

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 165 of 2017**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

**INOKE MATIA YALIMAI**

**Counsel** : Ms. L. Bogitini for the State  
Ms. E. Radrole with Mr. T. Varinava for the Accused

**Hearing on** : 02 - 04 September 2019

**Summing up on** : 05 September 2019

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "SQ". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

**SUMMING UP**

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are judges of facts.

2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room and the admitted facts. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. A police statement of a witness can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their

behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

7. The complainant said she is 18 years old and she gave evidence about an incident that had allegedly taken place in 2016. You may have come across children of her age. You will have an idea of the way a child of a particular age behave, think, talk and the way they describe things.
8. Children can be confused about what has happened to them. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time what they were doing was wrong.
9. I mention these possibilities because experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make.
10. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.

11. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses in court on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the reliability of the account given by the witness is unaffected. In this regard, you may perhaps think it obvious that the passage of time will affect the accuracy of memory. Therefore, you might not expect every detail to be the same from one account to the next.
12. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
13. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
14. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

15. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proven facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proven facts, then you should not draw the adverse inference.
16. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
17. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and an accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
18. In order to prove that an accused is guilty of an offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of an offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.

19. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not those charges have been proved.
20. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
21. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

**REPRESENTATIVE COUNT**

**FIRST COUNT**

*Statement of Offence*

**Sexual Assault:** contrary to section 210 (1) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**INOKE MATIA YALIMAIWAI** between the 1<sup>st</sup> day of December, 2016 to the 24<sup>th</sup> day of December, 2016 at Sigatoka in the Western Division, unlawfully and indecently assaulted **SQ**, by sucking her breast.

**REPRESENTATIVE COUNT**

**SECOND COUNT**

*Statement of Offence*

**Sexual Assault:** contrary to section 210 (1) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**INOKE MATIA YALIMAIWAI** between the 1<sup>st</sup> day of December, 2016 to the 24<sup>th</sup> day of December, 2016 at Sigatoka in the Western Division, unlawfully and indecently assaulted **SQ**, by licking her vagina.

**REPRESENTATIVE COUNT**

**THIRD COUNT**

*Statement of Offence*

**Rape:** contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**INOKE MATIA YALIMAIWAI** between the 1<sup>st</sup> day of December, 2016 to the 24<sup>th</sup> day of December, 2016 at Sigatoka in the Western Division, inserted his penis into the vagina of **SQ**, without her consent.

22. The accused is charged with three counts. However, please remember that you should consider each count separately. That is, you must not assume that the accused is guilty of the other count just because you find him guilty of one count.
23. You would notice that the three counts in the Information are termed as representative counts. A representative count is a count where the prosecution alleges that the accused had committed the offence he is charged with on more than one occasion during the period specified in the count but the prosecution has opted to frame only one charge. This is done usually when the prosecution is unable to ascertain the exact dates the offences were alleged to have been committed. When it comes to a representative count, the law says that it shall be sufficient for the prosecution to prove that between the dates specified in the charge at least one offence was committed.
24. To prove the offence of sexual assault which is the offence the accused is charged with on the first and the second counts, the prosecution should prove the following elements beyond reasonable doubt;
  - a) the accused;
  - b) unlawfully assaulted the complainant; and
  - c) the said assault is indecent and sexual.

25. The first element involves the identity of the offender who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence.
26. Assault is the use of unlawful force. A touch constitutes an assault if it is done without a lawful excuse.
27. The word “unlawfully” simply means without lawful excuse.
28. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. You should also ask yourself, firstly, whether you consider that indecent assault could also have been sexual because of its nature; and if the answer is ‘yes’, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.
29. To prove the offence of rape, which is relevant to the third count, the prosecution must prove the following elements beyond reasonable doubt;
  - a) the accused;
  - b) penetrated the vagina of the complainant with his penis;
  - c) without the consent of the complainant; and
  - d) the accused either;
    - i. knew or believed that the complainant was not consenting; or
    - ii. was reckless as to whether or not she was consenting.
30. The first element is concerned with the identity of the accused. The prosecution should prove beyond reasonable doubt that the accused committed the offence and no one else.
31. The second element involves the penetration of the complainant’s vagina with the penis. The law states that this element is complete on penetration to any extent.



Therefore, it is not necessary to have evidence of full penetration or ejaculation. A slightest penetration is sufficient to satisfy this element.

32. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent.
33. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
  - a) by force; or
  - b) by threat or intimidation; or
  - c) by fear of bodily harm; or
  - d) by exercise of authority.
34. Apart from proving that the complainant did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
35. It is not difficult to understand what is meant by the sentence "the accused knew or believed". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina, you may find that the accused was reckless as

to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.

36. If a person penetrates the vagina of a child between the age of 13 years and 16 years that person is guilty of the offence of defilement. Therefore in the event you find that the accused did insert his penis inside the complainant's vagina, but you are not sure whether the prosecution has proven the elements involving consent, you should consider the lesser offence of defilement. In that, you have to consider whether the prosecution has proven beyond reasonable doubt that the complainant was between the age of 13 years and 16 years at the time the accused inserted his penis inside her vagina.
37. Please remember that it is a defence to this offence if it appears to you that the accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years at the material time. However, it is not a defence that the complainant consented to sexual intercourse when it comes to the offence of defilement.
38. Please remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
39. When you consider the evidence on the identification in respect of each count, please bear in mind that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate the evidence given by the complainant on identification of the accused in relation to each count;
  - a) Duration of the observation;

- b) The distance within which the observation was made;
  - c) The lighting condition at the time the observation was made;
  - d) Whether there were any impediments to the observation or was something obstructing the view; and
  - e) Whether the complainant knew the accused and for how long.
40. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
41. The complainant said in her evidence that;
- a) *Her date of birth is 08/08/2001. In 2016 she spent her Christmas and New Year holidays at Bouwaga Village, Vatulele. At this time she was schooling at Nasinu. While she was at Vatulele in December 2016, one day she went with 6 friends to catch mud crabs. When they reached the place they got separated in order to catch the crabs.*
  - b) *When she was walking alone she felt that the accused who is her uncle was walking behind her. He then got hold of her waist with one hand and her mouth with the other. He lifted her up and carried her for about 15 minutes away from the roadside. During this 15 minutes she tried to free herself by moving her body. She kept on kicking throughout.*
  - c) *Thereafter, the accused tried to remove her pants but she kept on pulling it up. Then he pushed her down and that's the time she saw his face. She said that the accused tried to remove her pants after threatening her with the cane knife the accused had in his hand when he grabbed her. He threatened her with the knife and told her to remove her clothes. She was scared and did not move.*
  - d) *Then the accused pulled her trousers down but she pulled it up again. He again pulled it down and she pulled it up. Then the accused pushed her down and then pulled her trousers along with her panty. He then pulled her t-shirt and her bra up. Then the accused started kissing her on her neck. He came down to her breast and sucked her breast. Then the accused kissed her vagina and licked it. When he was doing this she was just lying down closing her eyes and was crying.*
  - e) *Thereafter the accused tried to insert his penis inside her vagina. It did not go in on the first attempt. He was then moving and thereafter the accused's penis went inside her vagina. She said that she experienced pain when the accused's penis went inside. She*

said she was scared. She said her eyes were closed and tears were rolling down her eyes. She said she did not consent for the accused to insert his penis into her vagina. After that the accused stood up, wore his clothes and left.

- f) The accused did not say anything to her. Her body was very weak and therefore she lay down for 5 to 10 minutes after the accused left. Thereafter she tried to locate the main road. While she was looking for the road she met one of her cousins and then she went with the cousin to the village. She did not say anything to the cousin about the incident. She said she did not say anything because she was scared and also because she respects the accused as he was her uncle. She did not complain to anyone after she reached the village.
- g) She said her father's mother is the sister of the accused's father. She said that she did not complain because she was treated as a "left alone child". When she was asked what she meant by that, she said most of the time the house chores were given to her when her siblings just go and play.
- h) She said the second incident took place when she was sleeping at her house in December 2016. It was night time. Two of her siblings were sleeping in the sitting room while she was sleeping alone in the room. Her parents were attending a function at the village hall. She said while she was sleeping she felt something big on her thighs. When she tried to move, she could not see anyone there. There was a pillow on her chest and a piece of cloth inside her mouth.
- i) She moved her body from side to side and the pillow fell down and then she saw the accused. She said there was light coming through the window in her room and she was able to see the accused. She said she got scared and she cried because it is the second time he is doing that to her. Then he removed her trousers together with her panty and pushed her vest and the bra. The accused then kissed her neck and then sucked her breast. Thereafter the accused kissed her vagina and licked it. Thereafter the accused inserted his penis inside her vagina.
- j) She said that it was painful. She said that when the accused was inserting his penis into her vagina the pillow was on her face and she was crying. She said that she saw the accused when he was putting on his clothes to go back. She removed the piece of cloth from her mouth and the pillow on her face after the accused left. She said she did not give consent for the accused to insert his penis inside her vagina. She said she did not tell the accused that she is not willing or consenting for him to do this because she respected him, but she did not like what he did. She said that though this was the second time she did not tell anyone about the incident, because the accused should keep her away from all bad things.
- k) On another night in December 2016 when she was at home alone, the accused came from the window and tied a piece of cloth around her mouth and put a pillow on her face. The accused then pulled her trousers and the panty down. He pulled her t-shirt up. The

*accused then kissed her neck, sucked her breast and then kissed her vagina. Thereafter the accused inserted his penis inside her vagina. She did not consent for the accused to insert his penis inside her vagina. When the accused was inserting his penis she closed her eyes and tears fell from her eyes. She didn't tell the accused that she was not consenting because she was scared of him. She was scared because the accused had told her that if she tells anyone he might kill her. He told this to her after the third incident. She said she tried to push the accused when the accused was trying to insert his penis inside her vagina. She knew that it was the accused because she saw his face when he was trying to remove his trousers. The third incident happened in the same room the second incident took place. There was nothing blocking her view when she saw the accused's face.*

- l) Even after this incident she did not tell anyone of her family members about what the accused had done to her. This is because the accused had told her that he will kill her if she tells anyone. Another reason was because her father was a short tempered person. She said she had known the accused since she was born. To her knowledge the accused resided at Bouwaqa, Vatulele in 2016. After the incidents, he left Bouwaqa and went to Viti Levu.*
- m) She said this matter was reported after her head girl in the school asked her whether she was pregnant. She said 'no', when the head girl asked her. She said the head girl asked her on a Wednesday and on the following Saturday she got injured during a sevens competition and was taken to the hospital in an ambulance by her coach. Upon her being examined at the hospital, she was told that she was 7 months pregnant. She said that this happened in July 2017. She said that the Vice Principal questioned her and she told him that her uncle had done this to her. She also told the head girl.*
- n) She said that she did not know that she was pregnant. She was not planning on telling anyone because the accused had threatened her. She did not tell her parents because she is a 'left alone child'.*
- o) During cross examination she said that while she struggled for 15 minutes the accused had the knife in his hand which was on her waist. She said she did not sustain any injuries. She agreed that her house in the village is located near other houses. She agreed that she had not mentioned to the police about the accused threatening her.*
- p) She agreed that it is not stated in her police statement that she found out she is pregnant after the sevens game. It was pointed out that it is stated in her police statement that she felt she might be pregnant because she noticed she did not have menstruation for some time. When it was pointed out that it is stated in her police statement that the police took her for a medical examination, she said when she arrived at the hospital in the ambulance with her coach, police officers came to the hospital. She said that her coach was the first person she relayed the story to. Then it was pointed out that she said in her evidence that the Vice Principal was the first person she informed.*

- q) *She said that she told the head girl she was pregnant only after she was checked at the hospital and that she never told the head girl about what happened to her. She denied the suggestion that she cried and said that she was sexually abused by her uncle in Caubati in April when the head girl asked her whether she is pregnant. She denied the suggestion that the accused and his wife were residing in Nadi in December 2016.*
- r) *During re-examination she said that she did not get injured from the knife during the 15 minutes she struggled because the sharp edge of the knife was away from her body. She said she did not mention that she was threatened by the accused in her police statement because she respects the accused. She said that both her coach and the vice principal were there when she was questioned at the hospital.*
42. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to call witnesses. Please remember that the accused has a right to remain silent and not to give evidence. You should not draw any adverse inference against the accused because he decided to exercise that right.
43. The First witness for the defence ("DW1") was the wife of the accused. She said that;
- a) *She and the accused were living in Vatulele and in June 2016 they went to her sister-in-law's place in Nadi for her confinement. In August they went to Kinoya to her parents' house and she gave birth in September. She said she went to Nadi again during the Christmas week in December 2016 as they were invited to spend the Christmas and the New Year in Nadi. They were in Kinoya during the first weeks of December 2016. She said the accused was with her throughout the month of December 2016.*
- b) *During cross-examination she agreed that she does not want her husband to go to prison. She said she told the truth about where they were residing.*
44. The second defence witness ("DW2") was the accused's brother-in-law. He said that;
- a) *The accused came with his family in June 2016 and lived in his house. He said the accused and his family were living in his house in Nadi and they spent Christmas together.*
- b) *During cross-examination he said the accused and his family stayed in his house till August and then went to Kinoya for the accused's wife's confinement. Then he invited*

*them to spend the New Year and Christmas with him and they came to Nadi during the Christmas week.*

45. The third defence witness (“DW3”) was one Nacani Virivirisai. He said he is residing in Bouwaqa, Vatulele and the accused is his cousin. The complainant’s father is his mother’s brother. He said that he did not see the accused in December 2016 at his village. He said that it is a small village and he would know if a visitor arrives.
46. The fourth defence witness (“DW4”) was the head girl of the school the complainant was referring to. She said that;
  - a) *On 08/07/17 which was a Saturday she was informed of a rumour that the complainant is pregnant. She approached the complainant at the complainant’s room. She said she first asked the complainant ‘how is boarding life’ because the complainant had been having cases of stealing and lying at the hostel. The complainant did not respond. But she looked worried. Then she asked her again, ‘is everything okay?’ The complainant then replied that there are rumors about her being pregnant and she started crying.*
  - b) *She then asked her ‘are you really pregnant?’ and the complainant said that she was abused by her uncle in Caubati. When she asked what kind of abuse, the complainant told her ‘sexual abuse’. Then she asked the complainant, when did this happen and the complainant told her that it was during April Holidays. She said that the complainant told her that she was pregnant and that the complainant was not having her menstruation for the past 2 months.*
  - c) *She then reported the matter to the mistress on duty and then to the Assistant Principal. Then the Assistant Principal with the Mistress on duty and the Matron had taken the complainant to the hospital for them to check whether she is really pregnant. She was taken from the Assistant Principal’s office to the hospital. She said she had received 4 complaints of the complainant lying and stealing other girls’ stuff.*
  - d) *During cross-examination she said that she came to know that the complainant had told the teachers that she was abused by her uncle in Vatulele.*

### ***Analysis***

47. In this case, there was a delay of about 07 months for the complainant to make a complaint to the police. As I have already highlighted, experience has shown that victims of sexual offences may react in different ways to what they went through.

Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, if there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay in making a complaint, you should see whether there is a reasonable explanation to such delay. Ultimately your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

48. You heard the evidence of DW4 who said that the complainant told her that the complainant was sexually abused by her uncle in Caubati in April when she questioned the complainant regarding the complainant's pregnancy. The complainant's evidence was that she only told DW4 that she is pregnant but this was after she was examined in the hospital and the complainant denied telling DW4 what happened to her.
49. According to the complainant the matter came to light after DW4 questioned her regarding her being pregnant. However, there was a marked difference between what the complainant said she told (and did not tell) DW4 and what DW4 said in her evidence about what the complainant told her. The most significant discrepancy is that according to DW4, the complainant told her that the complainant was sexually abused by her uncle in Caubati in April and the complainant's evidence was that she did not tell DW4 anything apart from her being pregnant. Then again what DW4 said she was told by the complainant is not consistent with the prosecution case against the accused.
50. It was also pointed out by the defence that the complainant had not mentioned in her police statement that she was threatened and about her being taken to the



hospital in an ambulance. The circumstances under which the complainant was taken to the hospital and DW4's evidence on how the complainant was taken to the hospital are also different.

51. I have explained to you how to deal with inconsistencies. You should deal with the above inconsistencies and any other inconsistency you may come across in line with the said directions.
52. DW4 also said in her evidence about receiving complaints against the complainant about lying and stealing. Even if the complainant had been found lying or stealing, that alone would not make the account she gave unreliable. However, if you believe DW4 regarding the said complaints against the complainant, it is open for you to conclude that the complainant has the propensity to lie.
53. The accused had taken up the position that he was not there at the place of offence at the time the offences are alleged to have been committed. This defence is known as the defence of *alibi*. According to the Information and the complainant's evidence the offences were allegedly committed in the month of December 2016. Accordingly, the accused says that he could not have committed the offences he is charged with because he was not there at Bouwaqa, Vatulele in December 2016. He brought three witnesses in this regard. Though an accused raises the defence of *alibi*, please remember that there is no burden for the accused to prove that he was elsewhere during the time the offence is alleged to have been committed. The prosecution should still prove that it was the accused that committed the offence and therefore the *alibi* is not true.
54. Having considered the evidence of the defence witnesses regarding the accused's *alibi*, if you think that the version of the accused is true or it may be true, then you must find the accused not guilty of each count.

55. However, you should also bear in mind that you should not assume that the accused is guilty of the offences he is charged with merely because you decide not to accept his *alibi*. You should remember that sometimes an accused may invent an *alibi* just because it is easier to do so rather than telling the truth. Main question remains the same. That is, whether you are sure that the accused committed each offence he is charged with.
56. The defence also pointed out that the account given by the complainant with regard to how the incidents took place is not probable.
57. In relation to the first count the prosecution case is that in the month of December in 2016, the complainant was sexually assaulted by the accused where the accused sucked the complainant's breasts without her consent.
58. In relation to the second count the prosecution case is that in the month of December in 2016, the complainant was sexually assaulted by the accused where the accused sucked the complainant's vagina without her consent.
59. In relation to the third count the prosecution case is that in the month of December in 2016, the complainant was raped by the accused where the accused inserted his penis inside her vagina without her consent.
60. The defence case is that the accused was not there in Bouwaqa, Vatulele in December 2016, so he could not have committed the offences. It is pointed out that the complainant had told DW4 when she was questioned about the pregnancy that she was sexually abused by her uncle in Caubati.
61. You should be careful not to be guided by emotion due to the fact that the complainant said that she had given birth to a child. The issue before you is whether

the prosecution has proven beyond reasonable doubt that the accused had committed the offences he is charged with, in December 2016.

62. Considering the facts you may consider to have been proved beyond reasonable doubt based on the evidence led in this case and the reasonable inferences you would draw from those proven facts, you have to ask yourselves, firstly, whether you are satisfied beyond reasonable doubt that the complainant had given you a truthful and a reliable account. Thereafter, you should decide whether the elements of each offence have been proved beyond reasonable doubt given the evidence you would consider to be credible and reliable.
63. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
64. I must again remind you that even though an accused person offers evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
65. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each charge;
  - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.

(iii) The third possibility is that you reject his evidence. But if you disbelieve him, or his witness, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

66. Any re-directions?

67. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

68. Your opinion should be as follows;

First count (sexual assault) – guilty or not guilty


Second count (sexual assault) – guilty or not guilty

Third count (rape) – guilty or not guilty

If not guilty

Defilement – guilty or not guilty



  
Vincent S. Perera  
JUDGE

**Solicitors;**

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