

opinions as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.

2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of facts. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for the Prosecution and the Accused made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the Accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.

9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this courtroom. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw inferences from proved facts if you find those inferences reasonable in the circumstances. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of facts in a trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
12. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gives evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable. But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
13. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who have given evidence in court. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.

14. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told Court contradicts with his/her earlier version. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter.
15. When you evaluate evidence of witnesses, please bear in mind their intellectual capabilities, their personal circumstances, their level of education and maturity, and then try and look at things from their perspective. If it appears reasonable from their perspective, then you might think he or she is reliable and believable.
16. You can consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.
17. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. Victims of sexual offences can react to the trauma 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, do not complain or go to authority for some time. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. It takes a while for self- confidence to reassert itself. There is, in other words, no classic or typical response by victims of Rape. It is a matter for you to determine whether, in this case, complaint victim made to police is genuine and what weight you attach to the complaint she eventually made.

18. You will appreciate that children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. You have to be mindful about that.
19. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it, and about using words they think are naughty, and therefore find it difficult to speak. Bear in mind that they are being asked questions by an adult they see as being in a position of authority- the policeman in the interview, or a counsel in Court. That can make it difficult for them.
20. You saw that a screen was put up in front of the accused so that the complainant could not see the accused. The screen was put up and other special arrangements were put in place because the complainant in this case is an underage vulnerable witness. By looking at those special arrangements, you must not draw any negative inference against the accused.
21. I now wish to direct you on recent complaint evidence. You heard the complainant say that she relayed the incident to her grandmother, Sam Raji. Sam Raji gave evidence and said that she received the complaint from the complainant on two separate occasions.
22. Sam Raji was not present when the alleged incident happened and therefore, she is not in a position to give evidence as to what actually happened between the complainant and the accused. What she heard from the complainant is not evidence as to what actually happened between the complainant and the accused. Recent complaint evidence is led to show consistency in the conduct of the complainant and is relevant in assessing her credibility.

23. If you find that the complainant had made a complaint that you find to be 'recent' in the circumstances of this case and her grandmother to be a credible witness, than you may use the complaint the complainant had made after the alleged incident to test the consistency and credibility of the conduct of the complainant.
24. You may consider whether there is a reason or motive on the part of the prosecution's witnesses to make up an allegation against the accused. If the witnesses had such a motive, then you may think that this allegation has been fabricated. If there is no such apparent reason or motive, you may conclude that the allegation is truthful.
25. I have given you a copy of the information which contains the charge against the accused. Please refer to it. The information reads as follows:

Statement of Offence

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

Particulars of Offence

Rajesh Prasad on the 30th day of December, 2017 at Labasa in the Northern Division, penetrated the vagina of SW, a child below the age of 13 years, with his penis.

26. I will now deal with the elements of the offence of Rape. A person rapes another person if:
 - (a) The person has carnal knowledge with or of the other person without other person's consent; or
 - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
 - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

27. Vulva is the external female genitalia that surround the opening to the vagina. Insertion of penis fully into vagina is not necessary to constitute the offence of Rape. A slightest penetration is sufficient to satisfy this element.
28. Consent as defined by Section 206 of the Crimes Act means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent. A person under age of 13 years is considered by law as a person without necessary mental capacity to give consent. There is no dispute that the complainant in this case was 11 years of age at the time of the alleged offence and therefore, she did not have the capacity under the law to consent. So, the Prosecution does not have to prove the absence of consent on the part of the victim because law says that she, in any event, cannot consent.
29. The elements of Rape in this case are that:
 - a. the accused, Rajesh Prasad
 - b. penetrated the vulva or vagina of the SW, with his penis.
30. Other parts of the offence are irrelevant to the facts of this case.
31. If you believe the version of the complainant but you are not sure if the accused had penetrated either the vulva or the vagina at least slightly with his penis, you should consider whether the elements of lesser offence of Sexual Assault have been satisfied, although the accused has not been charged with Sexual Assault in the information.
32. To make out the offence of Sexual Assault, the Prosecution must prove beyond reasonable doubt that the accused unlawfully and indecently assaulted the complainant. The word "unlawfully" simply means without lawful excuse. The assault becomes indecent when it is committed in circumstances of indecency. A circumstance of indecency is what right minded people would consider indecent. Assault can be defined as an application of unlawful force on another's body.
33. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence

beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.

34. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the victim was a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.
35. In this case the Defence relies upon the defence of *alibi*. I will now explain to you what defence of *alibi* is.
36. Defence of *Alibi*, in simple terms, is that the accused takes up the position that he was elsewhere at the time of the commission of the offence with which he is charged. The accused says that he was elsewhere and he produced evidence to that effect. But, he need not prove anything. Instead, the Prosecution must prove beyond reasonable doubt, that the accused committed the crime.
37. If the evidence of an *alibi* is accepted, it destroys the credibility of prosecution's case. If you reject that evidence, it does not follow that the accused is guilty, because the prosecution case must be accepted as proved beyond reasonable doubt. Even if you conclude that the *alibi* was false, that does not by itself entitle you to find the accused guilty. It is a matter which you may take into account, but you should bear in mind that an *alibi* is sometimes invented to bolster a genuine defence.
38. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of the complainant, depending on how you are going to look at her evidence.
39. I will now remind you of the Prosecution and Defence cases. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the salient features. If I do not mention a particular piece of evidence that

does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision in this case.

Case for the Prosecution

PW1 SW (the Complainant)

40. SW is the complainant in this case. She is 13 years of age at the time she gave evidence in court. She said that in December, 2017, she was living with her grandmother Sam Raji, mother Manjula Wati, and her sister Geeta Devi in KorowitiTovata.
41. On 26thDecember, 2017, during December holidays, her mother sent her to her maternal auntie's place at Korotari because she had to look after her sister Gita Devi who was sick and admitted at Labasa Hospital. She said she travelled toKorotari by bus by herself when she was made to sit in the bus by her mother at the bus stand. When she reached Korotari, her aunty had come to the road to receive her from the bus. Upon her arrival, she saw aunty calling her mother to confirm her arrival at Korotari.
42. On 30thDecember, 2017, whilst she was still at her uncle's place, she was sleeping with her aunty and uncle. Her aunty was sleeping next to her and her uncle was next to her aunty in the same bed. It was a Saturday and early in the morning at around 5-6 a.m., aunty went to the market to sell vegitables. When aunty went to the market, her uncle did something bad to her. Uncle did aR.A.P.E... SW said that she learned about RAPE at her healthy living class in Year 7. She said RAPE is sex.
43. When asked to clarify, SW said that her uncle touched her breast and took out his hand from the breast and then put her pants down. He took out his 'wee' and put his 'wee' on her wee. 'Wee' is where the boys 'wee' from. She said she was feeling bad and she felt the itch. Uncle put the blanket down and wiped her 'wee'.
44. When a diagram of body parts of a man was shown to SW, and asked to point out where the 'wee' is, she pointed out the penis. When she was shown a diagram of

female body parts, and asked to point out the wee, she pointed out the vagina. She said that after doing the bad thing, uncle told her not to tell aunty what he did to her.

45. SW said that she told aunty what the uncle did to her and when she returned home she told her grandmother. She told the grandmother that uncle did a bad thing to her, but she did not tell grandmother that uncle put his 'wee' on her 'wee'. Then the grandmother told her aunty '*he is a big man, he is not ashamed of what he is doing*'.
46. When her birth certificate was shown, SW confirmed that she was born on 26th February, 2006. SW recognised the accused in the dock as his uncle who did the bad thing to her.
47. Under cross examination, SW said that she went to uncle Rajesh's place by bus and came back home when her sister was discharged from hospital. She said that, when the alleged incident happened, uncle Rajesh's son Krishneel was sleeping in his bed room about 4 feet away from where she was sleeping. She said that she celebrated the New Year at Jolly uncle's house.
48. She denied that her uncle also went to sell vegetables in the market with aunty on the day of the alleged incident. She also denied that her uncle and aunty were not home on the 30th December, 2017. She denied the proposition that she was not staying at uncle Rajesh's house between 27th December 2017 and 2nd January, 2018.

PW 2 Manjula Wati

49. Manjula Wati is the mother of the complainant. She came to reside at Korowiri, To-vata with her two girls, SW and Geeta Devi when the school was closed for school holidays in December 2017. On 29th or 30th of December Geeta Devi was admitted at hospital for a check-up and she had to be with her. Her mother Sam Raji told her to leave SW at her sister Tara Wati's house at Korotari. She made SW to sit in a bus heading to Waikisi and then went to the hospital. When she called on Tara Wati's phone, Tara Wati confirmed that SW was at her place. SW stayed at Tara Wati's place for 3 days and came back when Geeta Devi was discharged from hospital.

50. Under cross examination, Manjula Wati said that SW was not alone in the bus when she was seated. As her sister had told her to put SW in the bus and she will pick her, she was not worried to send SW alone. She agreed that she celebrated 2018 New Year with Geeta and Swastika at her brother Jolly (Kishore Chand)'s place in Korowiri, listening to top 100 songs being played in the radio.

PW 3 Sam Raji

51. Sam Raji is the grandmother of the complainant. She said that in 2017, her daughter Manjula Wati was at her son Kishore Chand's place in Korowiri with her two daughters SW and Geeta Devi while she was in Bua. In December, 2017, Geeta Devi fell ill and was admitted to hospital. During that time, SW was sent to her sister's daughter Tara Wati's house.
52. When she came to SW's house in December, SW told her that Rajesh raped her. She was very busy and could not concentrate on what SW said. She did not talk much about it with SW. She told her daughter not to send SW again to Rajesh's place. When she returned to Bua, SW again said that uncle Rajesh raped her and it was paining. Then she asked her how he did it. SW said when she was sleeping, uncle was cuddling her, lifted her and took to his bed, took off her clothes, made her lie on the bed, sucked her breast, and he did it. He said '*don't tell aunty he will give money*'. Raji said that she thought about family reputation and advised her daughter not to do anything.
53. That is the case for the Prosecution. At the close of the Prosecution's case, you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
54. You know that the accused elected to give evidence and call witnesses on his behalf. That is his right. By electing to give evidence accused has not assumed any

burden to prove his innocence. He has nothing to prove and is under no obligation to prove his innocence. You should give such weight as you wish to the evidence presented by Defence. The counsel for Defence put her case to the Prosecution's witnesses in her cross examination. You must take into consideration the evidence presented for Defence and the version of the defence when evaluating evidence.

Case for Defence

DW1 - Rajesh Prasad (The Accused)

55. Prasad said that, in 2017, he was residing in Korotari with his wife Tara Wati and his son Praveen alias Krishneel. On 30th December, 2017, he and his wife went to the market early in the morning to sell the vegetables at Labasa Saturday Market. He left the house with the vegetables at 6 am to catch 6.30 am bus. His son Krishneel helped them to bring the vegetables to the bus halt and Krishneel returned home. He and his wife went to the Labasa Market by bus and after setting up the vegetable stall at the market; he went to do some shopping and returned home with his wife at around 3.15 pm. When he returned home, nobody was at home. Krishneel had gone to the town.
56. Prasad said that SW, his wife's sister's daughter used to come to his house with her mother and grandmother and she had never come to his place alone. In December 2017, SW did not come to his house and she was never at his house on the 30th December 2017. On the 31st, in the evening, he was drinking kava with PanditAje, Asneel, and Rajneel, listening to Top Ten songs of the hour till 2-3 am. He denied the allegation that he had touched SW's breast and penetrated her vagina with his penis.
57. Under cross-examination, Prasad denied that only his wife had gone to the market to sell vegetables on 30thDecember, 2017. He said that he was arrested in May, 2018 and caution interviewed by police. He said he did not tell anything to police as he was shocked. He admitted that he appeared before the Magistrates Court with a lawyer from the Legal Commission and that on the instructions of his lawyer he ex-

exercised his right to remain silent and did not tell his lawyer that he went to the market with his wife on the day of the alleged offence. He denied that he cooked up a story after a long time of his arrest on the instruction of his lawyer to defend himself.

DW 2 Tara Wati

58. Tara Wati is the wife of the accused. She said that on 30th December, 2017, she went to the Saturday Market by 6.30 am. By bus with her husband Rajesh to sell the vegetables in the market. Her son helped them to carry the vegetables to the bust halt and he went back home. Rajesh was with her at the Labasa market till 8.30 am and went for shopping. She returned home by 2.30 pm. Bus. Tara Wati said that SW had never come alone to her house. She said that SW did not come to her place between 26 December 2017 and 2nd January, 2018.
59. Under cross examination, Tara Wati denied that Manjula Wati had asked her to look after SW as Geeta Devi was hospitalized. She denied that she had received SW from the bus and took her to her place. She admitted that she did not instruct the Prasad's lawyer that Prasad went to the market with her to sell vegetables on the 30th December, 2017. She admitted that she gave a statement to police in 2019. She denied that she was giving evidence to save her husband and family reputation.
60. Under re-examination, she said that she gave instructions to the lawyer only in respect of Prasad's bail.

DW 3 Praveen Pranil Prasad (Krishneel)

61. Praveen is the son of the accused. He said that on 30thDecember, 2017, he helped his mother and father to bring the vegetables from home to the bus stop. When he returned home,no one else was at home. He went to town at 9.55 am. He said that SW was never present at his house in December, 2017.

DW 4 AjeAtish Kumar

62. Aje said that he is a Pandit. He was at Prasad's house on the 31st December, 2017 to celebrate the New Year. He was having grog and listing to Top 100 Songs of the Year till 2 a.m. He said he that he did not see a little girl present at Prasad's house.
63. Under cross examination, Aje admitted that the accused is a good friend of him and that he calls him grandfather.

DW 5Kishore Chand (Jolly)

64. Kishore said that SW is sister's daughter. His sister Manjula Wati and her two daughters were residing at his place in December 2017. He was home on leave during the Christmas season. He said that on 30th December, 2017, SW was home with her sister Geeta and they never left the home.
65. Under cross examination, Kishore admitted that he is charged in the Magistrates Court with sexual assault and SW is the complainant in that case also. He denied that he was giving evidence against SW because of the complaint she had made against him.
66. That is the case for Defence

Analysis

67. Lady and gentlemen assessors, the accused is charged with one count of Rape. To find the accused guilty of Rape in this case, you must be satisfied that the Prosecution has proved beyond a reasonable doubt that the accused penetrated complainant's vulva or vagina with his penis.



68. Accused denies the allegation. The case for the Defence is that the accused was not at his house at the material time and that the complainant was never present at his house on the alleged date of incident.
69. There is no dispute that the 'uncle' the complainant was referring to in her evidence is the accused in this case. The Defence Counsel did not cross examine the complainant on the basis that accused Rajesh Prasad is not the 'uncle' she was referring to in her evidence-in-chief. The complainant identified the accused as the person who had done bad things to her.
70. There is also no dispute that the complainant was under the age of 13 years at the time of the offence. Therefore, the only dispute in this case is in respect of penetration.
71. Prosecution called three witnesses, the complainant- SW, her mother Manjulawati and her grandmother Sam Raji. Prosecution's case is substantially based on the evidence of the complainant. Defence called the accused and four other witnesses. The resolution of the dispute depends on whether you could accept the evidence of the prosecution as being credible and believable.
72. Prosecution says that the complainant told the truth in court. If you are satisfied that she told the truth in court and if you can believe her story, then you can safely act upon her evidence in coming to your conclusion. No corroboration of her evidence is required. However, you may look at other evidence to test the consistency and credibility of her version.
73. The Prosecution relies on Sam Raji's evidence to prove the consistency of the conduct of the complainant. The complainant said that she complained to the wife of the accused, Tara Wati and, later, when her grandmother visited her, to the grandmother. Complainant's grandmother Raji confirmed that on two occasions, the complainant complained to her.

74. There is no specific evidence as to the dates on which the alleged complaints were made to the grandmother. The accused had been arrested and interviewed in May 2018 whereas the alleged incident had occurred on the 30th December, 2017. Raji said that she advised Manjula Wati not to do anything regarding the allegation thinking of the family reputation.
75. The Defence Counsel argues that the evidence of the complainant as to the alleged complaints is not consistent with that of her grandmother. You decide what weight you should give to the evidence of the complaint and whether the complaint she made had bolstered the credibility of the Prosecution's case.
76. Prosecution says that the child complainant had no reason to make up this serious allegation against her uncle and that she told nothing but the truth. You had the opportunity to observe the demeanor of the complainant. You decide if you could accept her evidence.
77. The Defence called the accused and 4 other witnesses. You had the opportunity to hear Defence's side of the story. The Defence raised the defence of *alibi* to support its version. Defence called witnesses to support accused's evidence that the complainant was never present at accused's house on the day of the alleged incident. You consider if you could believe the evidence of witnesses called by the Defence.
78. Prosecution says that the witnesses called by the Defence are unreliable because they are either close relatives or friends who had an interest in Defence case and they gave evidence to save the accused. They further say that the accused was making up a story to defend himself because he had never raised his Defence at the first available opportunity. You've observed the conduct and demeanor of the accused and Defence's witnesses when they were giving evidence. You decide whether they are reliable and what weight you should attach to their evidence.
79. The Counsel for Prosecution in the course of cross-examination referred to the caution interview of the accused and his failure to raise his *alibi* at the first available

opportunity. The accused said that he was shocked and, he, on the instructions of his lawyer exercised his right to remain silent.

80. I must tell you that under our Constitution, the accused has the right to remain silent and no negative inference as to his guilt should be drawn against the accused for exercising his right. You must not think that the accused remained silent because he was guilty. However, you may properly take into account accused's conduct and his failure to raise the defence of *alibi* at the first available opportunity when you test the consistency of his defence of *alibi*. Please bear in mind, as I said earlier, even if you reject the evidence of *alibi*, it is the burden of the Prosecution to make you sure that the accused was present at the crime scene at the material time and that he committed this offence.
81. If you believe that the complainant is telling you the truth, then you must be satisfied that all the elements of the offence of rape as charged have been proved. The Complainant said that when aunty went to the market, her uncle did something bad to her. Uncle did a R.A.P.E. . She said she learned about R.A.P.E. at her healthy living class in Year 7. She said that, to her understanding, RAPE is sex.
82. When asked to clarify, the complainant said that her uncle touched her breast and then put her pants down. Uncle took out his 'wee' and put his 'wee' on her wee. 'Wee' is where the boys 'wee' from. She said she was feeling bad and she felt the itch. Uncle put the blanket down and wiped her 'wee'. The complainant showed us the wee she referred to with the help of the diagram that was shown to her. She pointed out the penis and the vagina in respective diagrams.
83. If you are satisfied that the complainant told the truth and you are sure that word "wee" referred to the genital organs (penis of the accused and the vagina of the complainant) and his penis had penetrated, at least slightly, the vagina of the complainant, then you should find the accused guilty of Rape. But if you do not believe complainant's evidence regarding the alleged offence, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty of Rape.

84. However, if you are satisfied that the accused had touched her breast and he had touched her vagina with his penis you should find the accused guilty of Sexual Assault.
85. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
86. Any re-directions?


Aruna Aluthge
Judge


AT LABASA

1st May, 2019

**Solicitors: Office of the Director of Public Prosecution for State
Legal Aid Commission for Defence**