

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 05 of 2016

STATE

V

JOSEFA VODONAYALEWA

Counsel : Ms. Unaisi Tamanikaiyaroi for the State
Mr. Lisiate Qetaki for the Accused

Dates of Trial : 26-28 June 2018

Summing Up : 2 July 2018

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

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 has 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 opinions. You must take all evidence into consideration, before you proceed to form your opinions. 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 charges 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 charges 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, the documents tendered as prosecution exhibits (PE 1 and PE 2) and any admissions made by the parties by way of agreed 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, a 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 she or he 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, JK, whose date of birth is 25 October 1998, was 14 years old in August 2013 (to be precise, 14 years and 9 months), and four months older in December 2013, and was 19 years old when she testified in Court. Experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case, however, is a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

- [16] Furthermore, the experience of the Courts is that victims of sexual offences react to the incident in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, may not complain or go to the authorities for some time. There is, in other words, no classic or typical response by victims of sexual offences.
- [17] You must bear in mind that a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. In this matter, it is for you to determine regarding the lateness or belatedness of the complaint and what weight you attach to it. It is also for you to decide, when eventually the complainant did complain, as to the genuineness of the said complaint.
- [18] 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.
- [19] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their 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.
- [20] 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 the witness provided for the inconsistency or omission and consider him or her to be reliable as a witness.

- [21] 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.
- [22] 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.
- [23] 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 charges. 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.
- [24] 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 offences charged.
- [25] 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.
- [26] 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.
- [27] 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 facts and the inferences that could be drawn from them.

- [28] 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.
- [29] 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 offences charged. It is not his task to prove his innocence.
- [30] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [31] 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 offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [32] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, 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.
- [33] 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.
- [34] 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.
- [35] Let us now look at the charges contained in the Amended Information.

- [36] There are four charges preferred by the Director of Public Prosecutions (DPP), against the accused:

COUNT 1

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212(1) of the Crimes Act 2009.

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of August 2013 and the 31st day of August 2013, at Gau Island in the Central Division, unlawfully and indecently assaulted **JK** by fondling her breasts.

COUNT 2

Statement of Offence

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

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of August 2013 and the 31st day of August 2013, at Gau Island in the Central Division, penetrated the vagina of **JK** with his finger, without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of December 2013 and the 31st day of December 2013, at Gau Island in the Central Division, penetrated the vagina of **JK** with his tongue, without her consent.

COUNT 4

Statement of Offence

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

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of December 2013 and the 31st day of December 2013, at Gau Island in the Central Division, penetrated the vagina of JK with his penis, without her consent.

[37] As you would observe the accused has been charged with one count of Indecent Assault and three counts of Rape.

[38] The offence of Indecent Assault has been described in Section 212 of the Crimes Act No. 44 of 2009 (Crimes Act) in the following terms:

212. — (1) A person commits a summary offence if he or she unlawfully and indecently assaults any other person.

(2) It is no defence to a charge for an indecent assault on a boy or girl under the age of 16 years to prove that he or she consented to the act of indecency.

(3) It shall be a sufficient defence to a charge for an indecent assault on a boy or girl under the age of 16 years to prove that —

(a) the boy or girl consented to the act of indecency and that the person so charged had reasonable cause to believe, and did in fact believe, that the boy or girl was of or above the age of 16 years; or

(b) that the offender was of a similar age to the boy or girl and that consent to the act of indecency was given in the context of a continuing friendship between the offender and the boy or girl.

(4) No person who is on a relationship of control or trust over the boy or girl may rely on a defence provided for in sub-section (3).

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

(i) The accused;

- (ii) During the specified period (in this case between the 1 August 2013 and 31 August 2013);
- (iii) At Gau Island, in the Central Division;
- (iv) Unlawfully and indecently assaulted JK, the complainant, by fondling her breasts.

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

[41] The second element relates to the specific period during 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 accused would be guilty of Indecent Assault, if he unlawfully and indecently assaulted the complainant. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of fondling the complainant's breasts by the accused is an indecent act and thereby amounts to Indecent Assault.

[43] In terms of Section 212 (2) of the Crimes Act, it is no defence to a charge for an Indecent Assault on a boy or girl under the age of 16 years to prove that he or she consented to the act of indecency. The complainant in this case was 14 years and 9 months old in August 2013.

[44] Let me now explain the elements of counts two and three, Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act.

[45] Section 207(1) of the Crimes Act reads as follows:

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

[46] Section 207(2) (b) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a); or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

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

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

(2) A person rapes another person if —

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

[48] Section 207(2) (b) refers to a person penetrating the vulva, vagina or anus of the other person, to any extent, with a thing or a part of the person's body that is not a penis.

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

- (i) The accused;
- (ii) During the specified period (in this case between the 1 August 2013 and 31 August 2013);
- (iii) At Gau Island, in the Central Division;
- (iv) Penetrated the complainant's vagina, with his finger;
- (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.

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

- (i) The accused;
- (ii) During the specified period (in this case between the 1 December 2013 and 31 December 2013);
- (iii) At Gau Island, in the Central Division;
- (iv) Penetrated the complainant's vagina, with his tongue;
- (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.

[51] I will now elaborate upon each of these elements together, in respect of both counts 2 and 3.

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

[53] The second element relates to the specific period during 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.

[54] The fourth element involves the penetration of the complainant's vagina; with the accused's finger (for count 2) and with his tongue (for count 3). The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the complainant's vagina with his finger (for count 2) and with his tongue (for count 3) to any extent.

[55] 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 finger (for count 2) and with his tongue (for count 3), without her consent.

[56] 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.

[57] Apart from proving that the complainant did not consent for the accused to insert his finger (for count 2) and his tongue (for count 3), 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.

[58] 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 over the age of 13 years at the time of the incident, and therefore, she had the mental capacity to consent.

[59] Let me now explain the elements of count four, Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act.

[60] Section 207(1) of the Crimes Act reads as follows:

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

[61] 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

[62] 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.

- [63] 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.
- [64] Therefore, in order for the prosecution to prove the fourth count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) During the specified period (in this case 1 December 2013 and 31 December 2013);
 - (iii) At Gau Island, in the Central Division;
 - (iv) Penetrated the vagina of JK 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.
- [65] 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.
- [66] The second element relates to the specific period during 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.
- [67] 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.
- [68] 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.
- [69] You should again 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.

[70] 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.

[71] As mentioned before 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 over the age of 13 years at the time of the incident, and therefore, she had the mental capacity to consent.

[72] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Indecent Assault and Rape are obviously considered as Sexual Offences. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

[73] If you are satisfied beyond any reasonable doubt that the accused, between 1 August 2013 and 31 August 2013, at Gau Island, unlawfully and indecently assaulted JK by fondling her breasts, then you must find him guilty of the first count of Indecent Assault.

[74] If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the first count of Indecent Assault.

- [75] If you are satisfied beyond any reasonable doubt that the accused, during the period 1 August 2013 and 31 August 2013, at Gau Island, penetrated the vagina of JK with his finger, 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 second count of Rape.
- [76] If you find that the prosecution has failed to establish any of these elements in relation to the second count of Rape, then you must find him not guilty of Rape.
- [77] If you are satisfied beyond any reasonable doubt that the accused, during the period 1 December 2013 and 31 December 2013, at Gau Island, penetrated the vagina of JK with his tongue, 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 third count of Rape.
- [78] If you find that the prosecution has failed to establish any of these elements in relation to the third count of Rape, then you must find him not guilty of Rape.
- [79] If you are satisfied beyond any reasonable doubt that the accused, during the period 1 December 2013 and 31 December 2013, at Gau Island, penetrated the vagina of JK 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 fourth count of Rape.
- [80] If you find that the prosecution has failed to establish any of these elements in relation to the fourth count of Rape, then you must find him not guilty of Rape.
- [81] However, in the event you have a reasonable doubt as to whether the prosecution has proven the two elements based on consent, which I explained earlier, beyond reasonable doubt and therefore the offence of Rape, in count four is not established, as an alternative, you may consider whether the accused is guilty or not guilty of the lesser offence of Defilement of a Young Person between 13 and 16 Years of Age, in respect of the said count, though the accused is not formally charged in the Amended Information for that offence.
- [82] In terms of Section 215(1) of the Crimes Act:

"A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years"

- [83] As I have mentioned before, in layman's terms, having carnal knowledge with or of any person, means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.
- [84] Therefore, for the prosecution to prove the offence of Defilement of a Young Person between 13 and 16 Years of Age, the prosecution must establish beyond reasonable doubt that the accused, during the period 1 December 2013 and 31 December 2013, at Gau Island, penetrated the vagina of the complainant, who is between the age of 13 and 16 years, with his penis.
- [85] It is a defence to this offence if it appears to you that the accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years at the time.
- [86] No issue of consent comes into play under Section 215(1) of the Crimes Act, as it is said it is no defence to any charge under this Section to prove that the person consented to the act.
- [87] I wish to remind you once again that you need to go in this direction ONLY if you find that the prosecution has failed to establish the two elements based on consent beyond reasonable doubt in count four. If you are satisfied that the prosecution has established all the elements constituting the offences of Rape beyond reasonable doubt, then you must find the accused guilty of Rape as charged in respect of count four.
- [88] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [89] 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 "*Agreed Facts*" without placing necessary evidence to prove them:
1. That JK (hereinafter referred to as "the complainant") is the granddaughter of JOSEFA VODONAYALEWA (hereinafter referred to as "the accused").
 2. That the complainant and her sister reside in accused's house with his wife at Navuikailagi in Gau Island in 2010 until the accused was arrested by police. The complainant's father passed away and her mother has remarried which is the reason why they are residing with their grandparents.
 3. That the house is made of corrugated iron roof and coconut thatched walls.

4. That the complainant was attending Year 9 (Form 3) at Gau Secondary School in 2013. She had spent the school term breaks for Term 1 to Term 3 at the accused house.
5. That on 29 November 2015, the accused confessed to Semi Vueti (a lay Pastor) that he had sexual intercourse with the complainant. He further stated that he had no sex with his wife for about 8 months to 10 months in 2013.
6. That the matter was reported to the police.
7. That the complainant was taken for medical examination on 17 December 2015 at Qarani Health Centre.

[90] You must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[91] The prosecution, in support of their case, called the complainant, JK, an Assistant Pastor (lay Pastor), Semi Vueti and Waisake Yavala Dakai, a Minister of the Methodist Church. The prosecution also tendered the following documents as a prosecution exhibits:

Prosecution Exhibit PE1 – A sketch drawn by the complainant of the house where she was residing.

Prosecution Exhibit PE2 – A sketch drawn by the complainant of the portion of the house which is considered as the bedroom (the outline of the bedroom).

[92] Evidence of the complainant JK

- (i) *The complainant testified that she is currently residing at Kora Island with her spouse.*
- (ii) *She said that her date of birth is 25 October 1998. Thus she is currently 19 years of age.*
- (iii) *In the year 2013 she was living in Gau Island. She was staying there with her grandfather, Josefa Vodonayalewa, and her grandmother, Sera Yabaki. They are her father's parents. Her father had passed away in the year 2000. Thereafter, her mother had remarried and was staying in Kora Island. Thus, she was taken by her grandparents to stay with them. They had gone to Gau Island in 2010. Prior to that they had been staying in Samabula.*

- (iv) *Therefore, in 2013, she was staying with her grandparents in Gau Island. She was attending Gau Secondary School and was in Class 9 (Form 3). Whilst in Class 7 and 8 she was attending Navukailagi District School, also in Gau Island.*
- (v) *In 2013, she was boarded during the school term. There are 3 school terms in a year. During the school holidays she used to come back and reside at her grandparents' house. The Term 1 holiday is for 2 weeks in April/May; the Term 2 holidays is for 2 weeks in August; and the Term 3 holidays is for about 8 weeks starting in December and going on till January/February the following year.*
- (vi) *The witness clearly described her grandparents' house, which was a single story house. She drew a sketch of the house, which was tendered to Court as Prosecution Exhibit PE1. She also drew a sketch of the portion of the house which is considered as the bedroom. There is a single bed and a TV rack in this portion of the house. This sketch was tendered to Court as Prosecution Exhibit PE2.*
- (vii) *The witness testified that in 2013, it was her grandmother, grandfather, her younger sister, Lanleta Koto, and her herself who were staying in the house. The complainant said that she was not so close to her grandmother. When asked about her grandfather, she said he was good. When she was boarding and wanted something, she would tell her grandfather and he would provide it. She viewed her grandfather as her own father and trusted him.*
- (viii) *The complainant testified to the events which took place, during the second term school break (in the month of August 2013). As usual she had gone to her grandparents' home during the holidays. Her grandmother, grandfather, her younger sister, and her herself were staying in the house.*
- (ix) *She had been at Pastor, Waisake Yavala's place to have lunch. She visits the pastor's house quite frequently (almost on a daily basis). After lunch, she had gone back home to have her bath. This was around 1.00 in the afternoon.*
- (x) *When she had arrived home, only her grandfather was present at the time. She doesn't recall where her grandmother and sister were at the time. Her grandfather was lying down in front of the door, facing towards the bathroom. The witness showed on PE1 where her grandfather was lying down at the time.*
- (xi) *The complainant had entered through the front door and had gone straight to the bedroom. She had gone into the bedroom to look for her clothes. Thereafter, she had left her change of clothes in the room,*

and gone to the bathroom to have her bath. She was wearing a T-Shirt and a skirt at the time. She had taken her towel with her. She went to the bathroom through the door where her grandfather was lying down at the time.

- (xii) After finishing her bath, she went back to the bedroom to get dressed. She was wearing only a towel around her at the time. At this point, she had entered the house through the front door. She had not used the door that she used earlier to go to the bathroom, because her grandfather was lying there.
- (xiii) After going to the bedroom she had closed the curtain that separates the bedroom from the remaining portion of the house. She had been getting dressed. At the time, she had been facing the back of the house.
- (xiv) She had then seen her grandfather come into the room. She could see him coming in from where she was standing. He had come from the side of the TV rack. She had been wearing a skirt and a T shirt at the time.
- (xv) At the time she saw her grandfather come into the room, she was just standing, because she thought he came to get something from the room.
- (xvi) Thereafter, her grandfather had come beside her and was touching her. He had stood behind her and put his hands in front of her and started touching her breasts. The witness demonstrated in Court as to how her grandfather was touching her from behind. The complainant said that her grandfather was touching her breasts over her clothes. He had been touching her breasts for one minute.
- (xvii) The complainant had remained still. When asked why she remained still, the complainant said, that her grandfather had asked her to remain still and not to move. She had not screamed or shouted out for help because she had felt scared and embarrassed. She didn't try to run away or break free because her grandfather was hugging her tightly.
- (xviii) Thereafter, one of his hands moved down and touched her panty and private part. He used his hand and put it into her private part. He had used his right index finger for this purpose. At the same time, he was touching her breasts with his left hand. When asked as to where she felt his finger go into/which area of her private part did she feel his finger go into, the witness answered, inside of her private part. When asked as to how she knew the finger went inside her private part, she answered, "Because I know. I can feel it". The complainant testified

that her grandfather had used his finger inside her private part for three minutes.

- (xix) The witness said that she was scared at the time. She did not try and scream as her grandfather had told her to keep quite. At the time she had told her grandfather not to do what he was doing and to stop. She said, she had told him twice. However, he had not said anything.*
- (xx) The complainant testified that she had not consented to her grandfather touching her breasts or to putting his finger into her private part.*
- (xxi) When the complainant was asked as to what she meant by her private part, she said "vagina".*
- (xxii) The complainant said that at this point in time, her grandfather wanted her lie down. To pull her down he had freed his hands. At that stage, the complainant had run outside the house. She had run to Pastor Walsake Yavala's house. She said, she didn't tell anybody about what had happened as she was scared. She had stayed the night at the Pastor's house.*
- (xxiii) She had returned home the next morning. Her grandfather, grandmother and sister had been present at home. However, she did not say anything to them because she was scared, neither did she go and report the matter to the Police.*
- (xxiv) In the third term she returned to school. During the school term she was again boarded at school. She did not inform any of her teachers or friends as to what her grandfather did to her during the second term holidays. She said she had been embarrassed and afraid to tell anybody.*
- (xxv) At the end of third term, she had returned home for the school holidays. This was in December 2013. During the school holidays, her grandfather, grandmother, sister and her paternal uncle Tuimola, were at home. Her uncle was only visiting and didn't stay overnight.*
- (xxvi) The complainant testified that her grandfather usually sleeps on the single bed and sometimes in the living room. Her grandmother usually sleeps in the living room. The complainant said that she sleeps in the bedroom (middle of the TV rack). Her sister sometimes sleeps in the living room and sometimes sleeps besides the complainant in the bedroom. They sleep on a mattress.*
- (xxvii) The complainant then testified to the events that took place during the school holidays, in December 2013. They were all at home having dinner. After dinner, they had been watching a movie. Her grandfather, grandmother, her sister and herself. This was after 8.00*

in the night. When she looked back she saw her grandmother and sister sleeping in the living room. Her grandfather had been lying on the bed. The complainant kept on watching the movie. She had then fallen asleep.

- (xxviii) Whilst she was sleeping, she had felt that someone was touching her face and her breasts. When she woke up she had seen her grandfather lying on top of her naked. She had remained still because her grandfather was lying on top of her. He had asked her to keep quite. The complainant had been shaking and had been scared. She could not scream as her grandfather had put his hand over her mouth. When she looked towards the living room, she saw that the curtains were closed.*
- (xxix) At the time she was lying down, her grandfather got up. One of his hands was on her stomach and with the other hand he separated her legs and pulled down her panty. The complainant had been wearing a T-shirt and a skirt at the time, and inside she was wearing a panty and a bra. Thereafter, her grandfather put his tongue into her vagina. He licked her vagina. He had been doing this for one minute. She had felt his tongue licking her vagina. While he was licking her vagina, he was touching her breasts with his left hand. While her grandfather was licking her vagina and touching her breasts she had been telling him not to do so and was moving around. However, she could not break free because he was holding her.*
- (xxx) Thereafter, her grandfather had put his private part into her vagina. When asked as to what she meant by private part, the complainant said his "penis". He had put his penis inside her vagina. She had felt that it was very painful. "Because it went inside of me". The complainant said that he was pushing his penis in and out of her vagina. He was doing this for three minutes.*
- (xxxi) The complainant said that she had not consented to her grandfather licking her vagina or putting his penis into her vagina.*
- (xxxii) Her grandfather had stopped when he heard her grandmother wake up. Thereafter, he went and put his clothes on and went to lie down on his bed. The complainant had then put on her panty, taken her pillow and gone and slept besides her grandmother and her sister.*
- (xxxiii) The complainant clearly identified her grandfather as the accused in Court.*
- (xxxiv) The witness was cross examined at length by the counsel for the Defence.*

(xxxv) *The Defence suggested to the complainant that she had consented to the accused fondling her breasts and also had agreed for the accused to have sexual intercourse with her. The complainant denied these suggestions.*

(xxxvi) *The Defence also suggested to the complainant that the accused never used his finger to penetrate her vagina nor that he ever used his tongue to penetrate her vagina. The complainant said that he did use his finger and his tongue to penetrate her vagina.*

(xxxv) *The Defence also suggested that the reason the complainant did not complain about this incident from 2013 until December 2015, was because she had consented to the accused fondling her breasts and also had agreed for the accused to have sexual intercourse with her. The complainant denied these suggestions.*

(xxxvi) *The following suggestions were also put to the complainant in cross examination:*

Q. Would you agree that you were not scared but you were embarrassed of what happened?

A. Yes

Q. You agree that it would have been embarrassing because you had agreed to have sexual intercourse with Josefa?

A. No

Q. You agree that it was embarrassing because you had allowed the Josefa to fondle your breasts?

A. No

Q. You will agree that you would have felt really embarrassed when you found out in 2015, that Josefa had gone to confess to a lay Pastor?

A. No

Q. And wouldn't you agree that the reason why you have blamed Josefa for doing this to you is because after that everyone else in the village found out about the incident?

A. No.

.....

Q. How did you feel when Josefa had confessed to the lay Pastor that you had sexual intercourse with him?

A. I felt good.

.....

(xxxvii) The Defence showed an inconsistency made by the complainant in her statement to the Police, compared to her testimony in Court. In her statement to the Police she had said "During the penetration I could not feel any pain". However, the complainant answered by saying, "I know in my statement it is written there, that I did not feel the pain. But for me I really felt the pain".

(xxxviii) The Defence also showed an omissions in the complainant's statement to the Police in comparison to the evidence the witness gave in Court. That is that the complainant has failed to state in her statement to the Police that the accused had asked her keep quiet or to be quiet. The complainant answered that she had said so to the Police.

[93] Evidence of Semi Vueti

- (i) He is an Assistant Pastor, Vakatawa. He currently resides in Waitoga Village in Nairai.
- (ii) He testified he has been an Assistant Pastor for 20 years. As Assistant Pastor his duties are to assist church members in their holy/spiritual life.
- (iii) In 2013, he was based in Gau Island.
- (iv) He testified that he knows the accused. He had got to know the accused when he was posted at Navukailagi in 2015.
- (v) The witness testified that in the second week of November 2015, there was a week of cleansing. He had met the accused during that week.
- (vi) On Tuesday, the following week, the accused had told him that he burned some Playboy magazine's together with some CDs of bad movies.
- (vii) On 29 November 2015, the accused had come to his house early in the morning to meet him. The accused had asked him whether they could speak privately.
- (viii) The accused had told him that he had raped his granddaughter in 2013 when the child was in Form 3. He said that for 8-10 months he had not been sleeping with his wife (not having sex with his wife). The witness had told the accused that the week of cleaning has finished so this will have to follow the law.
- (ix) The next day he had gone to the Pastor (Talatala) and informed him about what the accused had told him. The name of the Pastor is Rev.

Waisake Yavala. The Pastor had told him that the church cannot do anything about this. So for him to go and inform the Village Headman. Accordingly, the witness had gone and met the Village Headman. The matter had then been reported to the Police.

- (x) *It was put to the witness in cross examination, that in his statement made to the Police, he had stated that the accused had only told him that he had sexual intercourse with his grand-daughter. The witness said that the accused had told him that he had raped the complainant and that is what he had told the Police.*

[94] Evidence of Waisake Yavala Dakai

- (i) *He has been serving as a Methodist Church Minister for 5 years.*
- (ii) *In 2013, he was serving at Novukailagi in Gau.*
- (iii) *He recalls the incidents which took place in November 2015. He said that the lay Pastor Semi had come and told him that the accused had raped his grand-daughter.*
- (iv) *The witness then told the lay Pastor that this kind of case cannot be solved in church because it has broken the law of the government. Therefore, the law has to take its course. Accordingly, he had told the lay Pastor to go and inform the Village Headman and to report the matter to the Police.*

[95] 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

[96] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, JK, an Assistant Pastor (lay Pastor), Semi Vueti and Waisake Yavala Dakai, a Minister of the Methodist Church, to prove its case.

- [97] As I have informed you earlier, the burden of proving each ingredient of the four charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [98] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [99] 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 beyond reasonable doubt. Based on the said agreed facts the identity of the accused is proved, as it has been agreed 'That JK (hereinafter referred to as "the complainant") is the granddaughter of JOSEFA VODONAYALEWA (hereinafter referred to as "the accused")'.
- [100] The prosecution must prove the other elements of the offences of Indecent Assault and Rape beyond reasonable doubt.
- [101] The accused is taking up the position that he fondled the complainant's breasts with her consent. He also takes up the position that he had sexual intercourse with her consent. The complainant totally denies this position and states that she did not consent to these acts at any point in time.
- [102] The accused denies that he penetrated the complainant's vagina with his finger and also denies that he penetrated her vagina with his tongue. The complainant has testified that the accused did penetrate her vagina with his finger and also he penetrated her vagina with his tongue.
- [103] The defence also showed certain inconsistencies and omissions in the evidence given by the complainant and witness, Semi Vueti, during their testimony in Court. I have already directed you on 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. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected. 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.
- [104] 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.
- [105] 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 four charges, 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 offences, beyond reasonable doubt.

[106] You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the other count as well,

[107] 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 charges of Indecent Assault and Rape;*
- ii. If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of Indecent Assault and 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.*
- iii. As an alternative to Rape in count four, you may consider whether the accused is guilty or not guilty of Defilement of Young Person between 13 and 16 Years of Age in respect of the said count.*

[108] Any re directions the parties may request?

[109] 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 four counts 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.

[110] Your possible opinions should be as follows:

Count 1

Indecent Assault- Guilty or Not Guilty

Count 2

Rape- Guilty or Not Guilty

Count 3

Rape- Guilty or Not Guilty

Count 4

Rape- Guilty or Not Guilty

If not guilty,

In the alternative


Defilement of Young Person between 13 and 16 Years of Age- Guilty or Not Guilty

[111] I thank you for your patient hearing.



AT SUVA

Dated this 2nd Day of July 2018


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

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