assessors to attempt to and/or to come to any conclusions on those issues on the basis of your own observations or experiences. However, you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence. You should bear in mind that, having carefully considered, if you do not accept the evidence of the expert, you do not have to act upon it.



**Presentation of the Evidence of the Child Victim**

58. You have seen that the victim gave evidence from a special room via Skype. She was accompanied by her elder sister and the father. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness gives. The fact that the evidence has been so given must not in any way be considered by you as prejudicial to the accused.

**Evaluation of Evidence**

59. Ladies and Gentleman assessors, I now kindly request you to draw your attention to the directions on evaluation of evidence. It is your duty to determine this case based on the evidence. In doing that, you are required to evaluate the evidence in order to determine the credibility, reliability and truthfulness of them. That will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
60. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
61. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he or she was testifying, his disinterestedness, his integrity, and his veracity in order to determine the credibility of the witness and his evidence.

62. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.

### **Evidence of the Child Victim**

63. The most important part of your task is to judge whether the child witness has told the truth, and has given a reliable account of the events that she was describing. Some of you will have children and grandchildren who are of a similar age to the victim. If so, I think you will recognize the sense of the advice I am going to offer you about your judgment of the evidence of the child victim, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice and if you do not agree with it you should reject it.
64. Children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it, and about using words they think are naughty, and therefore find it difficult to speak.
65. Experience has shown a number of things. A child may not fully understand the significance of activity which is sexual and that may be reflected in the way they remember it or describe it. A child's perception of the passage of time is very likely to be different from that of an adult. A child's memory can fade even in the short term. When recounting events later, even a fairly short time later, a child's recall of when and in what order events occurred may not be accurate. She may well not be able to speak of the context in which those events occurred. A child may have particular difficulty dealing with conceptual questions such as how she felt some time ago, or why she did or did not take a particular course of action.



66. Remember how you normally talk to children of this age. You should bear those difficulties in mind when you consider the answers given by the child victim. All decisions about the evidence are for you to make.
67. The prosecution alleges that the accused penetrated the vulva of the victim with his finger. The prosecution presented evidence of the victim stating that Tai hurt her. Doctor Elvira explained the findings of her medical examination conducted on the victim. The mother of the victim in her evidence said that the child came to her and complained about the pain in her private part when the victim was bathing with her elder sister in the stream. Ms. Jiokapeci explained about the findings and conclusion which she has reached after conducting the play therapy using dolls. She further gave evidence regarding the cognitive ability of the victim.
68. The defence denies the allegation. The defence did not dispute or challenge the evidence given by the Doctor Elvira and Ms. Jiokapeci in respect of their respective findings. The defence claims that the victim usually referred to two other persons apart from the accused as Tai. One of them is one of her cousins whose name is Tukai and lives close to the house of the accused. The second person is the uncle of her mother, whose name is Takayawa Vuli. Takayawa is also one of the grandfathers of the victim and lives with the accused in his house.

### **Evidence of the Defence**

69. I now kindly draw your attention to the evidence adduced by the defence. The accused elected to give evidence on oath. The accused is not obliged to give evidence. He is not obliged to call any other witnesses. He does not have to prove his innocence.
70. However, the accused decided to give evidence. Therefore, you have to take into consideration the evidence adduced by him when determining the issues of fact of this case.

71. Accordingly, it is for you to decide whether you believe the evidence given by the accused. If you consider that the account given by the accused is or may be true, then the accused must be acquitted.
72. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.
73. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.

**Final Directions**

74. If you accept the evidence given by the victim, Doctor Elvira, mother and Ms. Jiokapeci, as truthful and reliable, then you can consider following factors as proven factors, that:
  - i) “Tai” had hurt the private part of the victim,
  - ii) The inner side of *labia minora* of the vagina of the victim was injured with abrasions.
75. You can then proceed to consider whether above proven facts allow you to form an inference that “Tai” has penetrated his finger into the vagina of the victim.
76. If you form such an inference, then you can consider from these proven facts, whether you can form further inference that this “Tai” is the accused.
77. What conclusion or inference you reach from the evidence which you considered as proven is entirely for you to decide. However, in considering what inference you should draw or what conclusion you should reach, it is important to be mindful that speculation has no part in this process. The inference must be the only and certain rational conclusion or inference



of the guilt of the accused. If the evidence that you accepted or considered as reliable suggests you some other probable inferences or conclusions, which show the innocence of the accused or create a doubt as to the guilt of the accused, you are then not entitled to draw any inference or form any conclusion of guilt of the accused.

78. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of rape as charged, you can find the accused is guilty for the said offence of Rape.


79. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused is not guilty for the said count of Rape and acquit him accordingly.

**Conclusion**

80. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.

81. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



  
R.D.R.T. Rajasinghe  
Judge

**At Suva**  
20<sup>th</sup> July 2017

**Solicitors**  
Office of the Director of Public Prosecutions for the State  
Office of the Legal Aid Commission for the Accused