

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 33 of 2017

STATE

V

PRASHANT RAJU

Counsel : Ms. P. Lata for the State.
: Mr. S. Nand for the Accused.

Dates of Hearing : 18, 19 and 20 May 2020
Closing Speeches : 21 May, 2020
Date of Summing Up : 21 May, 2020

SUMMING UP

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

Madam and Gentlemen Assessors

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

ROLE OF JUDGE AND ASSESSORS

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

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

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused person is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. 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.
6. 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.
7. During the closing speeches the learned defence counsel told you that the prosecution had not called the police officer who wrote the complaint withdrawal statement of the complainant and the Social Welfare Officer who was present at the time. I direct you to disregard this submission it is not for the defence or anyone to suggest how the prosecution should present its case. It is the prerogative of the Director of Public Prosecutions to call whichever witness he thinks fit relevant to the charges. You are not

to speculate why the above mentioned officers were not called to give evidence.

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 person. There is no obligation on the accused person 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 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 court room.
11. You must decide the facts without prejudice or sympathy for either the accused person or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

13. The accused person is charged with the following offences: (a copy of the information is with you).

COUNT ONE

[REPRESENTATIVE COUNT]

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

PRASHANT RAJU, between the 1st January, 2015 and the 31st of December, 2015 at Nadi in the Western Division, unlawfully and indecently assaulted “PW” a 9 year old girl, by licking her vagina and sucking her breasts.

COUNT TWO

[REPRESENTATIVE COUNT]

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

PRASHANT RAJU, between the 1st January, 2016 and the 30th of November, 2016 at Nadi in the Western Division, unlawfully and indecently assaulted “PW” a 9 year old girl, by licking her vagina and sucking her breasts.

COUNT THREE

Statement of Offence

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

Particulars of Offence

PRASHANT RAJU, between the 1st January, 2016 and the 30th of November, 2016 at Nadi in the Western Division, had carnal knowledge with “PW”, a 10 year old girl.

COUNT FOUR
Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

PRASHANT RAJU, on the 22nd of December, 2016 at Nadi in the Western Division, unlawfully and indecently assaulted “PW” a 10 year old girl, by licking her vagina and sucking her breasts.

COUNT FIVE
Statement of Offence

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

Particulars of Offence

PRASHANT RAJU, on 22nd of December 2016 at Nadi in the Western Division, had carnal knowledge with “PW”, a 10 year old girl.

REPRESENTATIVE COUNT

Madam and Gentlemen Assessors

13. You will note that the first and the second counts are representative counts, which covers a period between the 1st day of January, 2015 and the 30th of November, 2016. By a representative count the prosecution alleges that more than one offence as described in the information was committed during the period specified in the counts. The law says that it shall be sufficient for the prosecution to prove that between the specified dates in the counts at least one offence was committed.

14. Furthermore, as you are aware, after the prosecution closed its case, this court had ruled that the accused had a case to answer in respect of the first, second and the third counts only being two offences of sexual assault and one offence of rape. This means you are not to consider counts four and five as mentioned in the information.

15. To prove counts one and two the offences of sexual assault the prosecution must prove the following elements of this offence beyond reasonable doubt:
 - (a) The accused person;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant "PW" by:
 - 1) licking her vagina; and
 - 2) sucking her breasts.

16. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offence.

17. The words "unlawfully" and "indecently" in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.

18. The final element of assault is the unlawful use of force on the complainant by the act of licking her vagina and sucking her breasts.

You should ask yourself:

- a) whether you consider the force which was used could have been sexual because of its nature; and
- b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that use of force is in fact sexual in nature.

19. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then you must find the accused person guilty of either or 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 person not guilty.
20. In this trial the accused person has denied committing the offences of sexual assault as alleged. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently licked the vagina and sucked the breasts of the complainant between 1st January, 2015 and 30th November, 2016.
21. To prove count three the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant “PW” with his penis;
 - (c) “PW” was below the age of 13 years.
22. The slightest of penetration of the complainant’s vagina by the accused’s 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 the complainant was about 10 years at the time of the alleged offending. I therefore direct you that consent of the complainant is not an issue in this trial.
23. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
24. The second element is the act of penetration of the complainant’s vagina by the accused with his penis.

25. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was 9 years in 2015 which establishes that she was below the age of 13 years at the time of the alleged incident.
26. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis then you must find the accused guilty of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape then you must find the accused not guilty of the offence of rape.
27. In this trial the accused has denied committing the offence of rape he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis.
28. You must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for you to find the accused guilty of this count. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused not guilty.
29. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
30. Moreover, you should bear in mind that you are to consider the evidence in respect of each count separately from the other. If you find the accused guilty of one count that does not automatically make him guilty for the

remaining counts. You must not also assume that because the accused is guilty of one count he must be guilty of the other counts as well.

ADMITTED FACTS

31. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
32. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
33. 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. This was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

34. The prosecution called three witnesses to prove the charges against the accused.
35. The complainant who was 9 years of age in 2015 informed the court that the accused was her father and that she lived with her parents, two sisters and a brother at Solovi, Nadi.
36. According to the complainant from the middle of November 2015 to November 2016 the accused would come into her bedroom, after removing

her clothes he would lick her vagina and suck her breasts for about 4 to 5 minutes.

37. The complainant also recalled that during Diwali time in 2016 the accused came into her room removed his clothes and also her clothes and then he started licking her vagina and sucking her breasts this happened on four occasions. The accused then came on top of her and had sexual intercourse by penetrating her vagina with his penis for about two to three minutes. This act of sexual intercourse happened once only.
38. The reason the complainant knew about sexual intercourse was because in class 7 she had learnt about the male and female reproductive system.
39. The accused only stopped having sexual intercourse after he heard someone calling his name from outside the house so he quickly stood up, got dressed and went outside. The complainant did not tell anyone about what the accused had done to her since she was threatened by the accused on all occasions that if she told anyone or her mother he will kill or hurt her.
40. The accused used to do this when the complainant's mother and other siblings would go to town to do shopping leaving the complainant and her 2 year old brother at home.
41. The complainant felt very bad about what her father was doing to her. In late 2016 the complainant, her mother and her siblings left their family home at Solovi because her father used to assault her and her mother so they started living at the Loloma Home. The decision to move out of her father's house was that of her mother. As a result of her father's actions the complainant could not concentrate in her studies since she always thought about what her father was doing to her.

42. At Loloma Home the complainant met Adi Laite who was looking after the complainant, her mother and her siblings she told Laite everything what her father had done to her. Laite reported the matter to the Police the complainant identified the accused in court.
43. In cross examination the complainant agreed that her mother stayed home and did the entire house work including the laundry for everyone. In regards to her relationship with her mother the complainant said that they did talk to each other about “girl things” but not about what the accused had done to her. The complainant agreed that her father left early for work and came home late from work.
44. Before the incidents the complainant had a good relationship with her mother, she used to share things that happened in school or if she was bullied by her elder sister.
45. The complainant stated the first time the accused had licked her vagina and sucked her breast was in January, 2015 during the daytime and the other times the incident happened in the middle of 2016.
46. The complainant disagreed that her mother took all the children with her for shopping. According to the complainant it was her mother and her sisters who would go shopping leaving the complainant and the younger brother at home.
47. The complainant agreed if anything would have happened to her during Diwali time she would have told her mother. She also agreed that she did not tell her teachers at school about what happened to her, or to her aunty Roshni, or the Social Welfare Officers, when it was suggested that she did not tell anyone because nothing had happened. The complainant said that she did not trust people, also she did not know them and that she did not

trust her mother since she was not very close to her mother also she did not know how to tell her mother about what her father was doing to her.

48. Although the complainant trusted her sister she could have spoken to her sister but did not. The complainant agreed that when the accused had put his penis inside her vagina there was bleeding but not enough to sip onto the bed because it was light bleeding.
49. It was on the 28th December, 2016 the complainant, her mother and her siblings had gone to Loloma Home. At the Loloma home, the complainant also did not discuss anything about what the accused had done to her with anyone at the girls' dormitory.
50. On 13th January, 2017 the complainant told Adi Laite about what had happened to her after she was told by Laite to be open and was encouraged to say about what had happened to her. On the 14th January, 2017 the matter was reported to the police and on the 18th she was medically examined at the hospital.
51. At Loloma Home the complainant's mother had not asked her about what her father had done to her, but the complainant agreed that her mother had approached her but she did not speak to her mother. In 2019 the complainant went back to Solovi after staying for about 1½ years at the Loloma Home.
52. The complainant agreed that she gave a statement about withdrawing her complaint against her father in the presence of Adi Laite and her mother and a Social Welfare Officer. The complainant stated that she made the statement of withdrawal after being asked by her parents to do so.
53. The complainant maintained that her father had licked her vagina and sucked her breast and also had sexual intercourse with her. The

complainant also stated that she told the truth in court. When it was suggested that the complainant was making the allegations as revenge because the accused used to assault her and her mother the complainant stated that it was true her father used to smack her and her mother.

54. In re-examination the complainant clarified that she did not mention anything to her aunty Roshni because she did not know her aunt very well. She also did not tell her elder sister because they used to fight with each other. She did not tell anything to the Social Welfare Officer because she did not know them.
55. In respect of her statement to withdraw her complaint, the complainant said her parents had told her to say that what her father had done to her was all lies that he did not do anything to her, she was also forced and pressured by her mother to withdraw the complaint. The reason why she did not complain to her mother was because her mother was on her father's side.
56. The second witness Adi Laite informed the court that she is the Director of Loloma Home and Care Centre. The complainant, her mother and her siblings were referred to the witness to provide them with shelter at the request of Social Welfare Department.
57. When the complainant was staying at the Loloma Home the witness noticed the complainant was showing signs of vomiting every day and drinking water every time she saw the complainant. This prompted the witness to ask the complainant if there was anything wrong with her. The complainant told the witness that her father had sexual intercourse with her for about ten (10) times.

58. The witness relayed this information to the complainant's mother who was unaware of what her daughter had gone through. The witness reported the matter to the Police thereafter the complainant was medically examined.

Madam and Gentlemen Assessors

59. 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.
60. 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 told Adi Laite after about four months that her father that had raped her.
61. This is commonly known as recent complaint evidence. The evidence given by Adi Laite is not evidence of what actually happened between the complainant and the accused since Adi Laite was not present and did not see what had happened between the complainant and the accused.
62. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told Adi Laite after about four months of the alleged rape but after about two years of the other alleged incidents because she was a child of about 9 to 10 years of age at the time and also she did not trust anyone including her mother who was on her father's side.

63. The complainant opened up to Adi Laite because Adi Laite had noticed the behaviour of the complainant and had encouraged the complainant to speak out which the complainant did. Furthermore, the prosecution says the complainant was of such an age that she would be uncomfortable in talking about sexual matters even though she did not talk about the incidents of sexual assaults she did relay relevant and important information to Adi about sexual intercourse by her father and therefore she is more likely to be truthful.
64. On the other hand, defence says the complainant had made up a story against the accused if what she told the court was the truth she would have informed her mother or her elder sister since she was going to school to her teacher or her best friend or to her aunty Roshni or to the Social Welfare Officers or to the other girls at the Loloma Home but she did not because nothing had happened. Defence further says the complainant did not mention anything to Adi Laite about being sexually assaulted by the accused so she should not be believed.
65. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
66. In cross examination the witness stated that her complaint was not reported on 13th January, 2017 when she was first informed by the complainant about what the accused had done to her because they were facing transport difficulties.

67. The witness was referred to her police statement dated 18th January, 2017 which she had given to the Police. The witness agreed that it was not mentioned in her police statement that she had seen the complainant showing signs of vomiting.

Madam and Gentlemen Assessors

68. The learned counsel for the accused in this regard was cross examining this witness about an inconsistency in the statement she gave to the police when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the witness with her evidence given in court. You are allowed to take into consideration the inconsistency in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
69. 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.
70. 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.
71. The final prosecution witness was Dr. Lice Vaniqi who had graduated with an MBBS degree from the Fiji National University in the year 2009. She has 10 years of experience as a Medical Practitioner. In 2017 the doctor was

based at the Nadi Hospital and on the 18th January, 2017 she had examined the complainant. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no.1.

72. Upon examination of the patient the doctor noted the following specific medical findings:

- 1) The hymen was not intact meaning the hymen was not visible upon vaginal examination;
- 2) No bruises were noted around the perenial region.

73. In the opinion of the doctor the complainant must have had sexual intercourse.

74. In cross examination the doctor stated that she did full body and vaginal examination of the patient and during the examination, she did not see any hymen. The doctor agreed the absence of the hymen could be due to digital manipulation apart from sex but she could not tell whether the hymen was not intact by penetration of the penis or by digital manipulation.

75. The doctor agreed that it was possible if a 10 or 11 year old girl was raped by a person of the accused built there will be bleeding if it was recent. It was also possible that the child may not be able to walk properly with unbearable pain as long as it was a recent incident and that someone will be able to notice these signs.

76. In re-examination the doctor clarified that in this case the patient had not mentioned anything about digital manipulation. She also stated that bleeding in child would be seen if there was recent forceful sexual intercourse, whether the bleeding will be heavy or light will depend on the circumstances but there will be bleeding, however, every person is different from the other.

77. The doctor further clarified that she did not notice all the symptoms suggested by the defence such as pain, inability to walk properly and so on since the medical examination was done after a long time.

Madam and Gentlemen Assessors

78. You have heard the evidence of Dr. Vaniqi 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.
79. 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.
80. 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.
81. This was the prosecution case.

DEFENCE CASE

Madam and Gentlemen Assessors

82. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.
83. The accused could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also called a witness. You must consider their evidence and give such weight as you think fit.
84. The accused informed the court that the complainant is his daughter born out of his defacto relationship with Shivangini, they have three daughters and one son. The accused works as a lorry driver, as part of his employment he works from Monday to Saturday.
85. The accused has a good relationship with his wife she has never betrayed him furthermore, his relationship with his children was good as well. The accused denied committing the offences as alleged by the complainant. He stated that he was not at home as mentioned by the complainant because he would leave home early and come home late at night when the children would be sleeping. The accused also said the allegations were false.
86. It is his wife who does the shopping for the household with all the children accompanying her to town. The accused recalled Diwali in 2016, according to him all the family members took part in the celebrations he did not buy dangerous firecrackers but the safe ones for his children.
87. One day his wife and children left his house because of water shortage which was an on-going problem for the family. On this day the accused and

his wife had an argument so she left the house, however, she did come back and seek forgiveness for leaving the house.

88. According to the accused, the complainant is lying about the allegations against him because the complainant didn't say anything to her mother and when she went to Loloma Home then he found out that she had made the allegations against him.
89. After the complainant returned from Loloma Home, the accused is aware that the complainant made a statement to the Police and Director of Public Prosecutions for the withdrawal of her complaint but he did not force her to make that withdrawal statement.
90. In cross examination by the State Counsel the accused stated that he had a good relationship with all his children including the complainant. The accused works from Mondays to Saturdays and does not take any holidays or leave from work. Apart from being a lorry driver, the accused was a part-time motor mechanic and on Sundays he used to do mechanical works as well. The accused stated that he hardly stayed at home.
91. The water problem faced by the family started in 2016 till 2017 and just because of the water problem, his wife and his children left his house. In 2016 on Boxing Day the accused came home after filling water and he saw no one was at home, he made several calls to his family and relatives. After sometime, the accused received a call from his wife and was asked to go to the Nadi Police Station. At the Police Station he came to know that the complainant had made the allegations against him.
92. The accused cannot understand why the complainant has made the allegations against him. The accused denied all the allegations raised by the complainant and stated that he has no idea why the allegations have

been made. He disagreed that he and his wife had pressured the complainant to make the withdrawal statement.

93. In re- examination, the accused stated that he worked so hard to build a house and give his daughters whatever they wanted.
94. The final defence witness was Shivangini Latchmi who has been living with the accused for the last 16 years in a defacto relationship. From their relationship they have four children, three girls and one boy. The complainant is their daughter.
95. The witness stays home and does the entire house work such as washing, tidying up the bedroom, washing the undergarments of the children, linens etc. Her relationship with her daughters is good and she loves her children. Her daughters mean a lot to her, she never growls at them and whatever she says the daughters respect it. Her daughters share everything with her such as whatever they do in school or at home.
96. On one occasion the complainant was in school where she had her first period when the complainant came home she showed her panty to the witness which had a tiny stain. The witness further stated that she has a good relationship with the accused who keeps her happy by doing a lot for her and also treats her nicely. The accused also treats all his daughters nicely, he has never ill-treated the complainant.
97. Whenever she goes shopping all the children go with her in 2016 the youngest child was 1 year old so she needed someone to look after the baby and also do shopping hence all her children would go along to help her. The accused leaves home very early in the morning sometimes 4.30am to 5.30am and returns home at 12pm or 1pm or sometimes 2pm to pick his lunch. The accused works from Mondays to Saturdays and sometimes Sundays if he is on call.

98. The witness stated on Christmas day in 2016 she left the house of the accused since there was no water at home for nearly one year. The accused had gone somewhere that night and there was no water for cooking and for the children to have their bath. The accused came home at 1am the next day when the witness confronted the accused there was an argument, the accused did not say anything, the witness was very angry. In 2016 the complainant did not make any complaint to her or was upset about anything and also she did not notice any blood stain on any of her clothes.
99. From her husband's home the witness took her children to her aunt Roshni's house from there they went to the Social Welfare Office where arrangement was made for the witness and her children to stay at the Loloma Home.
100. At Loloma Home after about two weeks Adi Laite informed the witness that the complainant had been raped by her father, she was shocked and crying. Adi Laite then reported the matter to the Police, after two years at the Loloma Home the witness returned home with her children.
101. The witness stated that all the allegations against the accused were not true, she never left any of her children home. Her husband is a very nice person, he will never do anything to his children. The accused never stays home, all the time he works to earn money for his children.
102. Finally the witness had not seen the complainant in pain or notice any change in her behaviour or attitude during Diwali time in 2016. The complainant was normal playing with her siblings and the witness did not notice anything wrong with the complainant.

103. The witness denied forcing the complainant to withdraw her complaint. This withdrawal statement was made by the complainant after returning from the Loloma Home when everyone was living in Solovi.
104. In cross examination the witness agreed that she was financially and emotionally dependent on the accused and that apart from her husband's house she has nowhere else to go to. However, she denied she was trying to save him. She had left her husband's house due to water problem because she was angry there was no water at home.
106. The witness agreed that she returned to her husband's house after staying for two years at Loloma Home and she decided to go back to her husband's house without any knowledge whether the water problem was solved or not. The witness also agreed that Adi Laite had taken good care of the witness and her children at the Loloma Home.
107. This was the defence case.

ANALYSIS

108. The prosecution alleges that between 2015 and 2016 the complainant was 9 to 10 years of age living with her parents and siblings. The accused had gone into the bedroom of the complainant removed her clothes and then licked her vagina and sucked her breasts. Thereafter during Diwali in 2016 the accused had forceful sexual intercourse with the complainant by penetrating her vagina with his penis. The accused had sexually assaulted the complainant on four occasions and had forceful sexual intercourse once only. When the accused was sexually assaulting and raping the complainant he had threatened her not to tell her mother or anyone otherwise he will kill her.

109. Furthermore, the incidents happened when the complainant was alone at home with her infant brother who would be sleeping in another room. On all these occasions the complainant's mother and her siblings had gone for shopping. The complainant did not tell her mother because she was not close to her mother and she did not know how to tell her mother what her father was doing to her. According to the complainant her mother was not on her side.
110. After the complainant's mother decided to leave the accused house the complainant and her siblings started living at the Loloma Home. It was here she told the Director of Loloma Home about what the accused had done to her.
111. The prosecution is also asking you to consider the reasons behind the late complaint by the complainant. Although there was a withdrawal of complaint by the complainant it was as a result of force by both her parents. The complainant did not make false allegations against her father but told the truth even though late by about two years.
112. On the other hand, the defence says the accused did not commit the offences as alleged. The complainant did not tell the truth in court if what she told the court was the truth then she would have told her mother, or her elder sister, or her teacher, or her best friend, or the Social Welfare Officers, or her aunty Roshni or the other girls in the dormitory at the Loloma Home but she did not because nothing had happened.
113. The story narrated by the complainant is not probable because if there was any truth her mother would have observed blood stains on the complainant's clothing's in the house, the complainant's mother also did not observe any pain in the complainant, or any change in attitude or anything unusual in her behaviour and that she was normal at home.

114. The complainant has a motive to implicate the accused because he used to assault her and therefore the complainant is taking revenge, the incidents did not happen as alleged.

Madam and Gentlemen Assessors

115. 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 whether the prosecution witnesses were reliable or not. You observed the witnesses give evidence in court. You decide if the witnesses were forthright and truthful or not. You may use your common sense when deciding on the facts. Assess the evidence of the witnesses and their demeanour in arriving at your opinions.
116. 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 the witnesses said, 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 the witnesses told the truth and is correctly recalling the facts about which he or she has testified. You can accept part of witness evidence and reject other parts. A witness may tell the truth about one matter and lie about another or be accurate in saying one thing and not be accurate in another.
117. 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 person 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 the previously made statement or with the other witnesses.
118. 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.

119. 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 guilty beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
120. The accused person is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
121. In this case, the accused faces two representative counts of sexual assault and one count of rape. As I have mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count separately from the other. If you find the accused guilty of one count that does not automatically make him guilty for the remaining counts. You must not assume if the accused is guilty of one count that he must be guilty of the other counts as well.
122. Your possible opinions are:-
1. COUNT ONE – **SEXUAL ASSAULT:** Accused - GUILTY OR NOT GUILTY.
 2. COUNT TWO- **SEXUAL ASSAULT:** Accused - GUILTY OR NOT GUILTY.
 3. COUNT THREE - **RAPE:** Accused - GUILTY OR NOT GUILTY.

Madam and Gentlemen Assessors

123. 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.
124. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.




Sunil Sharma
Judge

At Lautoka

21 May, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. Fazilat Shah Legal, Lautoka for the Accused.