

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO.HAC 142 of 2018

BETWEEN :

STATE

AND :

MAIKELI FREYER NAWAITABU

Counsel :

*Ms. S. Alagendra, Ms. K. Semisi, Ms. S. Shameem
and Dr. A. Jack for the State
Ms. S. Hazelman with Ms. P. Mataika for the
Accused*

Hearing on :

20th November - 27th November 2018

Summing up on :

28th November 2018

SUMMING UP

Lady and gentlemen 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. The names of the complainant juveniles are suppressed and they will be referred to as either by their initials or the witness number.
3. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of law. To wit;
 - i) If a person has committed an offence, he should be meted out with an adequate punishment.
In other words, if you are sure that the accused has committed the alleged offences, then it is your duty to convict him. I must remind you that it is the duty

of the prosecution to prove all the elements of the alleged offences beyond reasonable doubt. The accused is not required to prove anything as his innocence is presumed by the law.

- ii) An innocent person should never be convicted.
There is a saying that it is better to let 100 offenders get acquitted than to convict one innocent person. That is, unless you are very sure that the accused has committed the alleged offences, you should not commit him.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty, let us proceed.

4. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated 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.
5. 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 or for the defense are not evidence. A suggestion made by a lawyer during the 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 them appropriate.
6. 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 feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
7. 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, a part or none of any witness' evidence.
8. 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 and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that

the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.

9. 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 or has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. 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. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
10. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question of 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 the witness is a matter for you to decide.
11. 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 the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
12. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness 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.
13. 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 are two or more reasonable inferences to draw, one or more against the accused, as well as one or more in his favour, based on the same set of proved facts, then you should not draw the adverse inference. For example, a witnesses' silence when affronted with a vital question could draw many inferences, some in favour and some against the interests of the accused. Therefore, in such situation you should be careful enough to not to draw any adverse inference on it against the accused.

14. 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 an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. That is, you must be sure of the accused person's guilt.
15. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. For example, the lack of consent is an ingredient which has to be proved by the prosecution. If you have any reasonable doubt, the accused should have the benefit of it and your verdict should be not guilty. 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 detail in a short while.
16. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against the accused.
17. 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 mandatory.
18. Let us look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

COUNT ONE

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (b) of the Crimes Act of 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2014 and 31st day of December, 2014 at Nasinu in the Central Division penetrated the vagina of GN with your fingers without her consent.

COUNT TWO

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (c) of the Crimes Act of 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division penetrated the mouth of MN with your penis without his consent.

COUNT THREE

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (c) and (3) of the Crimes Act of 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division penetrated the mouth of JR, a child under 13 years of age with your penis.

COUNT FOUR

Statement of Offence

ATTEMPTED RAPE: Contrary to section 208 of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division attempted to have carnal knowledge of GN without her consent.

COUNT FIVE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(ii) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured GN to witness an act of gross indecency by displaying your penis to the said GN.

COUNT SIX

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(ii) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured MN to witness an act of gross indecency by displaying your penis to the said MN.

COUNT SEVEN

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(i) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured MN to commit an act of gross indecency by forcing the said MN to hold your penis

COUNT EIGHT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(ii) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured JR to witness an act of gross indecency by displaying your penis to the said JR.

19. Now I will deal with the essential elements of each of these offences.
Section 207(1) of the Crimes Act reads as;

207. — (1) Any person who rapes another person commits an indictable offence.

Section 207(2) (c) of the Crimes Act reads as;

(2) A person rapes another person if —

[c] The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

To prove the offence of **Rape** the prosecution must prove the following elements beyond reasonable doubt.

- (i) The accused;
- (ii) On the specified date;
- (iii) At Navua, in the Central Division;
- (iv) Penetrated;
 - 1. the Vagina of GN with his fingers as for Count 1
 - 2. the mouth of MN with his penis as for count 2
 - 3. the mouth of JR with his penis as for count 3
- (v) The said GN as for Count 1 or MN as for Count 2 did not consent to it, and
- (vi) The accused knew or believed that they were not consenting, or the accused was reckless as to whether or not he was consenting.

The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

The fourth element in count 1 involves the penetration of the GN's vagina; with the accused's finger. That of the 2nd and 3rd counts involves the penetration of the MN's and JR's mouth with the penis of the accused, respectively. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina or the mouth as charged in the counts of 1 to 3, to any extent.

The fifth element is the consent. Prosecution has to prove as regards to the 1st and 2nd counts, that the GN or MN did not consent to do it at the time of the incident.

It should be noted that in respect of count 3, consent is not an ingredient as the accused has admitted JR to be of 11 years old at the relevant time. A child under the age of 13 has no legal capacity to grant consent.

Apart from proving that the complainant did not consent for the accused to insert his finger or penis, into GN's vagina or MN's mouth, the prosecution must also prove that, either the accused knew or believed that she/he was not consenting or he was reckless as to whether or not she/he consented. The accused was reckless, if the accused realized there was a risk that she/he was not consenting but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether she/he was consenting or not. In determination of this issue you should consider within the limits of available evidence and decide, whether the accused acted with lust and did not care whether she/he consents or not.

The main elements of the offence of "**Attempt to Commit Rape**" are that:

- i) The accused,
- ii) Attempted to have carnal knowledge of the Complainant
- iii) Without her consent

The carnal knowledge means the penetration of the vagina or vulva of the Complainant with the penis. In respect of the element of attempt, you have to consider two things. First is that whether he intended to penetrate the vagina or the vulva of the

Complainant with his penis. The second is that, with that intention, whether he did something which was more than mere preparation for committing that offence. It is for you to decide whether what he did was more than mere preparation.

Accordingly, you have to be satisfied that the accused had an intention to penetrate the vagina or the vulva of the Complainant with his penis and with that intention he tried to penetrate the vagina or the vulva of the Complainant with his penis.

The next element is the consent. Prosecution has to prove that GN did not consent to do it at the time of the incident.

Elements of the offence of **Sexual Assault** are that:

- [a]. The accused,
- [b]. Unlawfully and Indecently
- [c]. Assaulted the Complainant.

The Accused is guilty of Sexual Assault, if he unlawfully and indecently assaulted the victim. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. Assault can be defined as an application of unlawful force on another’s body.

Summary of the evidence

20. The 1st witness for the prosecution was JR. A summary of his evidence is that;
- i) He was born on 12th of January 2004. (A copy of his certificate of birth is marked and produced as PE1)
 - ii) The witness and the accused are from the same neighborhood and has seen & known him but has not spoken to him until the alleged incidents.
 - iii) One day in November 2015, he has come home after school and gone to the playground with his father’s permission. He has seen Maikeli (the accused) and the accused has started a conversation with him saying ‘Hello’. The accused has allegedly said that he is cold and asked the witness to scratch his penis. The witness has said ‘no’ and at that moment a relation having called him the witness has gone home.
 - iv) Thereafter at holidays in December, when the witness is at Pena’s house the accused has come there and asked him to go down & get a wire from the spare room, which was at the basement (bottom) of the Pena’s house. The witness having found the wire, when turned to come back has seen the accused behind, with his pants lowered down to his knees. The accused has asked the witness to give him a ‘blow job’. The witness understood it to have meant to ‘suck his penis’. When the witness said ‘no’ the accused has grabbed his arms and tried to pull him. The witness has managed to escape and run out. When JR went back to Pena’s house, the accused also come up and has asked him to take the wire to the back of the Church.

- v) When JR took the wire to the Church, the accused has followed him behind. At the back of the Church, the accused has grabbed the arms of the witness, tightly and asked him to suck the accused's penis. The accused has made the witness to go down on his knees and suck the accused's penis. When the witness was sucking his penis, the accused had said some words in Fiji (I-Taukei), which the witness had not understood. After a while the accused has ejaculated in the mouth of the witness, which the witness has spat out. Having done so, the accused has gone away asking the witness also to go. The witness has stayed there for about 10 to 15 minutes and cried, feeling weak, helpless and like committing suicide. Thereafter JR has gone home cried some more, and slept.
 - vi) After a couple of weeks JR has told these incidents to Mitieli, Grace and Elanoa. He has told them when he heard their stories, only. Until then he has not told anyone because he was feeling shy and scared. At that time Grace has told him that the accused has locked her in a room and showing her his penis had wanted her to do a 'blow-job'. Further, as for the witness, Grace has told that she has seen the witness giving a 'blow-job' to the accused. Then Elanoa advised them to tell their parents.
 - vii) Thereafter, his parents has come to know of it and gone and complained to the Nakasi Police Station. The Police has recorded his statement at about 9 – 10 in the night.
 - viii) In cross examination, the witness states that he has been there in Davuilevu housing for 6 years since 2012, and by 2015, he is familiar with the neighborhood. He has seen Maikeli (the accused) only at the playground before. When asked that he had the opportunity of running away if he felt scared after the 1st incident at the bottom of the Pena's house, the witness while conceding that he had the opportunity, states that he did not run away.
 - ix) When confronted with his statement to the police and queried of the place of the 2nd incident, the witness states that he is sure that it happened outside the Church and attributes the discrepancy to the sleepiness he had when he gave the statement to the police, late at night.
 - x) When suggested that this was a story invented, to take revenge from the accused, the witness denies, stating that the Grace's issue regarding an Indian boy took place much later and the accused had no involvement with it.
21. The 2nd witness was GN. The summary of her evidence is that;
- i) She was born on the 13th of November 2000. (A copy of her certificate of birth is marked and produced as PE2)
 - ii) She has been living in the Davuilevu housing which is also known as Cargill Street Squatters, since 2007.
 - iii) The accused is an uncle of hers, as the accused's mother is a younger sister of her maternal Grandmother's.
 - iv) In 2014, when once she went to the accused's house to clean the accused's mother's room, Maikeli (the accused) entered the room, pulling his pants down,

- sowed his penis to the witness and asked her to suck it & satisfy him. The witness has refused and gone home.
- iv) After about 3 days later, when the witness has gone again to the accused's house on his mother's request to clean her room, the accused has come there with a bottle of oil and wanted the witness to play with his penis. The accused has shown his penis to the witness, there. The witness having refused it has gone home.
 - v) At about a week, thereafter the witness has gone back to the house of the accused, & while cleaning his mother's room, the accused has come there and tried to pull down the Sulu she was wearing and poked his finger into her vagina. Further, as for the witness, the accused has scratched her vagina and his hand has gone into her vagina at that moment. The witness has pushed away the accused has ran straight home. That has been painful to the witness and she has not agreed with the accused to commit such an act.
 - vi) Thereafter, one day the accused having pulled Cassava, has asked her to come and get it. When the witness is picking the Cassava, the accused has pushed her down and pulling his pants down has tried to pull the witnesses Sulu, down. When she has fallen on the ground the accused has knelt down and tried to lie down on top of her. At that moment, the witness had screamed and ran home pushing the accused away.
 - vii) She has not informed any of these incidents to the mother of the accused as she was scared. However, she is said to have informed of these incidents to her Friends JR and Elanoa. The witness further admits that JR told her of certain incidents alleged to have done by the accused to JR; however, she did not witness any such being done.
 - viii) In cross examination, the witness admits that there are four rooms in the accused's house, the living area being in the middle and two each on the sides. She also admits that there are many people living in the accused's house. The witness further admits that she maintains a close friendship with JR and MN and known them since 2012.
 - ix) When shown her statement to the police and queried upon the witness concedes that she did not describe the first two incidents which happened at the accused's house to the police in detail. She further admits that there were many people in the living room when the alleged third incident happened at the accused's house. However, they could not have seen it as the curtains were down at the time of the said incident. The witness also states that though she could have screamed, she did not do so, as she was shy and did not want the others to know about it.
 - x) It was suggested that the witness was having an affair with an Indian boy and her father having found it out queried her. The witness denies it, on two grounds. Firstly that she never had an affair and secondly that her father never queried her on any such. When it was suggested that she has made this up, the witness promptly denies it.

22. The PW3 was MN. The summary of his evidence is that;
- i) He was born on 25th of March 2002. (A copy of his certificate of birth is marked and produced as PE3)
 - ii) He has been living in the Davuilevu Housing, which is also known as Cargill Street Squatters, since birth.
 - iii) Somewhere in 2015, once when he was going by the accused's house, the accused has called him from the window. He was shocked to hear someone calling and when he turned he has seen the accused inside his mother's room touching his penis. The witness has clearly seen the penis of the accused and the accused while holding it, has said that it is itching.
 - iv) After a while, the accused has come around and asked the witness to help him to carry a wood to the Pena's house. While inside the basement or the tool room of the Pena's house, the accused has closed the door and has asked the witness to suck his penis. The witness says that he was scared and frightened and therefore, sucked the penis of the accused, there. Having sucked the penis of the accused for few minutes the witness has told to the accused that he wants to go home. At that moment the accused has offered to suck the penis of the witness, which the witness has refused. The stance of the witness is that he did not suck the penis of the accused willingly; he did it because he was scared and frightened. Thereafter, the accused has opened the door, peeped around to see whether any one was around, and seen no one around, has let the witness go.
 - v) When queried why he didn't run away at the first time, the witness replies that he never expected it to end up in such a way.
 - vi) Few weeks afterwards, once when the witness was returning after playing, he has seen the accused on the sea wall. The accused has called him and when gone, the accused has taken the hand of the witness and put it inside his underwear. The hand of the witness has touched the penis of the accused and the witness has pulled his hand out. The witness further testifies that he has not been agreeable to such an act and the accused knew it.
 - Vii) The witness says that he has told of these incidents to JR and Elanoa after a few weeks. When he told JR, JR told him that he also has sucked the penis of the accused. The witness further says that he told these to JR and Elanoa because they share secrets.
 - viii) In cross examination witness says that he and JR are cousins as his mother and JR's mother are sisters. When suggested that the accused chases children home when it's getting dark, the witness denies. When referred to the statement made by the witness to the police, he states that the order of events was incorrectly recorded by the police. The witness further admits that certain events were also incorrectly recorded by the police.
 - ix) The witness states that he did not inform the first incident of seeing the accused touching his penis to the police as the witness got scared when the police suddenly came and asked him to come to the police station to record a statement.

- x) When confronted with his statement, the witness admits that it differs from what he has said in evidence, about the incident alleged to have happened at the sea wall. Later, the witness says that these were two separate incidents. According to the witness, on second time the accused has come behind him while he was in the church yard and taken his hand and put it inside his underwear. However, witness contradicts his earlier stance of once accused taking his hand and putting it inside his underwear by stating that such an incident having happened twice.
 - xi) In re-examination, the witness clarifies that he, JR and GN did not like the accused not for anything else but for the alleged incidents. Further it was pointed out that the statement of the witness was recorded very late at night (commencing from 10.50pm) and was hurriedly recorded with in a very short time span (20 minutes).
23. The last witness for the prosecution was Ms. Elanoa Divaulu. The summary of her evidence is that;
- i) She is 24 years old, married and is a mother of two children.
 - ii) She has come to live in Davuilevu housing in May 2015.
 - iii) During the first week of December 2015, there has been a volleyball match at the playground. While being there she has seen GN holding a phone which might be belonging to the accused and the accused trying to take it from her. GN was refusing to give and was holding it away, to the back of her over the head. At that time, the accused has touched her breast & GN has gone away giving the phone back to the accused. Having seen this inappropriate act, the witness has queried the accused as to why did he touch the GN's breast. The accused's reply has been 'ah! That's o-kay'.
 - iv) Following Sunday when the witness was relaxing under a tree, she has seen GN, called her and asked whether the accused has been touching her body before. Then GN has answered in the positive and told her that the accused has asked her to suck his penis too. Further, the witness was informed by GN that once, in a bedroom of the accused's house, the accused has asked her to suck his penis which she rejected. While they were talking JR passed by and seeing him GN has told her that he is also involved. Then the witness has called JR and when asked about the accused's touching, JR having acknowledged that has revealed that the accused had asked him to suck his penis. Then MN has passed by and JR has informed that he was also involved. The witness has called MN and when queried, MN has confirmed that the accused has asked him too to suck the accused's penis.
 - v) Then the witness has inquired the MN of the place which the accused did such an act. She was informed by MN that it was done to him by the accused at the basement / storeroom of the Pena's house. When he inquired from JR, of the place of the incident she was told that it was done at a Cassava patch. But, later the witness admitted that she may have got mixed up of the places each one of them mentioned of.

- vi) In cross examination, as for the statement made to the police it was on the same day she saw the incident of GN, she spoke to her; in fact it was not on the same day that she spoke to her. Similarly, though it stated that she spoke to JR on the next day; in fact it was on the same day that she spoke to JR. Her explanation was that she was rushed through her statement and police has got some things mixed up. Furthermore, her contention was that though she mentioned of the incidents in respect of GN, whatever she mentioned to the police about GN was not recorded by them and the police has done a rough job.
 - viii) The witness identifies and points out the accused as Maikeli, who was in her neighborhood and was well known to her.
 - ix) When the witness was challenged that GN, JR or MN did not say anything to her she denies it.
24. When analyzing the above evidence it should be remembered that only direct evidence which relates to the alleged incidents, is the evidence of the PW1 to PW3. Therefore, the ultimate question would be whether their evidence would be trustworthy and reliable. You may get assistance from the evidence of the other witnesses to see into corroboration and giving due consideration to the discrepancies and contradiction, as directed before, may decide on it appropriately.
25. Another important factor would be the delay in making the complaint to the police. Given the due consideration to the explanations, you may decide on the credibility and acceptability of such using your experiences as members of the society.
26. With the leading of the above evidence prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Decree, called for a defense explaining the rights of the accused.
27. The accused elected to remain silent exercising the constitutional right given to him. It is his right and no adverse inferences should be drawn against him on that. Nevertheless, he decided to call a single witness, his mother, Siteri Nawaitabu on his behalf.
28. A summary of Siteri Nawaitabu's evidence was that;
- i) She is residing at Davuilevu housing since 1979 and a mother of 12 children. The accused is the youngest of her children and is living with her.
 - ii) The witness knows GN as GN's grandmother is a sister of the witness. GN used to come to her house, at her free will, for visits.
 - iii) She further says that in 2014, her house did not have any doors or curtains to the rooms.
 - iv) In cross examination the witness states that her house was under renovation for 4 months in 2014 and they occupied it back in December 2014. While the house is under renovation the house did not have any curtains. Nevertheless, since

they re-occupied it in December 2014, there were curtains at the entrances to the rooms.

- v) Answering further, the witness states that since they re-occupied in December, 2014 GN used to come to her place only if someone asks her to come. The always come there for a purpose, such as to get money from the grandmother. You should note that this is a clear contradiction of her earlier stance.
29. That was a summary of the evidence given by the witnesses. Please remember 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 did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
30. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence have been proven beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
31. When you consider the evidence on the identification of the accused, you should closely examine the following general circumstances among others on identification of the accused;
- (i) Duration of observation;
 - (ii) The distance within which the observation was made;
 - (iii) The lighting condition at the time the observation was made;
 - (iv) Whether there were any impediments to the observation or was something obstructing the view;
 - (v) Whether the witness knew the accused and for how long;
 - (vi) Whether the witness had seen the accused before, how often and special reason to remember; and
 - (vii) Duration between original observation and identification.
32. The Accused has indicated his stance through his cross-examination done from witnesses; it is that he did not do those acts. Therefore the prosecution will bear the responsibility to prove all the ingredients of the offences. With the submission of the accused's stance, one of the three situations given below would arise;
- (i) You may accept his stance and, if so your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily accepting his stance you may think, 'well what he suggests 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 stance. But, that itself does not make the accused guilty. The situation would then be that you should still consider whether the prosecution has proved all the elements beyond reasonable doubt.
33. Any re-directions?
34. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. You have copies of the document tendered as the exhibit "PE1 to PE3". When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.
35. Your opinion should be whether the accused is guilty or not guilty in respect of each count.


Chamath S. Morais
JUDGE



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