

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

**Criminal Case No.: HAC 19 of 2016**

**STATE**

**V**

**ISIKELI BAINITABUA**

**Counsel** : Mr. T. Tuenuku for the State.  
: Accused in person.

**Dates of Hearing** : 20, 21, 22, 23, 26, 27 August, 2019  
**Closing Speeches** : 30 August, 2019  
**Date of Summing Up** : 30 August, 2019

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**SUMMING UP**

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*(The name of the complainants are suppressed they will be referred to as "AV", "LM" and "RM" respectively)*

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 Counsel and the accused have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State Counsel and the accused 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. The accused had mentioned in court that he was in remand I direct you to disregard this from your minds completely and you are also not to speculate on the reason why the accused is in remand concentrate on the evidence adduced and nothing else.
11. You must decide the facts without prejudice or sympathy to either the accused or the complainants. 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, the accused and the court they are not evidence unless the witness accepts or has adopted the question asked.

### **INFORMATION**

13. The accused is charged with two counts of indecent assault, two counts of sexual assault and two counts of rape. (A copy of the information is with you).

### **COUNT ONE**

#### *Statement of Offence*

**INDECENT ASSAULT:** Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

#### *Particulars of Offence*

**ISIKELI BAINITABUA**, on the 6<sup>th</sup> day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted “**LM**” by pinching the nipple of the said “**LM**”.

### **COUNT TWO**

#### *Statement of Offence*

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

#### *Particulars of Offence*

**ISIKELI BAINITABUA**, on the 20<sup>th</sup> day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted “**AV**” by touching the vagina of the said “**AV**”.

### **COUNT THREE**

#### *Statement of Offence*

**RAPE:** Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009.

#### *Particulars of Offence*

**ISIKELI BAINITABUA**, on the 20<sup>th</sup> day of December, 2015 at Lautoka in the Western Division, penetrated the vagina of “**AV**” with his finger.

### **COUNT FOUR**

#### *Statement of Offence*

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

*Particulars of Offence*

**ISIKELI BAINITABUA**, on the 28<sup>th</sup> day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted “**AV**” by licking the vagina of the said “**AV**”.

**COUNT FIVE**

*Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (c) and (3) of the Crimes Act No. 44 of 2009.

*Particulars of Offence*

**ISIKELI BAINITABUA**, on the 28<sup>th</sup> day of December, 2015 at Lautoka in the Western Division, penetrated the mouth of “**AV**” with his penis.

**COUNT SIX**

*Statement of Offence*

**INDECENT ASSAULT**: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

*Particulars of Offence*

**ISIKELI BAINITABUA**, on the 7<sup>th</sup> day of January, 2016 at Lautoka in the Western Division, unlawfully and indecently assaulted “**RM**” by poking his finger in between the buttocks of the said “**RM**”.

14. To prove counts one and six the prosecution must prove the following elements of the offences of indecent assault beyond reasonable doubt:
  - (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant “LM” by pinching her nipple and assaulted the complainant “RM” by poking his finger in between his buttocks.
15. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed the offences.

16. The words “unlawfully” and “indecently” in respect of the second element of the offences simply mean without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
17. Assault is the unlawful use of force on the complainant “LM” by the act of pinching her nipple and on the complainant “RM” by the act of poking his finger in between his buttocks.
18. In respect of both the counts of indecent assault the accused has denied all the elements of the offences. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant “LM” by pinching her nipple and the complainant “RM” by poking his finger in between his buttocks.
19. If you are satisfied that the prosecution has proved all the elements of the offences of indecent assault beyond reasonable doubt, then you must find the accused guilty of both the offences of indecent assault. However, if you have a reasonable doubt in respect of any elements of the offences of indecent assault then you must find the accused not guilty.
20. To prove counts two and four the prosecution must prove the following elements of the offences of sexual assault beyond reasonable doubt:
  - (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant “**AV**” by touching and licking her vagina.
21. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offences.
22. The words “unlawfully” and “indecently” in respect of the second element of the offences 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.

23. The final element of assault is the unlawful use of force on the complainant by touching and licking her vagina.

You should ask yourself:

- (a) whether you consider the force which was used in touching and licking 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.

24. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offences of sexual assault as explained above, then you must find the accused guilty of both the offences of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offences of sexual assault, then you must find the accused not guilty.

25. In this trial, the accused has denied committing the offences 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 "AV" by touching and licking her vagina.

26. To prove counts three and five the prosecution must prove the following elements of the offences of rape beyond reasonable doubt:

- (a) The accused;
- (b) Penetrated the vagina and the mouth of the complainant "AV" with his finger and his penis;
- (c) "AV" was below the age of 13 years.

27. The slightest of penetration of the complainant's vagina and her mouth by the finger and the penis 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 there is no dispute that the complainant was 9 years at the time of the alleged offending. I therefore direct you that the consent of the complainant is not an issue in this trial.
28. The first element of the offence is concerned with the identity of the person who allegedly committed the offences.
29. The second element is the act of penetrating the vagina and the mouth of the complainant with the finger and the penis.
30. The final element of the offence is the age of the complainant. There is no dispute that the complainant "AV" was 9 years 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.
31. In respect of both the counts of rape the accused has denied all the elements of the offences. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina and the mouth of the complainant "AV" with his finger and penis.
32. If you are satisfied that the accused had penetrated the vagina and the mouth of the complainant with his finger and his penis respectively then you must find the accused guilty of both the offences of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offences of rape then you must find the accused not guilty.
33. 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 complainants to be corroborated. This means if you are satisfied with the evidence given by the complainants



and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainants.

34. In this case, the accused is charged with two counts of indecent assault, two counts of sexual assault and two counts of rape involving three complainants, you should bear in mind that you are to consider the evidence in respect of each count and each complainant separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.
35. 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 not a very long 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**

36. The prosecution called six (6) witnesses to prove the charges against the accused.
37. The first complainant "AV" who was 9 years of age in 2015 informed the court that she was born on 12<sup>th</sup> November, 2006 and the accused is her uncle.
38. On 20<sup>th</sup> December, 2015 the complainant was at the house of the accused after having her shower she was on her way to get her towel from the room when she saw the accused standing at the doorway. The complainant got scared when she saw the accused at this time he came towards her and touched her vagina.

39. The complainant went into the room to wear her clothes after a while the accused called her into the sitting room. In the sitting room the accused showed her some videos of bad things on his phone. She saw a man and a woman having sex the accused also told her for them to do what was seen in the phone this made the complainant scared and she refused.
40. The accused's 2 year old son Rupeni and her grandmother were in the house but her grandmother was sleeping in the room. After the complainant refused, the accused forcefully removed her pants and panty and then poked his index finger inside her vagina she felt pain. The accused asked her if it was painful, the complainant replied "yes" at this time the accused asked for forgiveness.
41. The accused then licked and sucked her vagina for about 5 minutes. After this, the complainant then wore her clothes and went to her grandmother and lay beside her. She did not tell her grandmother about what the accused had done to her because her grandmother was sick and sleeping. Since her parents were in Australia, she told her cousin, Litiana about what the accused had done to her. Litiana told the complainant to wait till her parents returned.
42. The complainant also recalled on 28<sup>th</sup> December, 2015 she was at the house of the accused on this day the accused was at home with his son. When the complainant was sitting on the settee in the sitting room the accused told the complainant to suck and lick his penis she refused.
43. The accused pushed the complainant's head towards his penis, at this time the accused was not wearing his pants the complainant refused so he again pushed her head towards his penis. The accused held her jaws and forced open her mouth and then put his penis inside her mouth for about 5 minutes.

44. After this the accused told the complainant not to tell anyone and he will give her money. The complainant told her cousin Litiana and her elder sister about what the accused had done to her. When the complainant's parents came back from Australia she did not tell anything to her parents but her eldest sister told them. The complainant did not tell her grandmother because her grandmother was sickly.
45. In cross examination the complainant stated on Sunday 20<sup>th</sup> December, 2015 the accused did not go to work. She disagreed with the suggestion that on this day the accused had taken his bag and left for work. The complainant agreed her grandmother was at the accused's house since she had suffered a stroke.
46. The complainant did not tell her mother, her grandmother or her aunt the wife of the accused that she had watched a bad video on the phone of the accused because the accused had told her not to tell anyone.
47. The complainant had stayed at the house of the accused for a week and she did not tell the wife of the accused about what the accused had done to her. The complainant denied that since nothing had happened she did not tell the wife of the accused.
48. On 29<sup>th</sup> December the complainant left the house of the accused but at home she did not tell her grandfather about what the accused had done to her, however, she did complain to her cousin Litiana and her sister "LM". The complainant disagreed she had told the court what her parents had told her.
49. In re-examination the complainant stated on 20<sup>th</sup> December the accused showed her a bad video and did do bad things to her.
50. The second complainant "LM" who was 15 years of age in 2015 informed the court that on 6<sup>th</sup> December, 2015 she was at home, in the afternoon the

accused with his wife and their baby were returning home in Sakur Place. The accused was carrying baby Rupeni in his arms and the baby was leaning on the chest of the accused.

51. The complainant went near the accused to kiss her cousin Rupeni as she leaned forward to kiss Rupeni she felt the hand of a grown up person touch her breast. When her breast was touched she was scared at this time she took a step back and looked at the accused who was staring at her. The accused did not say anything, she went into her house and told her cousin Litiana about what had happened.
52. In cross examination the witness agreed she did not see whether it was the accused's hand or Rupeni's hand that had touched her breast. She also could not recall whether the accused was carrying a bag in his other hand.
53. In re-examination the complainant stated that she felt the hand that touched her breast was not the hand of a child or a baby.
54. The third complainant "RM" who was 14 years of age in 2016 informed the court that "AV" was his youngest sister and "LM" was his eldest sister. The accused is his uncle on 7<sup>th</sup> January, 2016 the complainant was at the house of the accused babysitting Rupeni the accused's son. The wife of the accused was doing night shift from 5 pm to 12 midnight at around 9 to 10 pm the complainant got up and went to the washroom. When he returned he went to watch TV the accused was sitting on the settee in the sitting room.
55. After a while, the complainant lay on the mattress face down and fell asleep he woke up after he felt someone was touching his buttocks. When he turned around he saw the accused laughing at him, he did not like what the accused had done to him.

56. The complainant was able to recognize the accused because at that time the light in the sitting room was switched on together with the TV when the accused touched the complainant's buttocks he inserted his fingers inside from on top of the complainant's shorts. Since the complainant was scared he went outside the house and waited for his aunt to come the accused told the complainant not to tell anyone and to keep it a secret. The complainant told his aunt the wife of the accused and his cousin Litiana the next day at his house at Vunato about what the accused had done to him.
57. In cross examination the complainant stated on 7<sup>th</sup> January, 2016 the accused was at his house where he was babysitting Rupeni he maintained it was his aunty who had gone to work that day. The complainant further stated that when his aunty came home that night he did not complain to her since he was scared of the accused.
58. The complainant denied he had made up this allegation to blame the accused he maintained the incident had happened. According to the complainant he had his pants on and the accused was forcing his fingers in between his buttocks. He disagreed when suggested that the accused had only smacked his buttocks so that the volume of the TV could be lowered because Rupeni was sleeping.
59. The fourth prosecution witness was Dr. Teri Konrote who graduated with MBBS degree from the Fiji School of Medicine in 2008, she has been a Medical Practitioner for the past 10 years. The doctor confirmed that she had examined the first complainant "AV" on 15<sup>th</sup> January, 2016 at the Lautoka Hospital. The Fiji Police Medical Examination Form dated 15<sup>th</sup> January, 2016 was marked and tendered as prosecution exhibit No. 1.
60. The specific medical findings of the doctor were:
- a) The hymen was not visible at the location of 12 o'clock to 9 o'clock;  
and

b) **There was no active bleeding or discharge.**

61. The doctor explained that clock positioning was used to describe injuries on the hymen upon examination she was not able to see a quarter of the hymen but the rest of the hymen was intact. According to the doctor the likely cause could have been a result of trauma to the hymen she explained trauma could be in the form of finger penetration, digital self-penetration, horse-riding or anything with sufficient force could cause damage to the hymen and there were other possibilities as well.
62. In cross examination she stated it was not necessary that the penetration of the entire finger into the vagina would have completely damaged the hymen and there was a possibility that only partial hymen may be damaged.
63. The doctor also stated that if it was an injury suffered by the complainant it was possible that it occurred about one month prior to the examination or in 2014 as suggested by the accused, however, the doctor could not say with certainty that whatever she had observed was a result of finger penetration, however, the possibility remained.
64. The doctor maintained since there was no bleeding the possibility was the injury was an old one.

Ladies and Gentleman Assessors

65. You have heard the evidence of Dr. Konrote 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.

66. 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.
67. 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.
68. The fifth prosecution witness was Litiana Tikotani who informed the court that in 2015 the witness was staying at Vunato with her grandparents and her cousins namely "AV" "LM" and "RM" the accused is her uncle.
69. On 6<sup>th</sup> December, 2015 the complainant "LM" told the witness that in the afternoon as the accused and his son Rupeni were getting ready to go back to their house "LM" had gone to say goodbye and kiss Rupeni when the accused touched "LM's" breast. "LM" immediately after came running inside the house to tell her.
70. The witness told "LM" that they should keep the matter amongst themselves since she was scared of the accused that he would do something to her she suggested that they await the arrival of the complainant's parents. The witness did not tell her grandparents because her grandmother had suffered a stroke and her grandfather could not walk properly.
71. On 24<sup>th</sup> December, 2015 the witness was at home having dinner when the complainant "AV" came and told the witness that she wanted to say

something. The complainant said when she was having her shower at the accused house the accused was peeping from the door, he then came and touched the complainant's vagina.

72. After this, when the complainant went to lie down on the settee the accused showed the complainant some videos of bad things and said they should do what was shown in the video. When the complainant refused the accused removed the complainant's pants and then he poked her vagina. When the complainant told the accused it was painful, he then used his tongue on her vagina. After doing this the accused told the complainant to suck his penis just like she does with lollipop.
73. The witness and the complainant then hugged each other and both started crying. The witness called "LM" and told her what "AV" had told her. At this time, the witness told "AV" the accused had also touched "LM's" breast. The witness told both sisters that they should keep it amongst themselves till their parents arrived home.
74. On 8<sup>th</sup> January, 2016 the witness asked "RM" if the accused also did something to him. "RM" looked shocked the witness then relayed what the accused had done to his two sisters. The complainant "RM" then told her the story of how the accused told him to remove his pants since "RM" was angry he did not continue the witness identified the accused in court.
75. In cross examination the witness maintained that she did not make up any stories against the accused. She told the court what her cousins had told her and that she was not lying in court.

#### Ladies and Gentleman Assessors

74. 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.

75. 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 "LM" on 6<sup>th</sup> December, 2015 had told Litiana that when "LM" had gone to say goodbye and kiss Rupeni the accused had touched "LM's" breast.
76. In respect of the complainant "AV" when "AV" was having her shower at the accused house the accused came and touched the complainant's vagina, in the sitting room the accused removed the complainant's pants and then poked her vagina. When the complainant told the accused it was painful, the accused then used his tongue on her vagina. After doing this the accused told the complainant to suck his penis just like she does with lollipop. On 8<sup>th</sup> January, 2016 the complainant "RM" told Litiana how the accused had told him to remove his pants.
77. This is commonly known as recent complaint evidence. The evidence given by Litiana is not evidence of what actually happened between the complainants and the accused since Litiana was not present and did not see what had happened between the complainants and the accused.
78. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainants are credible witnesses. The prosecution says the complainants told their cousin sister Litiana what the accused had done to them, although not every detail of what the accused had done, but taking into account their age at the time they are more likely to be truthful.

79. On the other hand, the defence says the complainants made up a false complaint against the accused and Litiana also did not tell the truth in court. If there was any truth in the allegations the complainants would have immediately told the wife of the accused their aunty or their grandparents who were always around and therefore they should not be believed.
80. 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 complainants conduct goes to their credibility and reliability as witnesses. This is a matter for you to decide whether you accept the complainants as reliable and credible. The real question is whether the complainants were consistent and credible in their conduct and in their explanation of it.
81. The final prosecution witness Cpl. 3692 Asenaca Taufu the investigating and interviewing officer in this case informed the court on 12<sup>th</sup> January, 2016 she commenced the caution interview of the accused on her personal laptop. The accused had agreed for this mode of interview, after the interview was printed the accused signed followed by the witness and the witnessing officer Cpl. Manoa. The interview was conducted in the English language the witnessing officer has passed away, before the interview commenced the accused appeared fine, was in good health and had made no complaints. The interview was conducted at the crime office at the Lautoka Police Station.
82. The witness had given the accused his right at Q.9 and also the allegation and the cautionary words at Q.6 of the caution interview. The interview was conducted for two days, the interview for day one was suspended at Q.51 for the accused to rest. The interview recommenced the next day on 13<sup>th</sup> January, 2016 which concluded at 11:15hours. The caution interview of the accused was marked and tendered as prosecution exhibit no. 2.
83. The witness stated that neither she nor the witnessing officer had threatened, forced or intimidated the accused to sign the caution interview.

Furthermore, the witness and the witnessing officer did not forge the signature of the accused. According to the witness the accused did not complain about any ill treatment by the police officers at the conclusion of the caution interview the accused appeared remorseful for what he had done. During the investigation the witness had uplifted the birth certificate of the complainant "AV" which was marked and tendered as prosecution exhibit no. 3.

84. In cross examination the witness maintained the witnessing officer was Cpl. Manoa who was present throughout the interview and had signed the caution interview in her presence.
85. When the FNPF ID of the accused was shown to the witness, the witness could not comment whether the signature on the ID card was different from the one in the caution interview since the signature on the photocopy of the ID was not clear. The photocopy of FNPF ID of the accused was marked and tendered as defence exhibit No. 1.
86. The photocopy of Lautoka Police Station diary entries dated 12<sup>th</sup> January, 2016 to 14<sup>th</sup> January, 2016 was marked and tendered as defence exhibit No. 2. The witness agreed the diary entry of 12<sup>th</sup> January, 2016 as per serial no. 72 stated that the time the accused was brought into the Lautoka Police Station was 12.30pm. She also agreed it was not noted in the station diary that Cpl. Manoa was present during the caution interview but this was noted in the caution interview.
87. The witness denied the caution interview was fabricated she explained at the conclusion of the interview that it was printed the accused had read the contents before signing. The witness maintained whatever the accused had told her was recorded in the caution interview.

## Ladies and Gentleman Assessors

88. The caution interview of the accused is before you, the answers in the caution interview are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview. Also note that some parts of the caution interview has been blacked out you are not to speculate why that is so you are to concentrate on the legible parts of the caution interview.
89. During the cross examination of the interviewing officer the accused had asked questions suggesting that the answers contained in the caution interview were fabricated or made up by the interviewing officer, as a result the accused did not give his answers voluntarily. The accused also questioned the interviewing officer that in regards to the fact that he did not sign the interview.
90. This meant the accused had put to the witness that the admissions mentioned in the caution interview were not given voluntarily by him and that he did not sign the caution interview therefore you should disregard those admissions.
91. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his caution interview then you should disregard them. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.
92. This was the prosecution case.

## **DEFENCE CASE**

### Ladies and Gentleman Assessors

93. 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 three witnesses. You must consider their evidence and give such weight as you think fit.
94. The accused informed the court in 2015 he was residing at Jinnu Road, Waiyavi, Lautoka he is a Carpenter and he was working at Momi Bay. He left for work early in the morning every day at about 4.30am to 5.30am and he worked 7 days a week. The photocopy of reference from Fletcher Construction dated 16<sup>th</sup> March, 2016 was marked and tendered as defence exhibit no. 3.
95. On 20<sup>th</sup> December, 2015 the accused left his home for work at 4.30am leaving at home the complainants grandmother, his son Rupeni and the first complainant "AV". When he boarded the bus, he realized he had forgotten his phone at home. Since it was Sunday he knocked off from work at 1pm he then went to Farmers Club at Nadi Town to drink beer with some of his friends including one Peni Nakarawa and Joape Ralulu it was very late at night that he arrived home that day.
96. The next morning on the 21<sup>st</sup> the accused left for work, Peni Nakarawa also boarded the same bus from Kashmir. The accused also stated from 23<sup>rd</sup> December, 2015 till 4<sup>th</sup> January, 2016 he was on Christmas leave. On 24<sup>th</sup> December the first complainant "AV" and her grandmother returned to their home at Vunato.

97. On 7<sup>th</sup> January, 2016 the accused was at work he finished work at 4pm, however, he received a call before reaching Nadi Town to do overtime. The accused returned to the worksite in the company vehicle to do overtime. After doing overtime he knocked off at 8pm arriving home at around 11pm.
98. When he reached home, he saw the complainant's grandmother, Rupeni and the complainant "RM". His wife returned from work at around 12 midnight there was no complaint from anyone that night or the next morning. The complainant "RM" had come to babysit his son Rupeni and then returned to Vunato that same night. The accused gave the complainant his fare to go back to Vunato. The complainant never complained of anything that had happened to him or the way he was treated.
99. According to the accused just before Christmas he had gone to attend a wedding at Vunato. It was Sunday the accused with his family was about to leave for his home when the complainants grandfather came to say goodbye to his son Rupeni who was in his arms the accused was carrying a bag and holding the pram with his other hand. As the accused was going towards the car the complainant "LM" called out saying "*wait, I also want to kiss him*" "LM" came running pulled Rupeni, kissed him and went back. The complainant's grandfather was looking at them.
100. The complainant did not complain to his wife Seleima or her grandparents. On 12<sup>th</sup> January, 2016 the accused was arrested by the police at Namaka. He was assaulted by police officers at the Namaka roundabout and also at the police station. He did not make any statement when questioned by the police officers. The police officers did not allow him to see his family members or his wife.
101. In his caution interview the accused answered questions about meals and where he was on the 20<sup>th</sup> and 21<sup>st</sup> December, 2015 he had told the police he was working.

102. According to the accused he was not given his rights in the police station. The accused had asked for one of his relatives to be present and also for Legal Aid to be present which was not allowed. He was taken to the summer house beside the crime office here the police officers continued with their questions he was slapped and punched on the back of his head.
103. The accused denied committing the offences as alleged he said he did not do anything to the children who were under the care of his wife. The answers in the caution interview were fabricated by the interviewing officer.
104. In cross examination the accused maintained that he had complained about the assault on him to the interviewing officer and the arresting officers and had sought their assistance to be taken to the hospital but he was not taken.
105. The accused did not tell the Magistrate that he was assaulted by the police officers when he appeared in the Magistrate's Court on 14<sup>th</sup> January, 2016, however, he had told this to his counsel. When the accused was referred to the court record that the matter was stood down at his request to 2pm, and he had the opportunity to tell the Magistrate about the assault the accused stated that he was not in his right state of mind. He agreed that he did not tell the Magistrate about the assault or any injuries suffered.
106. On 20<sup>th</sup> December, 2015 the accused went to work when it was put to him that in answer to question 34 of the caution interview he had stated that he was at home, the accused responded by saying this was not his answer since he had refused to answer those questions and that he had refused to sign the caution interview as well.
107. The accused further stated that the complainant "AV" had made a false allegation against him with the help of her parents and that she had only watched the video on his phone and nothing happened.

108. In respect of the allegation of 28<sup>th</sup> the accused also said nothing happened. According to the accused, the complainant made up a false allegation against him because of the family dispute since the toilet at the complainant's house was damaged other than this they had consumed grog in the house of the complainants which was contrary to their religious belief the parents of the complainants did not like it so they all got together to make a false allegation against him.
109. Upon further questioning the accused stated that he was working on all the days of the allegations and he denied committing the offences as alleged.

### **DEFENCE OF ALIBI**

#### **Ladies and Gentleman Assessors**

110. The accused has put forward the defence of alibi. He says that he was not at the scene of crime when it was committed. As the prosecution has to prove his guilt so that you are sure of it, the accused does not have to prove he were elsewhere at the time. On the contrary, the prosecution must disprove the alibi beyond reasonable doubt. Even if you conclude that the alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence.
111. The second defence witness Peni Nakarawa informed the court that he was working as a grounds man for Fletcher Construction at Momi. He knew the accused and both used to board the same bus to work in the morning.
112. On 20<sup>th</sup> December, 2015 the witness had travelled together with the accused to Momi. At the work site the witness and the accused sometimes had their meal together the accused also used to sell food parcels and cigarette rolls which the witness sometimes used to buy from the accused.



113. On 28<sup>th</sup> December, 2015 the witness was working at Momi but the accused was not at work on this day. On 7<sup>th</sup> January, 2016 which was a Thursday the witness was working he started work at 7am and knocked off at 8pm. When he boarded the bus in the morning he saw the accused in the bus so he went and sat beside the accused.
114. The third defence witness Joape Ralulu informed the court that he knows the accused since 2015 and they had been working together at the Fletcher Construction the accused used to sell food parcels and also sometimes during the weekend the witness used to drink with the accused.
115. On 20<sup>th</sup> December, 2015 which was a Sunday the witness was at work at around 1pm he finished work with the accused, on this day the company had organized a thanksgiving party which both had attended.
116. On 21<sup>st</sup> December, 2015 the witness was at work he started work at 7am and knocked off at 4pm and he saw the accused at work. On 7<sup>th</sup> January, 2016 the witness was at work he started work at 7am and knocked off at 8pm he saw the accused working on the day.
117. On 23<sup>rd</sup> December, 2015 the witness finished work and resumed on the 4<sup>th</sup> January, 2016 during Christmas leave some workers continued working such as some of the Grounds men, Tile Layers and some of the Carpenters.
118. On 28<sup>th</sup> December, 2015 the witness went to work at Momi, the accused was also at work on this day.
119. In cross examination by the State Counsel the witness was referred to his police statement dated 12<sup>th</sup> August, 2019 the following paragraph was read:

*"I am the abovementioned person and I had been remanded at Natabua Remand Centre for 3 months now. I have known Isikeli Bainitabua since*

*2016 as I had worked with him at a Construction Company at Momi, Nadi I can't recall the company name."*

120. When it was put to the witness that 2 weeks ago he could not recall the name of the company and now he told the court it was Fletcher Construction the witness stated that when he gave his police statement he was locked up in segregation and he was not in his right state of mind. The witness agreed he is remanded with the accused at the Remand Centre but they shared different dormitories. The witness agreed there was nothing mentioned in his police statement about 20<sup>th</sup>, 21<sup>st</sup>, 28<sup>th</sup> December, 2015 or 7<sup>th</sup> January, 2016.
121. The witness stated the police officers did not ask him about these dates so he did not tell them but agreed they did ask about the details of his work with the accused at Momi and that was what he told them in his police statement.
122. The witness also agreed he was asked by the accused what date he had finished work in 2015 and he had responded 23<sup>rd</sup> December, 2015 and he had resumed work on 4<sup>th</sup> January, 2016.
123. The witness went to work on 28<sup>th</sup> December, 2015 to ask if he could do some work during his leave because he was on leave from the 23<sup>rd</sup>. He maintained on 28<sup>th</sup> December, 2015 and 7<sup>th</sup> January, 2016 the accused was at work with him, however, on the 28<sup>th</sup> the accused was not with the witness the whole day.
124. In re-examination the witness stated that on 28<sup>th</sup> December, 2015 he was on leave but he went to work to ask the Manager if he could be part of the 20 workers selected to work during the Christmas leave.
125. The final defence witness Apakuki Sowane informed the court that he knows the accused since they were raised together. The witness stated he

started worked for Fletcher Construction from July, 2015 as a Tile Layer. The accused was also working for Fletcher Construction and it was through the accused that he was able to get employment with Fletcher Construction.

126. On 20<sup>th</sup> December, 2015 the witness was at work they finished work at 1pm after which there was a party organized by the company for all the workers. The accused was at work as well.
127. On 21<sup>st</sup> December, 2015 the witness was at work laying tiles near the accused's job site where the accused was working he also went to buy cigarette from the accused that day. There was no work from 23<sup>rd</sup> to the 27<sup>th</sup> December, but the witness resumed work on the 28<sup>th</sup>. On the 28<sup>th</sup> the witness saw the accused working with the other workers.
128. On 7<sup>th</sup> January, 2016 the witness was at work with the accused during the whole week he used to have lunch with the accused and every time he wanted to have a cigarette he would always go and buy a roll from the accused.
129. In cross examination the witness stated that he believed he saw the accused on the 20<sup>th</sup> and 21<sup>st</sup> December. On 20<sup>th</sup> he had lunch with the accused at the work place the company party on this day had ended at around 6 to 7pm.
130. The witness maintained he was with the accused on the 28<sup>th</sup> of December, 2015 when he was referred to his police statement dated 12<sup>th</sup> August, 2019 he agreed that there was nothing mentioned about 28<sup>th</sup> December reason being he was asked about 20<sup>th</sup> and 21<sup>st</sup> and not about 28<sup>th</sup> December.

#### Ladies and Gentleman Assessors

131. The learned State Counsel was cross examining the defence witnesses Joape Ralulu and Apakuki Sowane about some inconsistencies in the statement

they gave to the police immediately after the accused had informed the court about his defence of alibi 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.

132. 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.
133. 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.
134. This was the defence case.

### **ANALYSIS**

135. The prosecution alleges the accused committed sexual offences on his two nieces and one nephew over numerous dates from 6<sup>th</sup> December, 2015 till 7<sup>th</sup> January, 2016.

136. On 20<sup>th</sup> December, 2015 the first complainant "AV" was at the house of the accused after having her shower she was on her way to get her towel from the room when she saw the accused standing at the doorway. She got scared when she saw the accused at this time he came towards her and touched her vagina.
137. After a while the accused called the complainant into the sitting room here he showed her some videos of bad things on his phone. The accused forcefully removed her pants and panty and then poked his index finger inside her vagina the accused asked her if it was painful, he then sought forgiveness.
138. The accused then licked and sucked the vagina of the complainant "AV" for about 5 minutes since her parents were in Australia, she told her cousin Litiana about what the accused had done to her. Litiana was afraid of the accused so she suggested that they wait for the complainant's parents to arrive into the country.
139. On 28<sup>th</sup> December, the complainant was at the house of the accused on this day the accused was at home with his son. When the complainant was sitting on the settee in the sitting room the accused told the complainant to suck and lick his penis which she refused to do.
140. The accused pushed the complainant's head towards his penis, at this time he was not wearing his pants the accused forcefully held her jaws and forced open her mouth and then put his penis inside her mouth for about 5 minutes.
141. After this the accused told the complainant not to tell anyone and he will give her money. The complainant told her cousin Litiana and her elder sister about what the accused had done to her. When the complainant's parents came back from Australia her eldest sister told them about what the accused had done.

142. On 6<sup>th</sup> December, 2015 the second complainant “LM” was at home when she went near the accused to kiss her cousin Rupeni who was in the arm of the accused as she leaned forward to kiss Rupeni the accused touched her breast. When her breast was touched she was scared at this time she took a step back and looked at the accused who was staring at her. The complainant went into her house and told her cousin Litiana about what had happened.
143. On 7<sup>th</sup> January, 2016 the third complainant “RM” was at the house of the accused babysitting Rupeni the accused’s son. The wife of the accused was doing night shift from 5pm to 12 midnight at around 9 to 10 pm the complainant got up and went to the washroom. When he returned he went to watch TV the accused was sitting on the settee in the sitting room.
144. After a while, the complainant lay face down on the mattress and fell asleep he woke up after he felt someone was touching his buttocks.
145. The accused had inserted his finger between his buttocks. The complainant told his aunt the wife of the accused and to his cousin Litiana the next day at his house at Vunato about what the accused had done to him.
146. After the matter was reported to the police the accused was caution interviewed whereby he made admissions about what he had done to the complainants. The prosecution is saying that you should rely on the answers contained in the caution interview which was given voluntarily by the accused. The prosecution also says the evidence of alibi adduced in court is unreliable and should be rejected.
147. On the other hand, the defence position is that the accused did not commit the offences as alleged by the three complainants. The three complainants made a false complaint against the accused since there was a family dispute

between the accused and the complainants family hence the parents of the complainants and the complainants made up this allegation.

148. The defence is also asking you to disregard the confession contained in the caution interview since they were obtained by fabrication the accused did not sign the caution interview and his signature was forged.
149. The defence says you should not believe the prosecution witnesses in particular all the complainants and the interviewing officer. The complainants made up a false allegation against the accused in collusion with their parents and the interviewing officer fabricated the answers in the caution interview. The accused says he did not sign the caution interview the signature in the caution interview is different from his signature in his FNPF ID which suggests that his signature was forged and therefore you should not rely on the caution interview at all.

#### Ladies and Gentleman Assessors

150. You have seen all the witnesses give evidence keep in mind that some witnesses react differently when giving evidence.
151. 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.
152. 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.

153. 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.
154. 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.
155. 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.
156. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
157. In this case, the accused is charged with two counts of indecent assault, two counts of sexual assault and two counts of rape, involving three complainants as mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count and each complainant



separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.

158. Your possible opinions are:-

Count One: **INDECENT ASSAULT** GUILTY OR NOT GUILTY.  
Count Two: **SEXUAL ASSAULT**: GUILTY OR NOT GUILTY.  
Count Three: **RAPE**: GUILTY OR NOT GUILTY.  
Count Four: **SEXUAL ASSAULT** GUILTY OR NOT GUILTY.  
Count five: **RAPE**: GUILTY OR NOT GUILTY.  
Count six: **INDECENT ASSAULT**: GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

159. 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.

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



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

30 August, 2019

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Accused in person.**