

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 222 of 2016

STATE

V

ALIPATE VUKI

Counsel : Ms. Lavenia Bogitini for the State
Ms. Aarti Prakash with Mr. Krisheel Chang for the Accused

Dates of Trial : 8-10 May 2018

Summing Up : 11 May 2018

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

SUMMING UP

Madam Assessors and Gentleman Assessor,

- [1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box and any admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted

the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, another matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15] According to the evidence you heard in this case, the complainant, SC, was 17 years old at the time of the alleged incident (17 years and 9 months to be precise), in March 2016, and was 19 years old when she testified in Court. 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 offence the accused is charged with.
- [16] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.

- [17] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. 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 and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission 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 or omission, you may conclude that the underlying reliability of the account is unaffected.
- [18] However, if there is no acceptable explanation for the inconsistency or omission, 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 inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission 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 or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.
- [19] Ladies and Gentleman Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [20] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [21] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not guilty of the charge. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.

- [22] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [23] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [24] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [25] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [26] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [27] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. It is not his task to prove his innocence.
- [28] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [29] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence charged. A

reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.

- [30] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [31] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [32] I must also explain to you as to the reason for permitting a closed court proceedings when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when you have a closed court proceedings, it makes it more comfortable for the complainant to describe the often unpleasant incidents that she has to testify to. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [33] Let us now look at the charge contained in the information.
- [34] There is one charge preferred by DPP, against the accused:

COUNT ONE

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 2009.

Particulars of Offence

ALIPATE VUKI on the 25th day of March 2016, at Namosi, in the Central Division, penetrated the vagina of **SC** with his penis, without her consent.

- [35] Section 207(1) of the Crimes Act No. 44 of 2009 (Crimes Act) reads as follows:

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

[36] Section 207(2) (a) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

[37] Therefore, when Section 207(1) is read with Section 207(2) (a) it would read as follows:

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

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent.

[38] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207(2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

[39] Therefore, in order for the prosecution to prove the count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 25 March 2016);
- (iii) At Namosi, in the Central Division;
- (iv) Penetrated the vagina of SC with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[40] 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.

[41] 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.

[42] The fourth element involves the penetration of the complainant's vagina; with his penis. 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 or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

[43] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.

[44] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[45] Apart from proving that the complainant did not consent for the accused to insert his penis, into her vagina, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[46] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 17 years of age at the time of the incident, and therefore, she had the mental capacity to consent.

[47] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape is obviously considered a Sexual Offence. Corroborative evidence is independent evidence that supplements and

strengthens evidence already presented as proof of a factual matter or matters.

- [48] If you are satisfied beyond any reasonable doubt that the accused, on 25 March 2016, at Namosi, penetrated the vagina of SC with his penis, without the consent of the complainant and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the count of Rape.
- [49] If you find that the prosecution has failed to establish any of these elements in relation to the count of Rape, then you must find him not guilty of Rape.
- [50] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [51] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Final Admitted Facts*" without placing necessary evidence to prove them:

1. The complainant in this matter is SC, whose date of birth is the 27th of June 1998.
2. The accused is Alipate Vuki, whose date of birth is the 4th of September 1970.
3. The accused is originally from Naraiyawa Village, Namosi.
4. The complainant and the accused were both residing at Naraiyawa Village, Namosi on the 25th of March 2016.
5. On the morning of 25th of March 2016, the accused went alone to his farm at Wainivusu where he met the complainant who was also there alone picking ota leaves.
6. On the 25th of March 2016, at Wainivusu, the accused inserted his penis into the vagina of the complainant.
7. The complainant was medically examined by Dr Talei Lauvanua on the 14th of June 2016.
8. The accused was interviewed under caution on the 17th of June 2016 by D/Cpl Tuaci Tasoqosoqo.
9. The accused was charged on the 19th of June 2016, by DC 4349 Tevita.

[52] You must therefore, treat the above facts as proved.

Case for the Prosecution

[53] The prosecution, in support of their case, called the complainant, SC, and her uncle Apisai Dreuvadra.

[54] Evidence of the complainant SC

- (i) *The complainant testified that she is currently residing in Ba with her aunty, her grand-mother, and her siblings.*
- (ii) *She is originally from Draubuta in Navosa.*
- (iii) *On 25 March 2016, she was residing at the Naraiyawa Village in Namasi. She was staying there with her aunty and uncle. Her uncle is Apisai Dreuvadra and her aunt is Veniana Lewarara. Apisai is her father's older brother.*
- (iv) *Her two sisters, Eseta Vasu (9 years of age) and Arieta Tovano (7 years of age), were also staying at the same residence.*
- (v) *During this time, her parents was staying at Draubuta village in Navosa. The reason she and her siblings were staying in Naraiyawa was because they were attending school there.*
- (vi) *The complainant was attending the Wainimakutu Secondary School, and was in Form 6.*
- (vii) *She had been staying in Naraiyawa for two years.*
- (viii) *In the morning of 25 March 2016, she had gone to Wainivusu to pick ota leaves. From Naraiyawa Village to Wainivusu it is about a 30 minutes walking distance. Later the witness said it will take 30-45 minutes.*
- (ix) *She testified that she goes all the way to Wainivusu to pick ota leaves, as you find plenty of ota leaves there. The purpose of getting the ota leaves is to sell it in the market.*
- (x) *She recalls that she was wearing a red t-shirt, a blue skirt and a red and white striped panty that day. She also had with her a sulu (wrap around cloth). The purpose of the sulu was to put the ota in it.*
- (xi) *The complainant said that she went to Wainivusu around 9.00 in the morning.*
- (xii) *Whilst at Wainivusu she had met the accused, Alipate Vuki. She knows the accused as he is also from the Naraiyawa village.*

- (xiii) When she saw the accused, the accused had asked her "you came with whom?" She had replied I came alone.
- (xiv) The accused was tying his horse at the time.
- (xv) She was picking ota and putting it on the sulu. She had then walked to the top and was picking some more ota. She was surprised to see the accused standing behind her. The accused had asked her again, whom she came with. He had asked her "where is Eseta and aunty?" She said I came alone.
- (xvi) The accused had then pulled her right hand with his right hand. The witness demonstrated in Court how this happened. She had been holding the ota with her left hand. When the accused had pulled her, she had dropped the ota and pushed him away and told him "don't because you are a married man".
- (xvii) The witness testified that when he pulled her hand, she pushed him but he kept on pulling her hand.
- (xviii) The complainant said that before 25 March 2016, she did not know the accused. Later she clarified by saying, that during the first year I was at Naraiyawa he was not there. When it was school holidays, I went to the village (Draubuta village). When she came back in the second year he was there.
- (xix) She said the accused pulled her right hand. She had put down the ota and tried to push him away. The witness demonstrated how the accused had pulled her hand. She had put down the ota and turned and tried to push the accused. However, she did not succeed (in pushing the accused away). The accused had then hugged her.
- (xx) The accused had told her to relax that this is between the two of them. The witness testified that the accused had told her "do not say it to anyone else that is between us, just relax."
- (xxi) The complainant said, that at this point she tried to push the accused one time, twice and thrice but she did not succeed (in pushing him away). The accused had let go of her right hand. The witness demonstrated how she tried to push the accused away.
- (xxii) When she was trying to push the accused away, he had hugged her tightly and laid her down (on the ground). The witness demonstrated in Court how this took place. She said that the place was a hill/slope. "He hugged me and he made me lie down".
- (xxiii) The witness also demonstrated how the accused hugged her and put his foot against her foot to make her lie down. The accused had used

his shoulder and his leg to make her lie down. When she was lying down she was facing upwards.

- (xxiv) When the accused was hugging her and laying her on the ground, both his hands had been around her back.
- (xxv) When the complainant was asked, "if you were laid on a hill why did you not roll?" she replied "the reason why I did not roll is because of the ota plants (which) were growing there." She said the ota plants were about 1.5 meters in height. Some ota plants reached her chest, while some were above her height. However, there were no ota plants growing at the spot where the accused had laid her down.
- (xxvi) The accused had then started to kiss her mouth. She did not do anything. His right hand was holding both her hands. With his left hand the accused had pulled up her skirt, pulled down her panty and had taken his pants off. When this was happening, she was lying down. The complainant testified that the accused pulled down his pants up to his knees and pulled down her panty below her knees.
- (xxvii) Thereafter, the accused had used his legs to spread her legs and then he inserted his penis into her vagina. The witness demonstrated with her hands as to how the accused used his knees to spread her legs. At the time the accused was spreading her legs he was kneeling. When asked, where the accused's hands were at the time he was kneeling, the witness said that both his hands were on his penis.
- (xxviii) The accused inserted his penis into her vagina and he was pushing in and out. He was doing this for 5 minutes.
- (xxix) The complainant testified that at no time did she give her consent to the accused to insert his penis into her vagina. When asked whether she had told this to the accused, she said no. She didn't tell the accused that she was not consenting because the accused was getting angry. He was getting angry because she was trying to push him.
- (xxx) The complainant said that she did not do anything at that point in time because the accused was getting angry and she was scared.
- (xxxi) The witness was then asked the following questions to which she replied as follows:

Q. Since you mentioned that you did not consent, why didn't you yell out or scream?

A. Because I know that the village is far away.

Q. You mentioned that you were scared because Alipate was getting angry. Why was this scary for you?

- A. *Because besides there was his knife.*
- Q. *What type of knife was this?*
- A. *Knife for weeding – cane knife.*
- Q. *How far (away) was this knife?*
- A. *Not long but it was near him.*
- Q. *You mentioned that Alipate inserted his penis into your vagina for about 5 minutes. Whilst this was going on, what were you doing?*
- A. *I was crying.*
- Q. *Why were you crying?*
- A. *Because that's the first time something of that sort happened to me.*
- Q. *When Alipate was inserting his penis into your vagina, what did you feel in your vagina?*
- A. *I felt pain.*
- Q. *After 5 minutes had passed, what did you observe in your vagina?*
- A. *That blood came out for me and water.*
- Q. *What do you mean when you say water?*
- A. *Water and blood was mixed.*
- Q. *Where was this water from?*
- A. *It came from my vagina.*
- Q. *Can you describe this water, how this water felt?*
- A. *Like jelly.*
- Q. *What happened after that?*
- A. *He stood up and went to his plantation.*
- Q. *Did Alipate say anything to you?*
- A. *He said not to tell anyone else.*
- Q. *What did you then do?*
- A. *I was crying while lying down. Then I stood up, then I pulled up my panty and I do my skirt properly.*
- Q. *What did you then do?*
- A. *The ota I dropped, I picked it up and went down and put it in the pink sulu.*

- Q. *Where did you then go?*
- A. *I went down to the village.*
- Q. *When you went back, did you tell anyone about what happened?*
- A. *No.*
- Q. *Can you tell us why?*
- A. *I was scared.*
- Q. *What were you scared of?*
- A. *Because my aunty (Veniana) is related to Alipate .*
- Q. *Do you know how closely related they are?*
- A. *Alipate's father and my aunty they are siblings.*
- Q. *Why didn't you tell your uncle?*
- A. *I was scared because our house and Alipate's house are close to each other.*
- Q. *Did you tell your two sisters about what happened?*
- A. *No.*
- Q. *Why?*
- A. *Because they were still young.*
- Q. *You said during this period of time, your parents stayed at Draubuta village, in Navosa. How far is Naraiyawa in Namosi to Draubuta village in Navosa, in terms of travelling?*
- A. *(If) you leave Naraiyawa in the morning and you reach Draubuta in the night.*
- Q. *Can you tell us why didn't you go to Draubuta village to tell your parents?*
- A. *Because they were far away from Naraiyawa.*
- Q. *You mentioned that you didn't tell anyone about what happened to you?*
- A. *Yes.*
- Q. *How did this then come to light?*
- A. *My uncle asked me.*
- Q. *What did your uncle asked you?*
- A. *He asked me "what's the reason that your attitude is like this? You are weak and your appearance is different."*

- Q. *What did you say when he asked you this?*
- A. *I said everything that was being done to me.*
- Q. *What do you mean?*
- A. *Everything that Alipate did to me, I said it all.*
- Q. *How long after the events of 25 March 2016 was this?*
- A. *In June.*
- Q. *What made you tell your uncle this?*
- A. *Because I felt that my monthly period was not coming.*
- Q. *What was it that made you to tell your uncle?*
- A. *I knew that I was pregnant.*
- Q. *Can you tell us why you waited until June to mention this to someone?*
- A. *I was scared of saying it.*

(xxxii) The complainant further testified that she gave birth to a baby boy on 24 December 2016. Currently, her uncle in Draubuta village is looking after the baby.

(xxxiii) She said that she felt ashamed when she found out that she was pregnant. This is because she is still a student and he (the accused) was married.

(xxxiv) The complainant stated that she realised that she was pregnant when her monthly periods did not come. This was around April or May (2016).

(xxxv) The following suggestions were put to the complainant in cross examination, and her replies were as follows:

Q. *I put it to you that you and Alipate had spoken to each other before 25 March 2016?*

A. *Not yet.*

Q. *I put it to you that you and Alipate were cordial with each other (were on friendly terms)?*

A. *No.*

Q. *I further put it to you that you referred to Alipate as Pate?*

A. *No.*

Q. *I also put it to you that you and Alipate used to speak to each other every day since December 2015, for 5 to 10 minutes?*

A. No.

.....

Q. *Alipate had asked you twice, whom you had come with?*

A. Yes.

Q. *The first time he asked you, you had indicated to your chest to say you were alone.*

A. No. I said it.

Q. *I put it to you that the first time Alipate had asked you, you had indicated your chest to say that you were alone?*

A. No.

Q. *I put it to you that the second time Alipate had asked you, you had replied "I came alone, maybe my two sisters they come later"?*

A. No.

Q. *I then put it to you that Alipate had said "SC I love you"?*

A. No.

Q. *I put it to you that you had giggled in response?*

A. No.

Q. *I put it to you that Alipate had then asked you, can we then have sex?*

A. No.

Q. *I put it to you that you then giggled again and did not say anything?*

A. No.

Q. *I put it to you that Alipate had then told you, "relax we just take it slow"?*

A. No.

Q. *I further put it to you that Alipate then went on to say "this is between me and you"?*

A. No.

Q. *I put it to you that Alipate then told you to put the ota down?*

A. No.

Q. *I further put it to you that Alipate held you by your right shoulder and he kissed your mouth?*

- A. No.
- Q. *I put it to you that you kissed him back?*
- A. No.
- Q. *I put to you that Alipate asked you to lie down?*
- A. No.
- Q. *I put to you that after you both laid down, you both kissed each other?*
- A. Yes.
- Q. *I put it to you that before Alipate inserted his penis into your vagina, he asked you "you ever went out with another boy"?*
- A. No.
- Q. *I put it to you that you had then responded by saying No?*
- A. No.
- Q. *I put it to you that Alipate then said "we will then have sex slowly?"*
- A. No.
- Q. *I put it to you that after you both had consensual sex Alipate told you to put on your panty?*
- A. No.
- Q. *I put it to you that Alipate then said "thank you"?*
- A. No.
- Q. *I put it to you that Alipate then told you to take the ota and wrap it with the sulu near the creek?*
- A. No.
- Q. *I further put it to you that Alipate said when he finishes he will carry the ota to your home?*
- A. No.
- Q. *I put it to you that whilst Alipate was on top of the hill you called out to him and said "Pate the ota is here?"*
- A. No.
- Q. *I put it to you that Alipate told you to leave it there and that he will carry it on horseback when he finishes work?*
- A. No.

Q. I put it to you that after an hour later Alipate brought the ota to your house?

A. No.

(xxxvi) It was also suggested to the complainant that there was never a knife in the vicinity of the alleged incident. The complainant denied this and said there was a knife. However, no mention of a knife has been referred to in the Police statement made by the complainant. The complainant said that she forgot to mention it to the Police.

[55] Evidence of Apisai Dreuvadra

- (i) He is currently residing at Naraiyawa in Namosi. He has been residing there for the past 7 years. He is married to Veniana Lewarara. Her village is Naraiyawa, Namosi. He is originally from Draubuta, Naikoro, Navosa.
- (ii) In June 2016, the complainant was staying at his residence. He is the complainant's uncle.
- (iii) He testified that on 12 June 2016, around 8.00 in the evening, he had asked the complainant whether she was sick. The complainant had asked him, "why uncle?" He had said, "listen carefully my child, when I saw you it appears to me that you are sick. Please my child if you are sick tell me straight." Thereafter, the complainant had said "uncle forgive me, I am pregnant". He said on hearing this news, they all cried.
- (iv) The complainant had said that it was Alipate Vuki who made her pregnant.
- (v) The witness had told the complainant "forgive me SC that is your weakness. I am going to see Alipate to explain to him what has happened to you."
- (vi) When he had asked the complainant about the problem that happened to her, she had said she was being forced.
- (vii) When the witness was asked, "can you explain what do you mean when you said she was being forced?" He replied "the guy (the accused) asked SC twice whom did you come with. Then he held both her hands and they stayed together."
- (viii) The witness explained further ".....he held both her hands, made her lie down and they had sex".
- (ix) Later he had gone to Alipate's house and relayed the incident. Alipate had confirmed that he made the complainant pregnant.

[56] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

Analysis

[57] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, SC, and her uncle Apisai Dreuvadra, to prove its case.

[58] As I have informed you earlier, the burden of proving each ingredient of the charge of Rape rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

[59] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.

[60] In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved. Based on the said agreed facts the identity of the accused, the date of incident (25 March 2016), the place of incident (Wainivusu in Namosi), and the fact that the accused inserted his penis into the vagina of the complainant are proved.

[61] The only elements left for the prosecution to prove are the elements relating to consent. That the accused, penetrated the vagina of SC with his penis without her consent; and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[62] The accused is taking up the position that he had consensual sexual intercourse with the complainant. The complainant totally denies this position.

[63] Although the incident took place on the 25 March 2016, the very first time the complainant reported the matter to anybody was on 12 June 2016, when she was questioned by her uncle Apisai. The complaint to the Police was made only thereafter. That was on 14 June 2016. You have heard from the complainant the reasons given by her as to the delay in reporting the incident. It is for you to decide whether you accept the explanation offered by the complainant or not.

[64] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you

find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the count of Rape, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence of Rape, beyond any reasonable doubt.

[65] In summary and before I conclude my summing up let me repeat some important points in following form:

- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Rape;*
- ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Rape has been established beyond any reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[66] Any re directions the parties may request?

[67] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the count of Rape separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

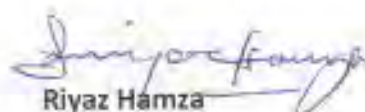
[68] Your possible opinions should be as follows:

Count One

Rape- Guilty or Not Guilty

[69] I thank you for your patient hearing.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 11th Day of May 2018

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