

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 59 of 2018**

**STATE**

**V**

**SITIVENI TUINASERAU**

**Counsel** : Ms. L. Latu for the State.  
: Ms. V. Diroiroi for the Accused.

**Dates of Hearing** : 11 and 12 February, 2019  
**Closing Speeches** : 14 February, 2019  
**Date of Summing Up** : 14 February, 2019

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**SUMMING UP**

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

Madam and Gentlemen 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 victim. 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 count of rape. (A copy of the information is with you).

### **ONE COUNT**

#### *Statement of Offence*

**RAPE:** Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.

#### *Particulars of Offence*

**SITIVENI TUINASERAU**, between the 1<sup>st</sup> day of March, 2018 and the 15<sup>th</sup> day of March, 2018 at Maururu, Ba, in the Western Division penetrated the vagina of **AB**, a child under the age of 13 years, with his finger.

14. To prove the above count 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 "AB" with his finger;
  - (c) "AB" was below the age of 13 years.
15. The slightest of penetration of the complainant's vagina by the accused's finger is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case the complainant was 4 years and 4 months during the period of the alleged offence. I therefore direct you that consent of the complainant is not an issue in this trial.
16. The first element of the offence is concerned with the identity of the person who allegedly committed the offence. The defence did not dispute this element therefore you can accept this element as proven beyond reasonable doubt.
17. The second element is the act of penetration of the complainant's vagina by the accused with his finger. The accused denies this element of the offence.
18. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was 4 years and 4 months at the time of the alleged offending which establishes that she was below the age of 13 years at the time of the alleged incident.
19. If you are satisfied that the accused had penetrated the vagina of the complainant with his finger then you must find the accused guilty of rape. If on the other hand you have a reasonable doubt with regard to any of

those elements concerning the offence of rape then you must find the accused not guilty of the offence of rape.

20. In this trial the accused has denied committing the offence of rape he has been charged with. 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 finger.
21. You must be satisfied that the prosecution has proved all the elements of the offence beyond reasonable doubt in order for you to find the accused guilty of the count. 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.
22. 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.

### **FINAL ADMITTED FACTS**

23. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final admitted facts.
24. From the final agreed facts you will have no problems in accepting the above 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.
25. 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**

26. The prosecution called three (3) witnesses to prove the allegation against the accused.
27. The first prosecution witness was Lanieta Likuwau the mother of the complainant "AB". In 2018 the witness was living in Maururu, Ba with her husband, mother in law and three children. The complainant is her eldest child who was 4 years in 2018. The birth certificate of the complainant was marked and tendered as prosecution exhibit no. 1.
28. The witness recalled in March, 2018 she was at home with her mother in law and her children. At around 11.30am Sereana the sister of the witness and her 6 year old son Semesa came at her house.
29. After a while Sereana and her son left, a little later the witness also went to her sister's house. At the house of Sereana the witness was inside while Semesa and the complainant were playing outside. At around 1pm the accused came and shared some jokes with the witness and her sister. The accused is the brother in law of the witness.
30. After the accused left, the witness did not hear the complainant's voice so she asked Semesa about the whereabouts of the complainant. The witness was told that the accused had called the complainant to go and pick some guavas.
31. About half an hour later the witness saw the complainant playing with Semesa and another little boy. The witness called the complainant who

- came and gave two guavas to the witness saying that uncle Sitiveni had given the guavas.
32. After giving the guavas the complainant said "*mummy uncle Sitiveni did*" then stopped. When the witness asked the complainant what had happened, the complainant repeated the same sentence three times and did not say anything else.
  33. Thereafter the witness took the complainant to the church for Palm Sunday rehearsals. After the rehearsals finished at about 5pm both reached home. At home the witness told the complainant to take off her clothes and have her shower. At this time the complainant started to cry. The witness took the complainant to the bathroom took off her panty and then saw blood on the undergarment of the complainant.
  34. When the witness asked the complainant the reason for the blood on her undergarment the complainant kept crying. The complainant then bent down and pointed to her back, the witness saw blood. The complainant said that uncle Siti had poked her vagina at the guava patch. At this time the witness felt bad and started crying she then called her husband and showed him the undergarment. After this the witness went and informed Joeli the elder brother of the accused. The accused was called and when confronted by the witness denied the allegation saying that the complainant was lying and that he had not taken the complainant to the guava patch.
  35. The next morning that is 15<sup>th</sup> March, the witness took the complainant to the hospital and then to Ba Police Station. In the hospital the complainant was kept overnight. The witness identified the accused in court.

Madam and Gentleman Assessors

36. 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.

37. 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 in this case did not tell her mother what the accused had done to her immediately after she met her mother after coming from the guava patch where the alleged incident took place. However, it was later in the afternoon of the same day the complainant told her mother when her mother saw the blood stained underwear about what the accused had done to her.
38. This is commonly known as recent complaint evidence. The evidence given by Lanieta is not evidence of what actually happened between the complainant and the accused since Lanieta was not present and did not see what had happened between them.
39. 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 wanted to tell her mother what the accused had done to her when she met her mother in the first instance but did not do so. But later in the day during shower time the complainant did complain to her mother after her mother saw the blood stains on the underwear of the complainant and therefore she is more likely to be truthful. On the other hand, defence says the complainant did not complain to her mother immediately after coming from the guava patch since nothing had happened.
40. 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 witness was consistent and credible in her conduct and in her explanation of it.

41. In cross examination the witness recalled the incident happened on 14<sup>th</sup> March and that the accused had gone with the complainant to pick guavas for about half an hour. When the complainant came back she was playing with Semesa and another little boy and that the complainant did not complain of any pain.
42. At around 3.30pm the witness took the complainant to the church where the Sunday School Teacher and other children were. The witness was in the church as well. The complainant also did not complain about any pain during the rehearsals at the church. In respect of the blood seen on the complainant's undergarment the witness said that it was a clot of blood.
43. The witness was referred to her police statement dated 16 March, 2018 she had given to the police. The witness maintained that she told the police the incident happened on 14<sup>th</sup> March and not 7<sup>th</sup> March as mentioned in her police statement. She agreed the police statement was read back to her. The witness was referred to second paragraph of the first page as follows:

*"I can recall that on Wednesday 7 March, 2018 at about 11.30am I was at home with my children. My sister namely Sereana Naivalu came home after picking [her] son Semesa from school. They just spend few minutes and went away. When they left [AB] followed them. After 20 minutes I followed them to get [AB]. I sat there for a while with my sister. [AB] and Semesa were playing outside. I heard my sister's neighbour were watching the programme on the TV."*

44. When questioned that the witness had informed the police the incident happened on 7<sup>th</sup> March but in her evidence she told the court that the

incident happened on the 14<sup>th</sup> the witness maintained that she told the police that it was the 14<sup>th</sup>.

Madam and Gentlemen Assessors

45. The learned counsel for the accused in this regard was cross examining the witness about some inconsistency in the statement she gave to the police immediately after the incident when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the witness with her evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
46. 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.
47. 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 of the reliability of the witness.
48. In re-examination the witness clarified that a police officer had recorded her police statement and that she had told her story to this officer.

49. The complainant "AB" informed the court that her uncle Siti referring to the accused took her to the guava patch where he had poked her "pipi" meaning her vagina with his little finger. As a result blood came out of her vagina. The accused wiped the blood with some mango leaves when the complainant started to cry, the accused then gave her some guavas. The complainant pointed to her private part when asked to show her "pipi".
50. The complainant further said that the accused then told her not to tell her mum about what he had done. She was lying down when the accused poked her "pipi". The accused poked her "pipi" whilst she was wearing her underwear.
51. The complainant told her mummy Lanietta about what the accused had done to her. The complainant identified the accused in court.
52. In cross examination the complainant agreed she went with the accused to pick guavas. At the guava patch the accused told her to sit and wait. When she was sitting the accused went and picked some guavas. After this both walked back to the village and she started playing with Semesa.
53. The complainant stated when she was coming back after picking guavas her "pipi" was sore yet she played with her friends. When she went to the church she told her mum about the pain in her "pipi".
54. The complainant maintained that the accused had poked her "pipi" that day and further stated that she told the doctor the accused had poked her. In church her "pipi" was not sore but when her mum had told her to go and have her shower she told her mum of her sore "pipi" because she did not want to shower.
55. In re-examination the complainant stated that her "pipi" was sore because the accused had poked her "pipi" after picking guavas.

56. The final witness was Dr. Renita Maharaj. Dr. Maharaj obtained her MBBS degree from the Fiji School of Medicine in the year 2010. Thereafter she completed post graduate Diploma in Public Health. This is her 9<sup>th</sup> year of practice and over the years she has worked at the Lautoka, Tavua and Ba Hospitals.
57. On 15<sup>th</sup> March, 2018 the doctor had examined the complainant at the Ba Mission Hospital. The Fiji Police Medical Examination Form of the complainant dated 15<sup>th</sup> March, 2018 was marked and tendered as prosecution exhibit no. 2.
58. According to the doctor the patient at the time of the medical examination was brought by her mother. The initial impression of the patient to be examined was that the child was very withdrawn, she was not talking and there was no eye contact.
59. The Specific Medical Findings of the doctor was explained as follows:
- (a) Swollen Inflamed Introitus  
Introitus is the opening of the vagina upon inspection of the vagina the doctor observed that the entrance was swollen it looked a bit red and upon touch it was very painful to the patient.
  - (b) Hymen not intact admits pus swab easily  
Hymen is a very fragile membrane that partially covers the vagina, when the doctor examined the complainant she could not see any hymen normally for a 4 year old the little finger should go in but because the patient was in pain the doctor used a pus swab stick which is a bit bigger than the little finger to see if the hymen was intact or not. The pus swab stick went in easily and freely.
  - (c) No active bleeding or laceration was noted.

60. The doctor further explained that some children can be born without hymen in general hymen not being intact could be caused by vigorous physical activity, horse riding or history of trauma like water slides or pool injury, sitting on a sharp object, something penetrating indirectly can also contribute to the hymen not being intact. Swollen and inflamed introitus can also be caused by such injuries. In respect of sharp object injury the doctor stated that there should be a trauma through the hymen such as penetration of a penis into a vagina.
61. The professional opinion of the doctor was that the hymen was not intact, indicative of abuse and panty was still blood stained from the previous day. The complainant was admitted to the Children's Ward.
62. In cross examination the doctor agreed the hymen of a 4 year child can also be damaged by falling. The doctor was unable to say for how long the hymen was not intact. To the suggestion that the injury could have been 1 week or 2 weeks old the doctor explained that the swelling and the associated pain if more than one week would not cause much pain, in one week she will be a bit relieved.
63. The doctor further stated that when the hymen gets torn from natural causes there will be no bleeding and no pain and the patient would not feel anything. The doctor agreed given that the hymen was not intact besides sexual abuse the possibilities of other causes could not be ruled out.

Madam and Gentlemen Assessors

64. You have heard the evidence of Dr. Maharaj who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. 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. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.

65. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case 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. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
66. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
67. This was the prosecution case.

#### Madam and Gentlemen Assessors

68. 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 could have remained silent but chose to give evidence and be subjected to cross examination. You must consider his evidence and give such weight as you think fit.

#### **DEFENCE CASE**

69. The accused informed the court that the complainant called him uncle. On 9<sup>th</sup> March, 2018 the accused recalled telling stories to Lanieta and Sereana at Sereana's house. The complainant was outside the house relieving herself. It was around 1pm to 2pm he left the house. The complainant saw

the accused and wanted to go with him to the guava patch since she was crying the accused took her with him. At the guava patch he made the complainant sit on the flip flops while he went to pick guavas. It took him about half an hour to pick guavas he gave the complainant her share of the guavas and told her they have to go home since her parents might be looking for her.

70. The accused denied the allegation made against him when they went back to the village Semesa was playing, the complainant cried and wanted to play with Semesa they played hide and seek game.
71. Furthermore, the accused stated that Lanieta had told him about the allegation in the presence of the complainant but when he asked the complainant she did not respond but was only looking at her mother. Further the accused stated he told Lanieta this was not the first time he had taken the complainant to pick guavas and each time he had safely returned her.
72. The accused whilst denying the allegation stated that he had a good relationship with the complainant and her family and he could not understand why the complainant made such an allegation against him.
73. In cross examination by the State Counsel the accused confirmed taking the complainant to the guava patch to pick guavas but denied poking the vagina of the complainant with his finger. Further the accused agreed he used to always visit the house of the complainant and he was treated like a family member the complainant's father was his first cousin. When he returned with the complainant from the guava patch he did not take the complainant back to her mother but left her to play with the other children since she was crying to go and play.
74. This was the defence case.

## ANALYSIS

75. The prosecution alleges between the 1<sup>st</sup> day of March, 2018 and the 15<sup>th</sup> day of March, 2018 the accused took the complainant to the guava patch where he penetrated her vagina with his little finger. As a result of what the accused did blood came out of the complainant's vagina. The accused wiped the blood with some mango leaves. The complainant cried as a result of the accused's action.
76. The accused then told the complainant not to tell her mum about what he had done, however, the complainant told her mummy Lanieta about what the accused had done to her.
77. Lanieta Likuwau the mother of the complainant on the day of the alleged incident while at the house of her sister Sereana saw her 6 year old nephew Semesa and the complainant playing outside. At around 1pm the accused came and shared some jokes with the witness and her sister.
78. After the accused left she did not hear the complainant's voice so she asked Semesa about the whereabouts of the complainant. Lanieta was told that the complainant had gone with the accused to pick some guavas.
79. Half an hour later she saw the complainant playing with Semesa and another little boy. Lanieta called the complainant who came and gave two guavas to her.
80. After giving the guavas the complainant said "*mummy uncle Sitiveni did*" then stopped. When the witness asked the complainant what had happened, the complainant repeated the same sentence three times and she did not say anything else.



81. Later the same afternoon at home Lanieta told the complainant to take off her clothes and to have her shower. At this time the complainant started to cry. The witness took the complainant to the bathroom took off her panty and then saw blood on the undergarment of the complainant.
82. When the witness asked the complainant the reason for the blood on her undergarment the complainant started crying. The complainant then bent down and pointed to her back Lanieta then saw blood. The complainant said that the accused had poked her vagina at the guava patch.
83. The next morning on 15<sup>th</sup> March, the witness took the complainant to the hospital and then to Ba Police Station.
84. On 15<sup>th</sup> March, 2018 the doctor who had examined the complainant informed the court that the complainant's hymen was not intact, indicative of abuse and her panty was still blood stained from the previous day.
85. The accused whilst denying the allegation said the complainant saw him leaving Sereana's house and wanted to go with him to the guava patch since she was crying he took her with him. At the guava patch he made the complainant sit on the flip flops while he went to pick guavas. It took him about half an hour to pick guavas he gave the complainant her share of the guavas and told her they have to go home since her parents might be looking for her.
86. When they went back to the village Semesa was playing the complainant cried and wanted to play with Semesa.
87. The accused denied the allegation and stated that he had a good relationship with the complainant and her family and he could not understand why the complainant made such an allegation against him.

Madam and Gentlemen Assessors


88. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
89. 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.
90. 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.
91. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge 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 statement 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.

92. 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.
93. 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.
94. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
95. Your possible opinions are:-  
Count One:           **RAPE**: GUILTY OR NOT GUILTY.

Madam and Gentlemen Assessors

96. 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 my staff so that the court can be reconvened.
97. 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**  
14<sup>th</sup> February, 2019

**Solicitors**

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