

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 225 of 2016

[CRIMINAL JURISDICTION]

STATE

V

KALISITO BOLATOLU

Counsel : Ms. K. Semisi for State  
Mr. L. Qetaki and Ms. L. Manulevu for Accused

Hearing on : 16<sup>th</sup> - 18<sup>th</sup> October 2017

Summing up on : 20<sup>th</sup> October 2017

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

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room the admitted facts and the exhibit tendered. As I have told you in

my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of his/her the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and

decide how much of it you believe. You may believe all, part or none of any witness' evidence.

7. When the complainant gave evidence she said she is 13 years old. She gave evidence of events that had taken place last year. You may have come across children of this age. You will have an idea of the way a child of a particular age behave, think, talk and the way they describe things.
8. Children can be confused about what has happened to them; sometimes children blame themselves for what had happened. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time that what they were doing was wrong. They may be embarrassed because they found that some aspects of the attention they were getting from the individual concerned were enjoyable.
9. I mention these possibilities because experience shows that victims of sexual offences may react in different ways to what they went through and children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.
10. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering

facts. Sometimes we honestly forget things or make mistakes regarding what we remember.

11. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
12. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by him/her is for you to decide.
13. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his/her evidence is inaccurate; or you may accept the reason he/she provided for the inconsistency and consider him/her to be reliable as a witness.
14. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what he/she said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

15. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
16. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
17. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
18. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of an offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.
19. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not those charges have been proved.

20. I must explain to you as to the reason for the use of the screen when the complainant gave evidence. It was a normal procedure adopted in courts on the request of the prosecution to make a particular witness relatively more comfortable when giving his/her evidence. You must not infer that such a protection to the witness was warranted due to the accused's behaviour and should not draw any adverse inference against him on that account.
21. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
22. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

**FIRST COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**KALISITO BOLATOLU** on the 18<sup>th</sup> day of April 2016 at Mead Road, Nabua in the Central Division penetrated the vagina of RK, a child under the age of 13 years, with his fingers.

**SECOND COUNT**

*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**KALISITO BOLATOLU** on the 18<sup>th</sup> day of April 2016 at Mead Road, Nabua in the Central Division unlawfully and indecently assaulted RK, a child under the age of 13 years by touching her thigh.

23. Though the accused is charged with two counts you should remember to consider each count separately. You must not assume that the accused is guilty of the other count just because you find him guilty of one count.

24. To prove the first count, the prosecution must prove the following elements beyond reasonable doubt;
  - a) the accused;
  - b) penetrated the vagina of the complainant with his fingers;
  - c) without the consent of the complainant; orthat the complainant was below the age of 13 years at the material time.
25. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence.
26. The second element involves the penetration of the complainant's vagina with the fingers. The law states that this element is complete on penetration to any extent. Therefore, it is not necessary to have evidence of full penetration. A slightest penetration is sufficient to satisfy this element.
27. To prove the third element, the prosecution should prove beyond reasonable doubt that the complainant was below the age of 13 years at the time the alleged offence was committed. At law, a person under the age of 13 years incapable of giving consent when it comes to the offence of rape.
28. To prove the offence of sexual assault, the prosecution should prove the following elements beyond reasonable doubt;
  - a) the accused;
  - b) unlawfully assaulted the complainant; and
  - c) the said assault is indecent and sexual.
29. The first element again involves the identity of the offender who committed the offence.
30. Assault is the use of unlawful force. A touch constitutes an assault if it is done without a lawful excuse.
31. The word "unlawfully" simply means without lawful excuse.

32. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. You should also ask yourself, firstly, whether you consider that indecent assault could also have been sexual because of its nature; and if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.
33. In the event you find that a right-minded person would not consider the force used to be sexual given the nature and the circumstances or the purpose of the force being used, but only to be indecent, you should find the accused not guilty of sexual assault but find him guilty of the lesser offence of indecent assault.

*Prosecution case*

34. The complainant said in her evidence that;
- a) *She is 13 years old and her date of birth is 06/04/04. On 17/04/16 when she was feeding the dog outside the house around 2.00pm, she saw the accused waving to her for her to come to him. She ignored and went back inside the house. She said she felt scared when the accused waved because he may do something bad to her. She thought this way because of how the accused looked at her and waved to her.*
  - b) *On 18/04/16 around 8pm while she was studying, her mother called her and told her to put on the kettle. While she was in the kitchen putting on the kettle the accused was standing near aunty Losena's door and was calling her. She felt scared and went back to the sitting room. She said she felt scared because the accused was in the dark. Thereafter she wanted to use the toilet. When she went inside the kitchen in order to go to the toilet, she noted that Patrick was inside the toilet. So she sat down on the chair beside the doorway to the sitting room. Then she saw the accused walking towards her. She stood up and the accused pushed her down by touching her chest and then touched her thigh. She wanted to scream but the accused told her to keep quiet.*
  - c) *When Patrick came out she went inside the toilet. Then the accused signaled to her that he wants to come inside. She ignored him and closed the door. When she came out, the light in the kitchen was off. On her way to the door of the sitting room and when she was about to go inside the sitting room, the accused grabbed her hand. The accused touched her stomach and moved his hand towards her vagina. Then the accused touched the top of her vagina, opened it with his two fingers and played with it. She said she was scared and it was painful. She said the accused put his two fingers inside her vagina. She tapped his hand away. When she wanted to walk away, the accused grabbed her hand and then he put his penis out and wanted her to touch it. She said when she looked at him he wanted to put his penis out*



- from his trousers. This happened inside the kitchen around 8.00pm. Though the kitchen light was off she saw him from the light that came from the TV in the house which was still on. The touching of the vagina took about 10 seconds. She said when this happened everyone else in the house was sleeping. Then she pulled her hand out of his hand and went inside the sitting room and sat next to her cousin sister.
- d) In a minute her sister came from Bayview. She said she told her sister how the accused touched her and that it started on Sunday. Her sister asked her mother the next day when they came back from school to ask the complainant about what happened. When the mother asked her, she told her everything. She said she told the mother that the accused touched her private part the previous night. Thereafter she went with her father to the police station and reported the matter. She said she was medically examined by a doctor. She said the accused had lived with them for about one year and she had known the accused for couple of years. She recognized the accused in court.
- e) During cross examination she agreed that a partition separates the kitchen from the sitting room. She denied that her parents can see the kitchen from their bedroom when the bedroom door is open. When the same was suggested to her again she said 'yes'. She denied the suggestion that on that night her parents were filling grog into small packets inside their bedroom. She agreed that the chair she was sitting on while she was waiting for Patrick to come out of the toilet was beside the door way to the sitting room and it was leaning against the partition that separated the living room.
- f) She denied the suggestion that if the accused pushed her down onto the chair it would have made a loud sound against the partition. She admitted that in her statement to the police she did not mention that the accused grabbed her hand. She said that she would share most of the things in life only with her sister and not with her parents. When she was asked what exactly did she tell her sister, she said that she told her that the accused touched her. Then she agreed that she told her sister what she told in court. She agreed that the doctor told her after the medical examination that there are no signs of injury on her vagina. She denied the suggestion that when she was on her way to enter the bathroom she tripped and fell towards the accused who was coming out. She also denied that when she fell towards the accused her hands touched the accused's penis. She also denied that when the accused tried to help her to get up, one of his hands touched her chest and the other hand touched her skirt over her vagina. She denied that the accused was sleeping next to Litia when her sister came back from Bayview Heights.
- g) She denied the suggestion that she told her sister that the accused raped her because she was scared that the accused will tell her parents and her family about how she touched his penis and because she was scared that the parents would get angry with her.
- h) During re-examination she said when her sister came back from Bayview Heights the accused was massaging Litia.

35. The 2<sup>nd</sup> witness for the prosecution was the complainant's sister. She said that;
- a) *When she returned home around 11.00pm on 18/04/16 from Bayview Heights the complainant was sitting on the settee in the kitchen and she looked upset. She said the complainant told her that the accused was in the other room where there was no light and he asked her to get matches to light the mosquito coil. When the complainant had gone in, the accused had pulled her hand, grabbed her waist and slid his finger down her skirt and had touched her vagina and the breast. When the sister wanted to shout the accused had blocked her mouth with his hand. She said when she reached home that night the accused was in the bathroom bathing and all others apart from the complainant were sleeping.*
  - b) *During cross examination she agreed that the partition which separates the kitchen from the sitting room is very thin and if someone is to be suddenly pushed to the settee it would create a noise because the settee is next to it. She also agreed that such noise would be heard by everyone in the sitting room. She said that when the door is open her parents can see the sink inside the kitchen from their room. She agreed that the room with no light she was referring to was Aunty Losena's room. She said when she arrived home that night the TV was switched off.*
36. The 3<sup>rd</sup> prosecution witness was the complainant's mother. She said that;
- a) *On 19/04/16 the complainant told her that the accused harassed her and touched her private part. She said, the complainant told her this when she asked the complainant after the second prosecution witness told her to ask the complainant. When the complainant started telling her she was scared and spoke in a low voice. She got angry and told the complainant to speak loud. Thereafter upon the advice of her elder brother she told her husband to take the complainant to the police station.*
  - b) *After two days the accused and his wife moved out of their house and went to her elder sister. She does not know why they moved. The accused is her sister's husband and he was living in her house for about one year. She said the relationship between the accused and her family was good. She said on 18/04/16 she went to sleep around 8pm and that night she was filling grog inside her room.*
  - c) *She said the accused came back to seek forgiveness for what he had done to the complainant after he moved out of their house. She said the accused presented grog to seek for forgiveness.*
  - d) *During cross examination she agreed that she was still awake after 8pm on 18/04/16. She said by the time she went to her room that night Litia was lying down with the accused and the complainant was writing in the living room. When it was suggested to her that the complainant's cousin Patrick was in the living room watching TV she said that time the TV was turned off. She said the complainant is closer to the father and her sister than to her. She denied that the accused and the wife left the house because accused's wife was not properly taken care of. She denied the suggestion that the accused came to seek forgiveness because he left the house suddenly. She admitted that she signed on the medical report prepared after examining the complainant and the said report was tendered as DE*

1. *She agreed that it is noted in the DE 1 that the hymen is intact and also that there are no signs of injuries.*

37. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give sworn evidence.

#### *Defence case*

38. The accused said in his evidence that;

- a) *He did not wave and call the complainant on 17/04/16. On that day he tapped the complainant when she was feeding the dog outside the house and told her to move aside so that he can urinate because someone was inside the toilet at that time. He said if he wanted to call her he will call out her name.*
- b) *He denied the allegations made against him with regard to the alleged incidents on 18/04/16. He said on that day after dinner he was massaging his wife. He saw the complainant writing in the sitting room. Then the complainant went to boil the kettle because her mother requested her to do so. Around 8pm he finished massaging his wife and went towards the bathroom. On his way the complainant asked him where the matches are. He showed her where the matches are and went inside the bathroom.*
- c) *After he finished bathing and was drying himself someone tried to open the bathroom door. So he tied the towel around his waist and opened the door for him to go outside. The complainant was leaning beside the door in front. He said the kitchen floor and the bathroom floor are not on the same level and because of that the complainant tripped and then he caught her so that she won't get hurt. When he caught her one of his hands landed on her chest and the other hand went down her stomach. He held her up and put her aside. He then went inside the house to change and lay down beside his wife. He said all this time Patrick was lying down in the sitting room beside the TV. The complainant's mother was sitting beside the door of her room and filling grog. He said when he came out of the kitchen area the complainant's mother was awake and saw Patrick moving around maybe because he was still watching TV. His wife was also awake.*
- d) *He left that house a few days after because his wife cried and told him that she was not being given the meals on time. He said the wife had to be given meals on time because she was a stroke patient. He said his wife begged him to move away from that family and to live with her eldest sister. He said he came back to present yaqona because they left the house without informing and that it is the iTaukei culture to seek forgiveness in such a situation.*
- e) *He said he came to know that the complainant had made an allegation against him after one month and two weeks when the police came looking for him. He said he*

*had an argument with the complainant's mother because of the food given to his wife. The complainant's mother got angry and told him that she will inform his workplace to stop his employment. He said on 18/04/16 he did not go inside Losena's room in the night because Losena was not there and the door was locked. He said the allegations the complainant had made against him are all a lie. He said when his wife is lying down she used to urinate and pass stools as she was sick and maybe those allegations were made because they wanted him and his wife to move out from the house.*

39. That is a summary of the evidence adduced by the prosecution and the defence. Please note that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I have not referred to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

#### *Recent Complaint Evidence*

40. You heard in this case that the complainant had made a complaint to the 2<sup>nd</sup> prosecution witness soon after the incident. The prosecution is relying on this evidence as recent complaint evidence. You should consider whether the complainant made that complaint without delay and whether she sufficiently complained of the offences the accused is charged with.
41. Such complaint need not specifically disclose all the ingredients of the offences and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. If you are satisfied that the complainant had made a prompt and a proper complaint, then and then only you may consider that her credibility is strengthened in view of that recent complaint. Please remember that this evidence of recent complaint is not evidence as to what actually happened between the complainant and the accused. It may only assist you to decide whether the complainant is consistent and whether or not the complainant has told you the truth. In the end you are deciding whether the complainant has given a truthful account of her encounter with the accused.

## *Analysis*

42. You heard that the defence totally denies the allegations and says that the complainant is lying. According to the accused on 18/04/16, he had accidentally touched the complainant where one of his hands landed on the complainant's chest and the other hand down her stomach when he caught her as the complainant tripped near the bathroom.
43. In order to prove the first count the prosecution should prove beyond reasonable doubt that the accused penetrated the complainant's vagina with his finger and the complainant was below the age of 13 years at the material time. When you consider whether the accused penetrated the complainant's vagina you should remember that a slightest penetration is sufficient to establish this element. However, you have to also remember to consider whether the accused had the intention to penetrate the complainant's vagina. A person has intention when he means to engage in the conduct in question. Intention is something which can only be inferred. You have to therefore be satisfied beyond reasonable doubt that the accused penetrated the complainant's vagina and he meant to penetrate the complainant's vagina, in relation to the first count.
44. The defence tendered the report prepared after the medical examination conducted on the complainant as DE 1 and highlighted that the complainant's hymen was intact and there were no injuries noted during the vaginal examination. DE 1 contains an opinion of a doctor based on what he/she observed when the complainant was medically examined. You are not bound to accept that evidence. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the doctor.
45. Further, when you assess DE 1 you may take into account that according to DE 1 the examination was conducted on 23/04/16 and the date of the alleged incident is 18/04/16 according to the complainant. When you consider DE 1, you should also remember that what is written in A(4) and D(10) are not admissible in considering whether the facts stated therein are true because those

parts are filled based on the information received. The individuals who filled those parts in the form did not give evidence and they did not actually see what is written there. For this reason, the contents of D(10) are blotted out.

46. In order to prove the second count the prosecution should prove beyond reasonable doubt that the accused committed the offence of sexual assault by touching her thigh.
47. The accused totally denies this allegation. It is pointed out by the defence that if someone is pushed onto the chair that was next to the partition that separates the kitchen and the sitting room it would create a sound and the people in the sitting room would hear it. The complainant denied this suggestion but the 2<sup>nd</sup> prosecution witness agreed.
48. Further, if you are satisfied beyond reasonable doubt that the accused touched the complainant's thigh as testified by the complainant, but however if you do not find that the act of the accused is sexual but only indecent, you should find the accused not guilty of the offence of sexual assault as charged and find him guilty of the lesser offence of indecent assault.
49. The defence pointed out that there are inconsistencies in the evidence presented by the prosecution. Inconsistencies may be found in the evidence given by a particular witness and also between the evidence given by different witnesses. It was pointed out that the version of events the complainant had told the 2<sup>nd</sup> prosecution witness is different from the evidence given by the complainant. The complainant clearly said in her evidence that she told her sister the 2<sup>nd</sup> prosecution witness the same thing she said in her evidence. However, according to the 2<sup>nd</sup> prosecution witness the complainant had told her about something that had taken place inside a room and not in the kitchen. You may consider this as a significant inconsistency. The complainant also did not agree that her mother was filling grog into packets that night however, the mother who was the 3<sup>rd</sup> prosecution witness said that she was filling grog that night. The complainant did not agree that it would create a sound if someone was

pushed onto the chair she mentioned but the evidence of the 2<sup>nd</sup> prosecution witness was otherwise. I have already explained to you how you should deal with inconsistencies when you assess the testimony of a witness.

50. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
51. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
52. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each offence;
  - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
  - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.
53. Any re-directions?

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

55. Your possible opinion should be as follows;

1<sup>st</sup> count (rape) – guilty or not guilty

2<sup>nd</sup> count (sexual assault) – guilty or not guilty

If not guilty

Indecent assault – guilty or not guilty



Vinsent S. Perera

JUDGE

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