

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 201 of 2018**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

**TAIONE PETERO SENIKUTA**

**Counsel** : Ms. S. Serukai for State  
Ms. M. Ratidara for Accused

**Hearing on** : 28<sup>th</sup> January – 31<sup>st</sup> January 2019

**Summing up on** : 01<sup>st</sup> February 2019

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

**SUMMING UP**

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.

2. Evidence in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibit tendered. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

6. The complainant said she is 08 years old and she gave evidence about an incident that had allegedly taken place last year. You may have come across children of this age. You will have an idea of the way a child of a particular age behave, think, talk and the way they describe things.
7. Children can be confused about what has happened to them. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time that what they were doing was wrong.
8. I mention these possibilities because 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 is, however, a decision for you to make.
9. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.
10. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence

given by witnesses on the same issue. This is how you should deal with each inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.

11. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
12. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
13. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
14. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those

proven facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proven facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proven facts, then you should not draw the adverse inference.

15. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
16. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
17. In order to prove that the accused is guilty of the offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
18. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.

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

**COUNT ONE**

*Statement of Offence*

**Rape:** contrary to section 207 (1) and (2)(b) and (3) of the Crimes Act of 2009.

*Particulars of Offence*

**TAIONE PETERO SENIKUTA**, on the 29<sup>th</sup> of April, 2018 at Nadoi Village, Rewa, in the Central Division, penetrated the vulva of CS, who is a child under the age of 13 years old, with his finger.

22. To prove the offence of rape in this case, the prosecution must prove the following elements beyond reasonable doubt:
  - a) the accused;
  - b) penetrated the complainant's vulva with his finger;
  - c) without the consent of the complainant; orthat the complainant was below the age of 13 years at the time of the incident.

23. The first element of the offence of rape is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.
24. Second element involves penetration. To establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vulva of the complainant with his finger. A slightest penetration is sufficient to satisfy this element.
25. Law says that 'a child under the age of thirteen years is incapable of giving consent'. It is an admitted fact in this case that CS was 08 years old at the time of the alleged incident. Therefore, you should consider that the third element above is proven beyond reasonable doubt.

#### ***Prosecution case***

26. The complainant said in her evidence that;
  - a) *She is 8 years old. She said she went to watch television at one Salote Nabou's house on 29/04/18. Her friend Katalina and Lewasau were also watching TV with her. They were in the living room. After sometime, Katalina and Lewasau went to their houses to have tea and she continued to watch TV.*
  - b) *While she was alone watching TV, the accused came and sat beside her. At that time she was lying down on her chest. She said the accused then started touching her right leg, asking her what happened to her leg. She said the accused started from her toes and then went up to her 'Pesi'. When requested by the prosecutor to show what the accused did, she came out of the witness box and moved her hand from her toes up to her groin area.*
  - c) *She said the accused then poked her 'Pesi' with his finger and that the finger went inside her 'Pesi'. She said it was painful when he did this. Thereafter the accused told her not to tell anyone and he left. She continued watching TV and no one joined her to watch TV*

thereafter. She said the incident happened on a Sunday and the following day she told her friend Katalina about the incident.

- d) She said that Katalina told another friend and thereafter her father came to know about it and questioned her. After she told her father what happened, her father took her to the police.
- e) During cross-examination she agreed that there are houses nearby to the house she was watching TV that day. She agreed that there is a door in the living room which is used to go in and out of the house. She denied the suggestion that the said door is always open during day time.
- f) She agreed that she watched Las Vegas Sevens with her friends at Alivereti's house. She denied the suggestion that the accused smacked her bottom on that day blaming her that she farted in the living room. She said she did not tell her mother or father about the incident because she was scared.
- g) She agreed with the suggestion that the story only came up because of the rumors that spread in the village.

27. The second prosecution witness was Dr. Elvira Ongbit. She said that;

- a) She had been a medical doctor for more than 31 years. She had specialized in obstetrics and gynecology. She medically examined the complainant on 07/05/18. She tendered the medical report as PE 1. She said the complainant was calm and cooperative.
- b) She observed a fresh hymenal laceration at the 8 o'clock position, a bruise and redness. She said the word fresh means from the time of injury until the injury is completely healed. She said a laceration is a break in the continuity of the skin. She said the laceration was caused by the impact or force applied through the vaginal opening and that injury could have taken place within 15 days prior to the date of examination.
- c) In her opinion the injuries she noted could have been caused by a finger forced on the hymenal opening 7 days before the examination. She said force had been applied through the vulva to the vaginal opening. She said if a finger is forced to the vaginal opening it is possible to feel pain.
- d) During cross-examination she said appearance of a wound would be different at different stages depending on whether the wound is infected or not. She said the wounds were not



*infected when she examined.*

28. The third prosecution witness was WDC Irinieta Naqolo. She said;
- a) *She was one of the investigating officers in this case. In this case she was instructed to record the statement of the complainant's father and to visit the scene.*
29. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence and to call witnesses.
30. The accused said in his evidence that;
- a) *He had lived in Nadoi village for 30 to 40 years. He said there are 5 houses immediately surrounding Alivereti and Salote Nabou's house. He used to go to Alivereti's house to tell stories, charge his phones and to watch TV. This house has three doors and he would usually enter from the door in the sitting room which is near the bathroom going to the kitchen. He said this house was like the boys center in the village where they would go after work to smoke cigarettes and to watch TV.*
  - b) *He said in the first week of March last year, he watched Las Vegas Sevens at Alivereti's house. He said Alivereti's wife, he, Katalina, the complainant, Sailasa and Vucago were there and Alivereti was having a nap. After a while he left that house to bring his phones to have them charged. When he came back four children were playing outside and only the complainant was there.*
  - c) *He said the complainant called him to show him a plaster on the complainant's right leg. As he was still looking at the plaster, the other kids came inside the house. Then one of them farted and he thought that it was the complainant. He then spanked the complainant's bottom (buttocks). Later he realized that it was not the complainant but Katalina who farted. Then all children including the complainant ran outside the house.*
  - d) *He denied the allegation against him and said, if he really did that he would have run away because he knows the consequences. He said when he spanked the complainant, she*

*was wearing her clothes. He said apart from spanking her 2 times that day, he did not have any form of physical contact with the complainant.*

- e) During cross-examination, he denied watching TV alone with the complainant. He said when he touched the complainant's foot, the other kids suddenly came inside the house and this happened in March last year. He denied the allegation.*

31. The second witness for the defence was Katalina Wakalo. She said;

- a) Last year when she was watching TV with the complainant at Alivereti's house the accused was looking at the complainant's leg. She said the complainant had a boil on her leg. After that she came outside with Lewasau and Vucago but the complainant and the accused were inside the house watching movies. Thereafter she, Lewasau and Vucago went to church as it was a Sunday. She said Salote and Alivereti were in the room.*
- b) During cross-examination she said when she was at Alivereti's house, Salote and Alivereti were awake and the room door was open. She said she was not able to see Alivereti and Salote from the living room and they were not able to see her. She said she was not watching Las Vegas Sevens that day.*

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

33. The agreed facts in this case are as follows:

- 1. That the Complainant in this matter is CS.*
- 2. That CS was born on 27/3/2010 and was 8 years old at the time of the alleged offence.*
- 3. That Taione Senikuta, was 59 years old at the time of the alleged offence.*
- 4. That Taione Senikuta resides in Nadoi Village, Rewa.*
- 5. That on the 29<sup>th</sup> of April, 2018, Taione Senikuta joined CS at Salote Nabou's house, to watch television in the living room.*

34. As I have already highlighted, experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, if there is a delay in making a complaint, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. Therefore, if there is a delay in making a complaint, you should look whether there is a reasonable explanation to that delay. Ultimately 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.
35. The second prosecution witness gave her medical opinion based on what she observed and her experience. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the second prosecution witness. Evaluating her evidence will therefore include a consideration of her expertise, her findings and the quality of the analysis which supports her opinion. In the event you accept her opinion, you should bear in mind that the said opinion would only support the fact that the complainant's vulva had been penetrated by a foreign object which includes a finger and that this could have taken place within 15 days prior to 07/05/18 which was the date of the medical examination. The medical evidence does not establish that the accused penetrated the complainant's vulva.
36. When you consider PE 1, you should remember that what is written in A(4) and D(10) are not admissible when considering the question whether the facts stated therein are true because those parts are filled based on information received and not

based on what the respective authors had witnessed. That is the reason for what is written in A(4) and D(10) to be blotted out.

37. The accused denies the allegation that he penetrated the complainant's vulva with his finger. The defence says that the complainant is lying. Defence points out that the account given by the complainant is not probable.
38. As it is agreed that the complainant was below the age of 13 years at the material time, consent is not an issue in this case. Therefore, the only issue you should decide in this case is whether the prosecution has proven beyond reasonable doubt that the accused penetrated the complainant's vulva with his finger.
39. According to the second witness for the prosecution the doctor who examined the complainant, there was evidence that force had been used through the complainant's vulva to her vaginal opening within 15 days prior to 07/05/18. The doctor could not say exactly what object was used but she said it can be a finger. If you accept this evidence you may consider it as supportive of the fact that the complainant's vulva was penetrated by a foreign object on or about the date of the alleged offence.
40. The prosecution says that the accused penetrated the complainant's vulva and the accused says that he did not do it and the only physical contact he had with the complainant was to hit her on her buttocks. Given the evidence presented before this court, you should ask yourselves whether you are satisfied beyond reasonable doubt that the accused penetrated the complainant's vulva.

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

If you are sure that the prosecution has proven all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

44. Any re-directions?

45. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
46. Your opinion should be whether the accused is guilty or not guilty.



A handwritten signature in blue ink, appearing to read "Vincent S. Perera".

Vincent S. Perera

JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for Accused