

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 97 of 2016

STATE

V

MITIELI NABORISI

Counsel : Ms. R. Uce for the State.
: Mr. J. Dinati for the Accused.

Dates of Hearing : 19 and 22 July, 2019
Closing Speeches : 23 July, 2019
Date of Summing Up : 24 July, 2019

SUMMING UP

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

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable,

what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy to either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

13. The accused is charged with one representative count of sexual assault and one representative count of rape. (A copy of the information is with you).

COUNT ONE

REPRESENTATIVE COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) and (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

MITIELI NABORISI, between the 1st of January, 2013 and 31st of December, 2013 at Lautoka in the Western Division, unlawfully and indecently assaulted “**AT**”.

COUNT TWO

REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

MITIELI NABORISI, between the 1st of January, 2014 and 30th of April, 2014 at Lautoka in the Western Division, penetrated the vagina of “**AT**” with his penis without the consent of the said “**AT**”.

REPRESENTATIVE COUNTS

Ladies and Gentleman Assessors

14. You will note that both the above counts are representative counts, which cover a period between the 1st of January, 2013 and 31st of December, 2013 and 1st of January, 2014 and 30th of April, 2014 respectively. By a representative count the prosecution alleges that more than one offence as described in the information were committed during the period specified in the counts. The law says that it shall be sufficient for the prosecution to prove that between the specified dates in the counts at least one offence was committed.
15. To prove count one the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;

- (c) Assaulted the complainant **“AT”** by molesting, kissing, squeezing her breasts and also fondling her vagina.
16. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offence.
 17. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
 18. The final element of assault is the unlawful use of force on the complainant by molesting, kissing, squeezing her breasts and also fondling her vagina.

You should ask yourself:

- (a) whether you consider the force which was used in molesting, kissing, squeezing the breasts and also fondling the vagina of the complainant were sexual in nature; and
 - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
19. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then you must find the accused guilty of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused not guilty.
 20. In this trial, the accused has denied committing the offence of sexual assault he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by molesting, kissing, squeezing her

breasts and fondling her vagina between the 1st of January, 2013 and 31st of December, 2013.

21. To prove count two, the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant "AT" with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
22. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent.
23. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
24. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
25. The second element is the act of penetration of the complainant's vagina by the penis.
26. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

27. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
28. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
29. You must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for you to find the accused guilty of the offence of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused not guilty.
30. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
31. In this case, the accused is charged with one representative count of sexual assault and one representative count of rape, you should bear in mind that you are to consider the evidence in respect of each count separately from the other. You must not assume that because the accused is guilty of one representative count that he must be guilty of the other as well.

ADMITTED FACTS

32. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.

33. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
34. I will now remind you of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

35. The prosecution called two (2) witnesses to prove the charges against the accused.
36. The complainant "AT" informed the court that in 2013 she was nearly 14 years of age, her parents had separated and her mother was living in a defacto relationship with the accused. The complainant in 2013 up to early 2014 was living with her mother and her stepfather the accused and his 5 children. At first the complainant got on well with the accused and since she had not been living with her father, she was keen to know the accused and later started calling him dad.
37. The house of the accused was a one bedroom house the complainant was sleeping on the bed in the sitting room. Her mother and the accused would sleep in the bedroom. At around midnight the accused would come over to where she was sleeping, he would molest her, kiss her and sometimes squeeze her breasts and also fondled her vagina.

38. The children of the accused would sometimes sleep in the sitting room on the floor on their mattresses, but most of the time they would sleep at their grandfather's house a few blocks away. Since the complainant had undergone a surgery for appendicitis, she would sleep face up. At first the accused would squeeze her breast and fondle her vagina from on top of her clothes, however, as the days went by he would forcefully take off her clothes.
39. When the accused was doing this she would lay stiff in bed and close her eyes, she could not move because he would lock his thighs in between hers, she would try to push him away, but he would cup his hand on her mouth and tell her to relax.
40. As a result the complainant wasn't able to scream, the accused also threatened her if she screams he will do something to her. At this time the accused's children would either be sleeping on the floor on the other side of the sitting room or would be sleeping at their grandfather's house he used to do this to her nearly every night.
41. The complainant wanted to tell her mother, but she did not since the accused was always around. One night during the beginning of 2014 while the complainant was asleep the accused came and woke her she was shocked when she saw the accused standing. On this night the complainant had come back from a "soli" or a fundraising organized at a nearby school. According to the complainant it was probably past midnight when the accused and her mother came back home.
42. The accused started to kiss her, molest her, squeeze her breasts and then went on to fondle her vagina at this time he removed her pants. The complainant tried to stop him, but could not, the complainant saw the accused put some coconut oil on his penis. She felt very scared and started to cry the accused came on top of her spread her legs apart and then penetrated his penis into her vagina. When the complainant told the

accused to stop he cupped his hand on her mouth and threatened her that he will do something to her or to her mother. She tried to push him away, but could not since she was feeling weak.

43. The accused penetrated his penis into the vagina of the complainant three times after the accused ejaculated she forcefully turned over since she felt pain from what was being done to her. The complainant tried to tell her mother but couldn't because the accused was always around. The accused had penetrated her vagina on three occasions she did not tell anyone until she went to her grandmother's house to stay.
44. Sometimes in April, 2014 she went to live with her father at his village since she was not her normal self her father dropped her back to her grandmother's house. When she was at her father's village, she had told her uncle some things about what the accused was doing to her, but not the whole story when her father came to know he was furious.
45. One day at her grandmother's house the complainant's father told everything to her grandmother in the presence of her mother whilst the accused was inside the room. At that time no one believed her they said she was lying.
46. As days went by there was an argument between the complainant's mother and her grandmother since the complainant loved to write she wrote about what the accused had done to her and had saved the document on a laptop. The complainant's grandmother read what was written by her when she was using the laptop. This prompted her grandmother to ask the complainant about what she had written, at this moment she told her grandmother everything the accused had done to her.
47. As a result of what the accused had done to her, she had attempted suicide 13 times since no one at home believed her and that she could not stop her grandmother from allowing her mother and the accused from coming into

the house. The complainant got sick and was mentally ill, at one time she ended up at the Hub Center for treatment. The complainant did not agree with what the accused had done to her.

48. In cross examination the complainant stated she had to agree to the accused relationship with her mother because she was a child and she did not have any say in what her mother was doing. The complainant agreed the accused did what she told the court at around midnight or sometimes past midnight.
49. She agreed it was her mother who had brought her and the accused's children home after the fundraising at the school, but disagreed with the suggestion that the accused did not come home that night and had come the next day. The complainant stated as far as she knew it was night time and the accused and her mother had come home together from the fundraising.
50. When the incident happened after the fundraising she had already undergone surgery for her appendicitis.
51. The complainant was referred to her police statement dated 5th September 2015, line 30, page 1 as follows:

"Then at times when I sleep alone in the sitting room he, my stepfather would come to me while I am sleeping and will touch my breasts and insert his hand inside my panty and fondle my private part with his fingers. At times while he fondles me he will fondle until I leak and I would just cry"

52. The complainant agreed it was not stated in her police statement about the accused cupping his hand on her mouth and threatening her that he would do something to her or to her mother. In her explanation the complainant said whatever she could remember she said it when the statement was written.

53. The complainant agreed the accused would be cupping his hand on her mouth in a forceful way and that was the reason why she wasn't able to scream and also she would not scream because of his threatening words not only directed to her but to her mother as well which terrified her every single day. She told her mother everything the accused was doing to her, but her mother did not believe her.
54. The complainant stated when the accused penetrated her vagina for the first time she had noticed blood clots within her pants the next day. The complainant agreed it was not in her police statement that every night the accused molested, squeezed her breasts and fondled her body. She was not really sure why it was not in her police statement, but she was emotional at the time.
55. The complainant agreed she told the full story about what the accused had done to her grandmother. She also agreed it was not in her police statement that her grandmother had seen her write up in the laptop and had questioned her about the contents of this document. The complainant stated it was not in her police statement that she had informed her father's brother or her mother about what the accused had done to her.
56. The complainant agreed it was in her police statement that she told her grandmother what the accused was doing to her. She also stated it was in 2015 a day before her police statement was recorded that her grandmother after reading her document in the laptop questioned her to tell everything the accused had done to her.
57. The complainant agreed it was not in her police statement that the accused would touch her breasts from inside her clothes. The complainant explained it took her two years to report the matter to the police because none of her family members believed her and it was no use telling them. In 2013 and 2014 the accused and her mother used to come together as

husband and wife to her grandmother's house and stay there as a result she did not have the courage to say anything.

58. When suggested that she could have told her father, the complainant said she only met her father in 2014 since she had been brought up by her grandmother. In respect of telling the other relatives she stated that she was not close to her other relatives and that it was a matter of trust, the only person she trusted was her grandmother.
59. The complainant maintained that she told the truth in court and she had no reason to lie. She further stated that she did not hate the relationship between her mother and the accused. Whatever her mother did was her business and she did not have any say. According to the complainant, she had kept these allegations to herself for quite a long time and she should have said it a long time ago.
60. In re-examination the complainant stated that she did not tell the police everything that had happened because most of the time she was crying.
61. The final prosecution witness Atelaite Ravu the grandmother of the complainant informed the court that sometimes in 2013 the complainant had gone to stay with her mother. In 2014 she came back to live with the witness when the complainant was living with her, she noticed the complainant wanted to tell her something but couldn't say so.
62. On many occasions she asked the complainant if anything had happened to her, she didn't reply, but was in tears until one night she saw a document in the laptop which the complainant had typed. When she asked the complainant about the contents of the document she told her everything that had happened to her. After listening to the complainant the witness took the complainant to the police station the next morning.

63. The witness stated the complainant told her the accused would touch her breasts, kiss her, poke his tongue on her vagina, suck her vagina and had sex with her. The complainant did not tell anyone because she was told by the accused not to. When the complainant was telling her this, she was crying.

Ladies and Gentleman Assessors

64. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

65. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant who was nearly 14 years at the time had told her grandmother about what the accused had done to her but was not believed, until about two years later upon questioning by her grandmother about what she had written and saved on the laptop that she again told her grandmother what the accused had done to her.

66. This is commonly known as recent complaint evidence. The evidence given by Atelaite is not evidence of what actually happened between the complainant and the accused since Atelaite was not present and did not see what had happened between the complainant and the accused.

67. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told her grandmother what the accused had done to her but she was not believed. It was only after her

grandmother had questioned her after reading her write up that she told her grandmother everything the accused had done to her and therefore she is more likely to be truthful.

68. On the other hand, the defence says the complainant made up a false complaint against the accused because she hated the relationship the accused had with her mother. When the complainant was not believed she was in a position to inform her other relatives and her father, but she did not do so and therefore she should not be believed.
69. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
70. In cross examination the witness stated the complainant had told her everything the accused had done to her on 13th August, 2015 and also that she was raped about 4 times.
71. The witness was referred to her police statement dated 5th day of September, 2015 to line 10 on page 2.

"It can be recalled on the 30th of July, 2015 I was home when my granddaughter Adi Kawa called me in her room and told me that her step father had sexual intercourse with her twice in 2014."

72. When it was put to the witness that in her evidence she had stated that she was only informed by the complainant on the 13th of August, the witness explained that she was first told on the 30th of July 2015 but she did not believe that the accused could do such a thing because he was her cousin sister's son and like her son.

73. When she saw the document on the laptop, she first confirmed with the complainant and then reported the matter to the police. The witness agreed it was not in her police statement that when she was told by the complainant on 30th July she did not believe her.
74. The witness agreed she had stated in her police statement that the complainant had told her the accused had sexual intercourse with her twice, but she maintained the complainant had told her the accused had sexual intercourse with her four times.

Ladies and Gentleman Assessors

75. The learned counsel for the accused in this regard was cross examining the complainant and this witness about some inconsistencies in the statement they gave to the police immediately after the incidents when facts were fresh in their minds with their evidence in court. I will now explain to you the purpose of considering the previously made statement of the two witnesses with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witnesses are believable and credible. However, the police statement itself is not evidence of the truth of its contents.
76. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
77. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then 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 about the reliability of the witness.

78. In re-examination the witness confirmed that the first time she heard about the allegation from the complainant was on 30th July, 2015, the second time she confirmed with the complainant was 12th August when she went through the laptop, on the 13th she called the complainant and asked her about the allegations and on the 14th August, she took the complainant to report the matter.
79. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

80. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused gave evidence and called a witness. You must consider their evidence and give such weight as you think fit.
81. The accused informed the court in 2013 he was in a defacto relationship with Salote Tukavesi and they lived at the Lololo Settlement, Lautoka. As a result of an argument between the complainant and her grandmother whereby the complainant was beaten by her grandmother, the complainant came to live with the accused and his family. The accused treated the complainant like his eldest daughter together with his five children. The complainant came in September 2013 and stayed with him and his family till 2014. The accused observed that something was wrong with the complainant and that she was possessed.
82. During the Fiji Day long weekend that is 10th October 2013 there was a fundraising organized at the Lololo Primary School. The accused and the

whole family, including the complainant attended the fundraising at the school. It was night time when the fundraising finished, Salote the complainant's mother at around 10pm took all the children including the complainant home.

83. After dropping the children home, Salote came back with a bottle of rum. The accused and the others present started drinking at around midnight. The drinking finished at 5am the next day, the accused and his wife Salote arrived home during the early hours of the morning. After being awakened by his father the accused was shocked to see the complainant crying. The following week on the 27th of October the accused rushed the complainant to the hospital where the complainant was admitted for an appendicitis operation. The complainant had asked him not to inform her grandparents about her admission to the hospital since she was beaten up by her grandmother.
84. After the complainant was discharged she was taken to her grandparents' house, in the evening the whole family had a prayer meeting the accused on behalf of his family sought forgiveness in regards to the complainant's medical condition.
85. The accused denied committing the offences as alleged he says his house was a small one bedroom house, the accused and his wife slept in the bedroom, whereas the complainant slept on the bed in the sitting room with his 5 children. He further stated if there was anything done as alleged the whole family would have known the alleged incidents happened in 2013 and 2014 and yet the matter was reported in 2015.
86. In cross examination the accused denied sexually assaulting the complainant by kissing, squeezing her breasts and fondling her vagina, and cupping her mouth to prevent her from shouting or screaming for help and threatening her not to tell anyone otherwise he would hurt the complainant

or her mother. The accused also denied doing these acts on the complainant after midnight or when everyone was fast asleep.

87. In respect of the count of rape, the accused denied he had forceful sexual intercourse with the complainant on three occasions in the sitting room where the complainant would be sleeping after his wife had fallen asleep. He also denied removing the complainant's clothes forcefully, cupping her mouth with his hand and threatening her. When it was suggested the complainant did not agree to the sexual intercourse the accused stated nothing happened.
88. The final prosecution witness was the wife of the accused Salote Tukavesi she informed the court that the complainant was her daughter she basically confirmed what the accused had told the court that after the fundraising she left with the complainant and the children. At about 9.30pm she took a bottle of rum and went back to the school where the fundraising had taken place.
89. After midnight the grog finished and the accused drank liquor and at about 4.45am when they reached home it was day break. According to the witness she did not see anything suspicious or peculiar happening at school or at home.
90. In cross examination the witness maintained it was on the 27th of October, 2013 the complainant had undergone a surgery and on the 10th of October after the fundraising the accused had accompanied her home at 4.45am. There was nothing wrong with the complainant and that she was not possessed.
91. This was the defence case.

ANALYSIS

92. The prosecution alleges that between 2013 and 2014 whilst the complainant was living with the accused in his one bedroom house on more than one occasion at around midnight the accused would come over to where the complainant would be sleeping. He would molest her, kiss her and sometimes squeeze her breasts and also fondled her vagina.
93. Since the complainant had undergone a surgery for appendicitis, she would sleep face up at first the accused would squeeze her breast and fondle her vagina from on top of her clothes, however as days went by he would forcefully remove her clothes.
94. When the accused was doing this she would lay stiff in bed and close her eyes, she could not move because he would lock her thighs in between his, she would try to push him away but he would cup his hand on her mouth and tell her to relax.
95. The complainant wasn't able to scream since the accused would cup his hand on her mouth and also threatened her that he will do something to her. The accused used to do this to her nearly every night.
96. The complainant wanted to tell her mother, but she did not since the accused was always around. During the beginning of 2014 the complainant was asleep when the accused came and woke her she was shocked when she saw the accused standing. On this night the complainant had come back from a fundraising organized at a nearby school.
97. The accused started to kiss her, molest her, squeeze her breasts and then went on to fondle her vagina at this time he removed her pants. The complainant tried to stop him, but could not, the complainant saw the accused put some coconut oil on his penis. The complainant felt very scared

and started to cry. The accused came on top of her spread her legs apart and then penetrated his penis into her vagina.

98. The accused penetrated his penis into the vagina of the complainant three times after the accused ejaculated she forcefully turned over, since she felt pain from what was being done to her. The accused had penetrated her vagina on three occasions she did not tell anyone until she went to her grandmother's place.
99. As days went by the complainant's grandmother read what the complainant had written and saved on the laptop when her grandmother asked her about what she had written the complainant told her grandmother everything the accused had done. The complainant did not consent to what the accused had done to her.
100. On the other hand the defence took the position that the complainant hated the relationship between her mother and the accused as a result she made a false allegation against him.
101. The accused denied committing the offences as alleged he says his house was a small one bedroom house, the accused and his wife slept in the bedroom, whereas the complainant slept on the bed in the sitting room with his 5 children. He further stated if there was anything done as alleged the whole family would have known. The alleged incidents happened in 2013 and 2014 and yet the matter was reported in 2015.

Ladies and Gentleman Assessors

102. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
103. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses

are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

104. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. 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 be accurate in another.
105. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
106. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
107. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution

throughout the trial and it never shifts to the accused at any stage of the trial.

108. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

109. In this case, the accused is charged with one representative count of sexual assault and one representative count of rape and as mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count separately from the other. You must not assume that because the accused is guilty for one count that he must be guilty of the other as well.

110. Your possible opinions are:-

Count One: **SEXUAL ASSAULT**: GUILTY OR NOT GUILTY.

Count Two: **RAPE**: GUILTY OR NOT GUILTY

Ladies and Gentleman Assessors

111. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.

112. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



Sunil Sharma
Judge

At Lautoka

24 July, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. Vananalagi and Associates, for the Accused.