

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 381 of 2018

STATE

vs.

DAVID ALI

Counsel: Ms. K. Semisi with Ms. B. Khantaria for the State
Ms. L. Vaurasi with Ms. S. Nayacalevu for Accused

Date of Hearing: 11th, 12th, 15th, 17th, 29th, 30th April 2019, 01st, 02nd, 03rd May 2019

Date of Closing Submission: 06th March 2019

Date of Summing Up: 07th May 2019

SUMMING UP

1. The name of the complainant is suppressed. Hereinafter she will be referred to as **AB**.
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.

3. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
4. I may comment on the facts if I think it will assist you when 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 facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
5. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.

7. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

8. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused guilty for the offence.
9. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
10. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information and elements of the offences

11. The accused is charged with one count of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act. The particulars of information are before you. Hence, I do not intent to reproduce them in the summing up.

12. The main elements of the offence of rape as charged are that:
 1. The Accused,
 2. Penetrate the vulva of the complainant with his fingers.

Consent

13. The complainant was three years old at the time of this alleged incident took place. The defence has not disputed the age of the victim. Hence, she is incapable of giving consent to any form of penetration in to her vulva as defined under Section 207 of the Crimes Act.

Agreed Facts

14. I now take your attention to the agreed facts. They are the facts that the Prosecution and the Defence agreed to without any dispute. Hence, you are allowed to consider the agreed facts as proven facts beyond reasonable doubt by the Prosecution.

The Accused

15. It is the onus of the Prosecution to prove that it was the accused who has committed this crime to the complainant. As I explained above, at no point of time the onus shift on the accused to prove that it was not him who has committed this crime.

Penetration

16. Let me allow to explain you the element of penetration. Evidence of slightest penetration of the finger of the accused into the vulva of the complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Alternative Count

17. If you find the accused not guilty to the offence of Rape, then you are allowed to consider an alternative count that is Sexual Assault though it is not charged in the information. The main elements of the offence of Sexual Assault are that:
- (i) The accused,
 - (ii) Unlawfully and Indecently,
 - (iii) Assault the complainant.
18. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if a right-minded person would consider the act as indecent. It is your duty as Assessors to consider and decide whether the act of penetrating of the fingers of the accused into the vulva of the complainant is an indecent act amounting to sexual assault.

Corroboration

19. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable, credible and truthful; you are not required to look for any other evidence to corroborate the account given by the complainant.
20. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.
21. Offences of this nature can take place in any circumstance between any kinds of persons, who act in variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your opinion

strictly on the evidence that you have heard from the witnesses during the course of the hearing.

22. You must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanours of the complainant in the court while giving evidence is not necessarily a clue to the truth of the complainant's account.

Evidence of the Prosecution

23. Let me now remind you briefly the summary of the evidence presented by the prosecution and the defence during the course of the hearing. I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
24. The complainant had complained to her mother that her private part was paining when she was having her bath with her mother in the evening of the 31st of August 2018. The complainant had pointed out her vagina as the place that she was having pain. The mother of the complainant, in this case, that is Monisha has not taken it seriously. Once again on the 1st of September 2017, the complainant had complained the same to her mother and the mother had not taken it in seriously as she was an active child. On the 4th of September 2017, the complainant had complained again about the pain in her private parts. That gave Monisha an alarm. She then asked her. The complainant had reply, saying that she does not want to go to school anymore. After the bath, the complainant had played for a while and then she told the mother that one big boy named David had taken off her clothes and playing twinkle twinkle little stars. The complainant had explained to her mother that David had removed her pants, underwear, and the t-shirt and then she started to cry. The complainant told her mother that it was paining when he puts his fingers into her vagina. It happened at the office of David.

25. You have heard that Monisha said that she was not sure about the name of the person as she could not properly comprehend the pronunciation of the complainant. Hence, she had thought that it was either Daven, or Davin. She had further thought that it was a small boy that the complainant was referring to. On the 5th of September 2018, Monisha had gone to the Kid First School with the complainant and met Mary, who was one of the teachers at the school. Monisha asked Mary is there someone by the name of Davin or Daven. Mary had then told Monisha that they do not have someone by any of those names, but they have David. Monisha then asked the complainant “baby is that David”. The complainant has replied saying that “yes mummy that David”. The complainant had then taken Monisha and Mary to the kindergarten classroom and pointed out the left side corner of the room as the place where this incident took place. According to Monisha, the place was dark even during the day time. The Kindergarten teacher and the children were inside the class when they entered into it. She could not recall whether the left side corner had gapping bricks that bring the sunlight into the room. Moreover, she could not recall whether the right hand side of the room has glass windows.
26. After that, three of them had gone to the reception counter. According to Monisha there was no notice board that separates the office from the reception desk. She had gone behind the reception desk and met the Director of the school Ethan Buksh and Sera, another employee at the school. While she was talking to them, the accused had walked into the reception area to sign in for the work. Monisha and the complainant were standing at that time. There was no partition between the place she was talking to Ethan Buksh and Sera at the reception area. At that point of time, the complainant had pointed out to Monisha that David is there. She had tried to hide behind Monisha. Ethan Buksh had then asked David to go and sit in the bure. Monisha had requested Ethan Buksh to call the police. Monisha and the complainant had waited at the upstairs until the police arrive.
27. According to the evidence given by Monisha, the complainant was happy to attend to the school. She had enjoyed it. They usually drop her at 8.30 a.m. and pick her up around 5.30 p.m. The complainant had taken her tricycle to school and she likes to ride it. The complainant used to play with the slide at the school. Monisha had seen the complainant

playing at the slide and also had seen her going down on the middle hump side of the slide. You may recall that Monisha explained the educational schedule that the complainant had in the school. When the parents drop the kids, they have to sign in at the reception and they sign off the kids at the table of the pre-school area. Monisha said that when she goes to pick the complainant in the afternoon, there were not much parents and children around.

28. Monisha refused the proposition of the defence that her husband refused to believe the complainant and that was the reasons he did not accompany them to school and then later to the police station. Monisha recalls that she made a statement to the police regarding this incident on the 5th of September 2018. She has not stated in her statement that the complainant first complained about this on the 31st of August 2018 and also has not stated that the complainant refused to go to school. Moreover, she has not mentioned in the police statement that she started to suspect that something is wrong when she heard the complainant repeatedly complaining about the pain in her private part on the 4th of September 2018. Monisha had not taken it seriously initially and attributed that pain to the complainant's active life style. Furthermore, Monisha has not stated in her statement to the police that David walked into the reception area when she was talking to Ethan Buksh and Sera. It has not been recorded in the statement that the complainant had pointed out David. Monisha agreed in her evidence that the identification of David is very important, but she has not stated that incident in her statement. Moreover, Monisha has not stated in the statement that Ethan Buksh told David to go and stay in the Bure. Furthermore, Monisha has not mentioned in the statement that the complainant told her that David a big boy like her daddy. She had stated in the statement that she thought it was a small boy. She explained that she was not thinking straight when she made the statement to the police on the 5th of September 2018.
29. Monisha had initially believed that the person, the complainant was referring to, was a small boy. She was not sure about the name that the complainant was telling. But at the school the complainant told her that it was a big boy like daddy.

30. According to Monisha the complainant had been abused by her nanny previously. During that time Monisha was working and then she resigned from her employment. Monisha found that the investigating officer was not honest and did not finalise the charge to prosecute David. Investigating officer had told her that the medical report made by the doctor is not conclusive therefore, they have to wait. Monisha had met the doctor but denies that she pressured the doctor to change the medical examination report.
31. You have seen the complainant was giving evidence in court. She said that David took off her short, and touched her backside and private part. She does not want to go to school again because of David. She then said that nothing happened with David. She does not want to go to school because her mother does not want to drop her and has a case. The complainant said that this alleged incident took place at the outside of the Kindergarten. According to the complainant David is bad and she does not know it. When the learned counsel for the prosecution asked the complainant, that how does she know his name is David, the complainant replied saying that she does not know. She identifies the accused as David in court. The complainant said that her mother and father have phones. They have shown the complainant the photos of David in the phone. When they have shown the complainant the Photos of David in the phone, they have told the complainant that David is a bad man.
32. During the cross examination, the complainant said that she wants to go to school. The complainant further said that the name of David was told to her by her mother. When the learned counsel for the defence asked her that David Ali didn't touch her private parts, the complainant said yes.
33. You have heard the evidence of Doctor Elvira Orgbit. She was the doctor who conducted the medical examination of the complainant on the 5th of September 2018. In her evidence she explained the specific medical findings that she found during the medical examination. Those findings have been recorded under D12 of the Medical Examination Report. The medical examination report is tendered as Prosecution's Exhibit No 2. The Doctor has noted the injuries outside the vagina. It is the external side of the female genitalia. The

Doctor said the bruises that she found were within the two weeks period. She said normally bruises take two weeks to fade away. It depends on the location and the force that caused the injuries. The Doctor said that she has no measurement to explain the amount of force applied, but can explain the effect of the force by observing the injuries.

34. You have observed that the Doctor in her cross examination merely disagreed with many of the questions asked by the learned counsel for the defence seeking her expert opinions. Moreover, the Doctor said the many of the bruises noted were located close to the uterus. The Doctor is not a pediatrician but has obtained medical training about the female genitalia including the children. She has not done any study on the systemic review of the bruising of children.
35. During the cross examination, the Doctor agreed that most of her evidence regarding the medical findings have not been recorded in the medical examination form. She disagreed that she is required to report all the findings and opinion in the report as an expert witness. According to the evidence of the Doctor, she could reveal and disclose her findings at the trial without disclosing them to the defence in advance. Moreover the Doctor admitted that she had inserted the word “fresh” before the word of bruises at D12 (b). She had done that after the conclusion of the medical examination. She has not recorded the word “fresh” contemporary to the medical examination.
36. The doctor further said that the bruises are within two weeks period mean that it could be within 24 hours or 48 hours’ time before the examination. There is no certainty as to the exact period when the bruises were happened.
37. The investigation officer of this matter is WPC Arieta. She explained the nature and the manner the investigation was carried out. She has only recorded the statements of the complainant, her mother, and the accused. Apart from that she had obtained the medical examination report made by Doctor Elvira. According to the investigation officer, she found the medical examination report was not sufficient to charge the accused, but she was instructed by her superior officers to proceed with the charge.

38. The investigation officer admitted that she has not investigated the attendance sheet of the employees of the Kids First. WPC Arieta admitted that she has not investigate the nature of the school as she is still not aware that this school comprises with a pre-school, a kindergarten, and two classes of the primary school. Moreover, the investigation officer has not investigated the number of students attending to the school and also whether there are another or more students and people by the name of David in the school.
39. Finally the investigation officer had obtained the staff attendance sheet and student attendance sheet few days prior to the commencement of the hearing. According to the student attendance sheet there are few children by the name of David and one by the name of Darren. Moreover, according to the staff attendance sheet, the accused had signed in for the work from 20th to 24th of August 2018 and then on the 27th of August 2018. He has not signed in for work at school on the 28th, 29th, 30th and 31st of August 2018.

Evidence of Defence

40. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted to give evidence on oath and also called two witnesses for his defence.
41. The accused in his evidence denies that he raped the complainant. He has been the handyman for the Kids First and attends to works at the school if needed. He normally attends to small and urgent matters during the school time otherwise he does his work at school after the school hours. If he attends to the works at school during the school time, he is always accompanied by the receptionist or the Director Ethan Buksh as there are kids in the school. The receptionist or the Director would remain there until he completes the works. When he has works at the apartments which is adjacent to the school, he normally signs in and out at the reception of the school.
42. On the 5th of September 2018, the accused had come to the reception area to sign in for the work. He had not met or seen the complainant or her mother at the reception. He had spent few minutes signing in the attendant sheet and then walked towards to the apartment in

order to get his tool box. At that point of time, Ethan Buksh came and advised him not to work and wait at the bure. He was told by Ethan Buksh about this allegation. Then the police came in a while and took him to the police station.

43. The learned counsel for the prosecution suggested to the accused that he found the complainant at the left side corner of the kindergarten room and then removed her top, pajamas, and her underwear and then touch her back and her private part or vulva, for which accused said that he never did that.
44. The first witness of the defence is Ethan Buksh. He is the Director of the Kids First School. He explained the structure of the classes and programs in the school and also the physical layout of the school as well. He has noticed Monisha and the complainant were talking to Mary, a teacher at the pre-school in the morning of the 5th of September 2018. He had then noticed them going to the kindergarten class. He then followed them and observed as he found that there was something wrong. He then went back to his office which is at the reception area and waited for them to come. He was with another teacher, namely Sera. Monisha and complainant came to the office, which is separated from the reception area with a notice board. Monisha and the complainant were seated while she explained to Ethan Buksh and Sera about the allegation made by the complainant. Ethan Buksh and Sera were standing at that time. He then saw the accused walked in and signed in for the work at the reception area. Neither Monisha nor the complainant saw the accused at the reception area. The accused then went out. Ethan Buksh had instructed Sera to accompany Monisha and the complainant to upstairs and he went after the accused. He met the accused outside the school and told him to go and wait at the bure. He then advised the receptionist and his wife who was in the office to inform the police about this allegation.
45. Ethan Buksh explained about the procedure and structure of the maintenance works at the school. Every maintenance work has to be recorded in the maintenance book. He tendered the maintenance book for the year 2018, where it states that the accused has not done any maintenance work at the school in the month of August 2018.

46. The last witness of the defence is Mary Pickering. She was a teacher at the Kids First in 2018. She could recall that Monisha came and spoke to her about this incident in the morning of 5th of September 2018. Monisha came with the complainant. Monisha had asked her whether the school has someone by the name of Tarren or Darren. Mary had replied saying that there is no such person by those names, but they have David. Monisha then said “yes David that’s the guy”. Three of them have then gone to the kindergarten room, where the complainant had pointed out the blue colour couch as the place where this alleged incident took place. According to Mary, the complainant is a playful child.
47. I have summarized the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and recall yourselves on all of them. What I did only was to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

Analysis and Directions

48. The prosecution alleges that the accused had penetrated the vulva of the complainant at the left side corner of the kindergarten room. He had first removed her clothes and underwear and then inserted his fingers into her vulva. The defence denies the allegation and said that the accused never done such thing as alleged by the prosecution.
49. In order to prove the case against the accused, the prosecution presented the evidence of the complainant. Moreover, the prosecution presented the evidence of the mother of the complainant, the doctor who conducted the medical examination and the investigation officer. These evidence are presented in order to establish the consistence of the account given by the complainant. The accused and two other witnesses gave evidence for the defence. Accordingly, the two main issues that you have to determine are; firstly whether this alleged incident actually happened. Then you have to determine whether it was done by David Ali the accused or someone else.

Reliability of Evidence

50. In order to do that you have to evaluate the evidence presented by the prosecution and defence and determine the reliability and credibility of evidence given by the witnesses. You must be satisfied that you can rely on the evidence as the true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

Credibility of Evidence

51. The assessment of credibility of evidence does not concern with unintended inaccuracy, mistakes or errors. It is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his motivations, his relationship to and the reaction to the particular situation.
52. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to decide whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
53. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
54. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.

55. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.

Presentation of the Evidence of the Child Complainant

56. You saw that the complainant gave evidence without taking oaths. At the beginning of the evidence, the complainant gave evidence from a special child witness room. She was accompanied by her nanny and was allowed to play with the toys while giving evidence. She then came to the court to give evidence. The accused was seated behind a screen when she gave evidence in court. The judge was seated on the clerk's table. Neither the judge nor the counsel were robed. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the accused.

Evidence of the Child Complainant

57. The most important part of your task is to judge whether the child witness has told the truth, and has given a reliable and credible account of the events that she was describing. Some of you may have children, grandchildren, nieces or relatives who are of a similar age to the complainant. If so, I think you will recognize the sense of the advice that I am going to offer you about your opinion of the evidence of the child complainant, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice, if you do not agree with it.
58. Children do not have the same life experience as adults. They do not have the same standards of logic and consistency. Their ability to understand certain events 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.

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. They might think that using of some words are naughty, and therefore find it difficult to speak.

59. Experience has shown a number of things. A child may not fully understand the significance of sexual activities and that may be reflected in the way they remember it or describe it. A child's perception through the passage of time is very likely to be different from that of an adult. A child's memory can fade even in the short term. When recounting events later, even a fairly short time later, a child's recall of when and in what order events occurred may not be accurate. She or he may well not be able to speak of the context in which those events occurred. A child may have particular difficulty dealing with conceptual questions such as how she or he felt some time ago, or why she or he did or did not take a particular course of action.
60. Remember how you normally talk to children of this age. You should bear those difficulties in mind when you consider the answers given by the child complainant. All decisions about the evidence are for you to make.

Evidence of Recent Complaint

61. You have heard that the complainant had told her mother about this incident on the 4th of September 2018. The mother of the complainant, in this case is Monisha, gave evidence explaining how the complainant related this incident to her and the subsequent steps that she took in this regards. This form of evidence given by the mother of the complainant is known as evidence of recent complaint. It is not an evidence as to what actually happened between the complainant and the accused. The mother of the complainant was not present and witnessed what happened between the complainant and the accused.
62. You are entitled to consider the evidence of recent complaint in order to decide whether or not the complainant has told the truth. The evidence of recent complaint assists you to

determine the consistency of the complainant's evidence and also to assess the reliability and credibility of her evidence. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the complainant and the accused.

Contradiction and Inconsistencies

63. You have heard that the complainant said during the evidence in chief that David removed her clothes and did twinkle twinkle little stars. He has touched her private part and back side. However, during the cross examination by the learned counsel for the defence, the complainant said that he did not touch her back and private parts. It is important for you to take these contradictions into consideration when you evaluate the evidence given by the complainant.
64. Moreover, you have heard that the learned counsel for the defence cross examined the mother of the complainant about the inconsistent nature of her evidence given in the court with the statement that she made to the police on the 5th of September 2018. Few of them are that; in her evidence the mother of the complainant, Monisha said that the complainant had pointed at David when he came to sign in for work at the reception in the morning of 5th of September 2018. Monisha was talking to Ethan Buksh when the complainant pointed out the accused as David. However, it has not been stated in her statement made to the police on the 5th of September 2018. Moreover, she said in the court that the complainant told her that it was a big boy like daddy. However, in the statement she has stated that she thought that it was a small boy until she went to the school. According to the evidence of Monisha, the child had complained about pain in her private parts on the 31st of August and then on the 1st of September 2018. However, it has not been recorded in the statement she made to the police.
65. You are allowed to take into consideration about such inconsistencies when you consider the credibility and reliability of the evidence given by that particular witness. However,

previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the court.

66. It is 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. Moreover, as I explained above, the victims of rape and their closed relatives react differently to the trauma and the experience they have gone through, especially in revealing those incidents to another person.
67. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

Expert Witness

68. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.
69. In this case you have heard the evidence of Doctor Elvira Orgbit, who has been called as an expert medical doctor. Expert evidence is permitted in a criminal trial to provide you with scientific information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you

with regard to the injuries found in the complainant during the medical examination which was conducted on the 5th of September 2018.

70. With regard to this particular aspect of the evidence you are not experts; and it would be quite wrong for you as assessors to attempt to come to any conclusions on the basis of your own observations. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence.
71. You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert, you do not have to act upon it. You should remember that this evidence relates only to part of the case, that is the nature of the injuries found in the complainant during the medical examination.
72. The doctor in her evidence explained the specific medical findings that she has recorded under D12 of the medical examination report. She then said that those bruises were fresh and within the two weeks period. An expert witness is not allowed to give mere opinion, but is required to give the facts and reasons for reaching such an opinion. Hence, you are entitled to consider whether the Doctor Elvira gave the facts and reasons that she had relied upon in order to reach such an opinion about the age of the bruises.

Identification

73. I now take your attention to the issue of identification of the accused by the complainant. You have seen that the complainant pointed out at the accused when he was in the accused box as David from the school. This type of identification is called as dock identification. According to the evidence given by the investigation officer, the complainant had not previously made any identification of the accused during the investigation, such as an identification parade or photo identification. Accordingly, an identification of the accused for the first time in the dock is an undesirable practice. You have seen that it was only the accused was standing in the dock when the complainant made her dock identification of the accused. It was not similar to the identification of the accused by the complainant in an identification parade, where the complainant had to identify the accused when he is

standing among a group of other people. Therefore, you have to carefully scrutinize the evidence of dock identification before you act upon it. You have to take all other evidence adduce in the hearing with the evidence of dock identification before you proceed to act upon it.

74. In doing that you could take into consideration the evidence that Monisha was not sure about the name referred by the complainant in the night of 4th of September 2018. She had gone and asked Mary whether they have someone by the name of Davin or Daven. Then Mary had told her they do not have someone by any of these names, but they have David. Then Monisha said "that is the guy" and asked the complainant "Is it David?". The complainant had then said yes that is David. Moreover the complainant in her evidence said that her mother told her the name of David. Moreover, she had been shown photos of David by her mother and father from their phone. According to the evidence of Monisha, the complainant had not told her that it was a big boy like daddy in the night of 4th of September 2018. Furthermore, you could take into consideration the school attendance sheet for the period between 20th of August 2018 to 31st of August 2018. According to the said documents, you could find there are two students by the name of David and one student by the name of Darren in the school.
75. According to the staff attendance sheet, the accused had not signed in for work on the 28th, 29th, 30th, 31st of August 2018. He had only signed in for the work from 20th to 24th and 27th of August 2018. According to the evidence of the doctor, the bruises were fresh and within the two weeks period. She said that normally bruises fade away after two weeks. If you accept the opinion of the doctor, the bruises could have caused between 27th of August 2018 and 5th of September 2018.

Defence's Case

76. Let me now take your attention to the defence of the accused.
77. The accused is not obliged to prove his innocence and also not required to give evidence. However, in this hearing, the accused not only elected to give evidence on oath but also

called two witnesses to give evidence for the defence. Therefore, you have to take into consideration the evidence adduced by the accused and his witnesses when you determine the issues of fact of this case.

78. Accordingly, it is for you to decide whether you believe the evidence given by the defence. If you consider that the account given by the defence is or may be true, you must find accused not guilty.
79. If you neither believe nor disbelieve the version of the defence, yet, it creates a reasonable doubt in your mind about the prosecution's case. You must find the accused not guilty.
80. Even if you reject the version of the defence that does not mean that the prosecution has established that the accused guilty to this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.

Final Directions

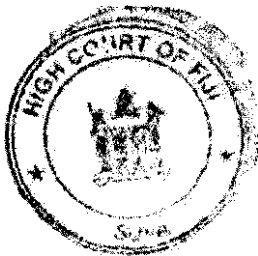
81. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you can find the accused guilty to the said offence of Rape.
82. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused not guilty to the said count of Rape.
83. If you found him not guilty for the offence of Rape, you are then allowed to consider the alternative count of Sexual Assault. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you can find him guilty of the alternative count of Sexual Assault.

84. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you must find the accused not guilty for the said count of Sexual Assault.

Conclusion

85. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.

86. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



A handwritten signature in black ink, appearing to read "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva
07th May 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
Shekinah Law for the Accused.