

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

**Criminal Case No.: HAC 41 of 2015**

**STATE**

**V**

**PETERO MASALA**

**Counsel** : Ms. S. Kiran for the State.  
: Ms. K. Vulimainadave [LAC] for the Accused.

**Date of Hearing** : 11 October, 2018  
**Closing Speeches** : 15 October, 2018  
**Date of Summing Up** : 16 October, 2018

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**SUMMING UP**

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*(The name of the complainant is suppressed she will be referred to as (“EB”).*

Ladies and Gentleman Assessors

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

**ROLE OF JUDGE AND ASSESSORS**

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

of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. During the closing speeches the defence counsel had put forward a number of propositions which were not part of the evidence and also required you to speculate by asking questions such as *“what is the first thing children do when someone does a bad thing to them they will yell out and scream won’t they? Why didn’t she tell her mother? Why didn’t she tell her cousin who was in the house that morning? Why didn’t she tell Faustina’s uncle who was in the house and lastly why didn’t she tell her good friend Faustina that day?”*
8. It is unfortunate that the counsel by posing the above questions was asking you to speculate or assume the answers. I direct you to disregard all the questions that invite you to speculate or assume the answers or were not

adduced in evidence during the trial. Your duty is to decide on evidence adduced in this courtroom and not to speculate on anything.

9. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

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

10. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
11. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
12. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
13. You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.
14. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

## **INFORMATION**

15. The accused is charged with one count of sexual assault and one count of rape. (A copy of the information is with you).

### **COUNT ONE**

#### ***Statement of Offence***

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

#### ***Particulars of Offence***

**PETERO MASALA** aka **PETE MASALA** sometimes between the 16<sup>th</sup> day of May, 2012 and 19<sup>th</sup> day of August, 2012 at Yalalevu, Ba in the Western Division, unlawfully and indecently touched the vagina of “**EB**” with his finger, without the said “**EB’s**” consent.

### **COUNT TWO**

#### ***Statement of Offence***

**RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.

#### ***Particulars of Offence***

**PETERO MASALA** aka **PETE MASALA** sometimes between the 16<sup>th</sup> day of May, 2012 and 19<sup>th</sup> day of August, 2012 at Yalalevu, Ba in the Western Division, had carnal knowledge (penile sex) of “**EB**” without the said “**EB’s**” consent.

16. To prove count one the prosecution must prove the following elements of the offence of sexual offence beyond reasonable doubt:
- (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant “**EB**” by touching her vagina.

17. The first element of the offence of rape is concerned with the identity of the person who allegedly committed the offence. There is no dispute that it was not the accused as alleged. You are to consider this element of the offence as proven beyond reasonable doubt.
18. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
19. The final element of assault is the unlawful use of force on the complainant by the act of touching her vagina.  
You should ask yourself:
  - a).whether you consider the force which was used could have been sexual because of its nature; and
  - b).if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that use of force is in fact sexual in nature.
20. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual offence as explained above, then you must find the accused guilty of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused not guilty.
21. In this trial the accused has denied committing the offence of sexual assault he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently touched the vagina of the complainant with his finger between the 16<sup>th</sup> day of May, 2012 and 19<sup>th</sup> day of August, 2012.
22. To prove count two, the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:

- (a) The accused;
  - (b) Penetrated the vagina of the complainant “**EB**” with his penis;
  - (c) Without her consent;
  - (d) The accused knew or believed the complainant “**EB**” was not consenting or didn’t care if she was not consenting at the time.
23. The first element of the offence of rape is concerned with the identity of the person who allegedly committed the offence. There is no dispute that it was not the accused as alleged. You are to consider this element of the offence as proven beyond reasonable doubt.
24. The second element is the act of penetration of the complainant’s vagina by the accused with his penis.
25. In respect of the third element that is of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
26. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
27. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
28. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of rape as explained above, then you must find the accused guilty of rape. If on the other hand, you have a reasonable doubt

with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty.

29. In this trial the accused has denied the offence of rape he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time that is between the 16<sup>th</sup> day of May, 2012 and 19<sup>th</sup> day of August, 2012.
30. It is not necessary for the prosecution to prove that there was ejaculation or full penetration of the vagina by the penis. The slightest of penetration of the complainant's vagina by the accused's penis is sufficient to satisfy the act of penetration.
31. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
32. In this case, the accused is charged with two offences, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.
33. You must be satisfied that the prosecution has proved all the elements of both the offences beyond reasonable doubt in order for you to find the accused guilty of either or both the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or both the offences, then you must find the accused not guilty.

### **FINAL ADMITTED FACTS**

34. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as Amended Admitted Facts.
35. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
36. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your mind. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your opinion in this case.

### **PROSECUTION CASE**

37. The prosecution called three (3) witnesses to prove its case against the accused.
38. The first prosecution witness was the complainant "EB" in 2012 she was a Form 3 student. On one of the days during the second term school she was at the house of her uncle the accused, her aunty had gone to work.
39. The complainant did not go to school because she was having stomach ache. During breakfast the complainant was alone with the accused, he offered to massage the complainant's stomach. The complainant and the accused after breakfast went into the sitting room. At this time the complainant's cousin had gone somewhere, the complainant was alone with the accused.
40. The complainant was wearing a shorts and a top. The accused started to massage the stomach of the complainant which gave a different feeling to



her. The accused started massaging up to her breast then he started fondling the complainant's breast for a while. After that the accused started to massage the complainant's vagina and was "playing around" by touching it. The accused then removed the complainant's shorts and underwear. At this time the complainant started to cry, she went blank, her hands were sweating, she was scared, felt helpless and she did not know what to do.

41. The accused then came on top of her and penetrated her vagina twice with his penis. While the accused was doing this, the complainant felt weak. When the accused penetrated her for the second time the complainant pushed the accused away. The complainant said that it was painful, her legs were shaking and she felt weak, emotionally she felt she was broken. The complainant did not allow the accused to touch her vagina or penetrate her vagina with his penis.
42. After this, the complainant ran to the house of her good friend and school mate Faustina Kavoa who lived across the road. The complainant used to go to the house of her friend to study or to do school projects.
43. When the complainant went to Faustina's house her friend was not at home, Faustina's uncle was sleeping in the house. The complainant went into Faustina's bedroom, used the bathroom then locked herself in the bedroom and waited for Faustina.
44. When Faustina came home after school, the complainant told Faustina that she had a stomach ache and so she wanted to go home. After two days the complainant went to Faustina's house to study for her mid-term exam.
45. It was here the complainant told Faustina why she had wanted to go home the other day. Further the complainant told Faustina she did not want to go to the house of her uncle and that she hated her uncle for what he had done to her.

46. The complainant also told Faustina the reason why she did not tell her on the day of the incident because she was shocked and scared. The complainant did not tell Faustina anything in school after the incident because she was not talking much in school.
47. The complainant could not think properly and didn't know who to talk to. Faustina wanted to tell her mother but the complainant stopped her since she felt nobody would believe her and that she was scared.
48. The incident happened when the complainant was in Form 3 but the matter was reported to police after 2 years when she was in Form 5. The reason for the delay was that the complainant couldn't continue to live with it any longer, it was too much for her. She used to see the accused at family gatherings and he was also one of the Eucharistic Ministers in the church. On one occasion the accused was at the altar preaching, at this time the complainant broke down in church. The complainant told her aunty Soko Thaggard of severe headache.
49. At the hospital the complainant was given medicine and sent home. At home the complainant felt shortness of breath and fainted so she was again taken to the hospital. The medicine was not working, so the doctor told the complainant's aunt to ask the complainant what was wrong with her.
50. The complainant then told her aunty what the accused had done to her. The complainant identified the accused in court.
51. In cross examination the complainant disagreed she was insisting that her uncle massage her stomach. When she was in the sitting room on the day of the incident the main door was closed and the curtains were drawn. The complainant disagreed after massaging her stomach the accused had also massaged her ribs and that she was facing the floor.
52. The complainant did not seek the assistance of Faustina's uncle she just went and locked herself in Faustina's bedroom. The complainant

maintained the accused had fondled her breasts and penetrated her vagina with his penis on the day in question.

53. The complainant denied that the animosity that existed between her cousins, her family, herself and the accused had prompted her to make false allegations against the accused.
54. The second prosecution witness was Faustina Kavoa the best friend of the complainant who informed the court in 2012 during the second term of school the complainant had told the witness that her uncle Petero Masala had offered to massage her stomach. When massaging he went onto the complainant sexually forcing himself on her by penetrating her vagina. The complainant told this to the witness two days after the incident.
55. The witness and the complainant went to the same school and met each other every day. When the complainant was telling the witness what had happened to her she was scared and couldn't talk properly. The witness wanted to tell her mum, but the complainant told her not to tell her mum or anyone else. The witness could not remember meeting the complainant after returning home from school on the day of the alleged incident.
56. In cross examination the witness stated that she did not tell her mother because she did not want to betray her friend's trust and it was not because she did not believe her friend or was double minded whether to tell her mother or not. The witness stated the complainant had never lied to her.

#### Ladies and Gentleman Assessors

57. Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for the complainant not to complain to her friend and school mate on the day of the alleged incident that the accused had sexually assaulted and raped her. Some in distress or anger may complain

to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

58. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in this case did not inform her best friend and school mate that she had been raped and sexually assaulted by the accused in the afternoon of the incident.
59. This is commonly known as recent complaint evidence. The evidence given by Faustina is not evidence of what had actually happened between the complainant and the accused since she was not present and did not see what had happened between the accused and the complainant.
60. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant who was a Form 3 student in 2012 did not complain to her friend and school mate Faustina about the two alleged incidents on the day of the alleged incident since she was shocked, scared, could not think properly and did not know who to talk to about what the accused had done to her. However, the complainant did complain to Faustina after two days of the alleged incident therefore she was more likely to be truthful.
61. On the other hand, the defence says the complainant did not complain to her friend and her school mate Faustina when she met Faustina in the afternoon of the alleged incident. The complainant only complained to Faustina after two days of the alleged incident which was only in respect of rape but not about sexual assault and that the matter was reported to

police after two years in 2014. The defence is asking you not to believe the complainant as truthful.

62. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
63. The final prosecution witness was Laisiana Tukana who knew the complainant since they went to the same church and were also distant relatives.
64. This witness recalled in February, 2014 during a Sunday mass at 7.00am she noticed the complainant was crying with her head bowed. After the church service the witness went to the complainant to find out what was the matter.
65. Upon questioning the complainant there was no response, the witness noticed the complainant was in some kind of pain. The complainant's cousin took the complainant to his home. After lunch that day the witness received a call that the complainant wanted to see the witness. The complainant's cousin came in his car with the complainant and all went to the hospital.
66. At the hospital the complainant was in pain, she saw the complainant had one hand on her head and the other hand on her chest since the complainant was not saying anything, the witness told the complainant she will ask questions and all the complainant had to do was to shake her head for a "no" and give a nod for a "yes".

67. As the questioning progressed the complainant finally spoke and told the witness that she had been sexually hurt, when asked who did that, the complainant shook her head.
68. When questioned whether it was just fondling, the complainant replied “yes” the next question was whether he had touched her womanhood, the complainant replied “yes”. The complainant was reluctant to tell the name of the person who had done this to her. After the complainant calmed down she told the witness the name of the accused.
69. In cross examination the witness stated that she could remember clearly the questions she had asked and the answers given by the complainant between February to April, 2014 because the complainant was very close to her and she also felt the pain of the complainant.
70. The witness stated on the way to the hospital the complainant did not tell her when the incident had happened but she did say that the accused had offered to massage her.
71. This was the prosecution case.

## **DEFENCE CASE**

### Ladies and Gentleman Assessors

72. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent and not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent.

73. According to the line of cross examination, the accused takes up the position that he did not sexually assault or have sexual intercourse with the complainant that is penetrate the vagina of the complainant with his penis without her consent. The complainant and her family had an animosity against the accused since he married the complainant's aunty after her first husband had passed on. In view of this, the complainant concocted these false allegations against him since they did not want the accused as part of the family.
74. This was the defence case.

### **ANALYSIS**

75. The prosecution alleges that sometimes between the 16<sup>th</sup> day of May, 2012 and 19<sup>th</sup> August, 2012 the complainant a Form 3 student was at the house of her uncle the accused. The complainant did not go to school because she was having stomach ache. The accused offered to massage the complainant's stomach. The complainant and the accused after breakfast went into the sitting room.
76. The complainant was wearing a shorts and a top. The accused started to massage the stomach of the complainant, he then started massaging up to her breast, and kept on fondling the complainant's breast. After that the accused started to massage the complainant's vagina and was playing with it by touching it. Thereafter, the accused removed the complainant's shorts and underwear. At this time the complainant started to cry, she went blank, her hands were sweating. The complainant was scared and felt helpless she did not know what to do.
77. The accused came on top of her and penetrated her vagina twice with his erected penis. While the accused was doing this, the complainant felt weak, when the accused penetrated her for the second time the complainant pushed the accused away. The complainant said that it was painful her legs

were shaking and she felt weak. The complainant did not consent to what the accused had done to her.

78. After 2 days the complainant went to Faustina's house to study for her mid-term exam. It was here the complainant told Faustina the reason why she had wanted to go home the other day. Further the complainant told Faustina she did not want to go to the house of her uncle and that she hated her uncle for what he had done to her.
79. Faustina Kavoa the best friend of the complainant informed the court the complainant had told the witness that her uncle Petero Masala had offered to massage her sore stomach, when massaging he forcefully penetrated the complainant's vagina with his penis.
80. The complainant told the witness two days after the incident. When the complainant told the witness what had happened to her she noticed the complainant was scared and couldn't talk properly.
81. Laisiana Tukana knew the complainant since they went to the same church and were also distant relatives. During a Sunday mass at 7.00am she noticed the complainant was crying with her head bowed. After lunch that day the witness received a call that the complainant wanted to see the witness.
82. At the hospital the witness after asking the complainant a series of questions came to know that the complainant had been sexually hurt. When questioned whether it was fondling, the complainant replied "yes" the next question whether he had touched her womanhood, the complainant replied "yes". After the complainant calmed down she told the witness the name of the accused.
83. The position taken by the accused is that the complainant had made false allegations against him he did not do anything as alleged, the complainant and her family were against him since he married into the family.



Furthermore, the complainant delayed reporting the matter to the police by two years since it did not happen.

Ladies and Gentleman Assessors

84. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
85. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
86. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
87. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the

prosecution or the defence. You must apply the same test and standards in applying that.

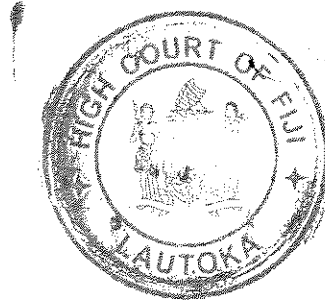
88. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
89. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
90. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
91. In this case, the accused is charged with one (1) count of sexual assault and one (1) count of rape, as mentioned earlier you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.
92. Your possible opinions are:-


Count One:           **SEXUAL ASSAULT: GUILTY OR NOT GUILTY.**

Count Two:           **RAPE**: GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

93. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.
94. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

**16 October, 2018**

**Solicitors**

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

**Office of the Legal Aid Commission for the Accused.**