

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 020 OF 2017

BETWEEN :

STATE

AND :

BARMA NAND

Counsel :

Mr. J. B. Niudamu for the State

Mr. J. Reddy for the Accused

Hearing on :

24th of February 2020 – 27th of February 2020

Summing up on :

28th of February 2020

SUMMING UP

Ladies and gentleman assessors;

1. It is now my duty to sum up the case to you. Though I am not bound by your opinion, it is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case. You must accept my directions on law and 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 it coincides with your own reasoning. You are the judges of facts.

2. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to 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.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel during the examination of a witness is not evidence unless the witness accepted

that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

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 available 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 anyone else. Your emotions should not 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 behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences 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 none, a part or all of any witness' evidence.
7. 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 that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his 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 between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. 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 underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question of 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 the witness is a matter for you to decide.
10. 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 provide for the inconsistency and consider him/her to be reliable as a witness.
11. 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 a few guidelines. It is up to you, how you assess the evidence and what weight you give to a witnesses' testimony.

12. 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 proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there more than one reasonable inference to draw, against the accused, as well in his favor, based on the same set of proved facts, then you should not draw the adverse inference.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond a reasonable doubt, in order for you to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.
15. You are not required to decide on every point the Counsels 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 the charges are proved against the accused.

16. 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 a must.
17. Let us look at the Information. Though the Director of Public Prosecutions has charged the accused of 4 counts, at the conclusion of the prosecution case the accused was acquitted of the 3rd and the 4th counts as the prosecution failed to adduce sufficient evidence on them. Thereafter the defense was called on the following two offences.

COUNT 1

Statement of Offence

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

Particulars of Offence

Barma Nand, between the 1st day of January 2015 and 31st day of December 2015, at Rakiraki, in the Western Division, penetrated the vagina of Mitchell Pritika Avantika Lal, a 10 year old girl, with his finger.

COUNT 2

Statement of Offence

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

Particulars of Offence

Barma Nand, between the 1st day of January 2016 and 31st day of January 2016, at Rakiraki, in the Western Division, penetrated the vagina of Mitchell Pritika Avantika Lal, a 10 year old girl, with his penis.

18. Now I will deal with the essential elements of the offence of Rape.

Section 207(1) of the Crimes Act reads as;

207. —(1) Any person who rapes another person commits an indictable offence.

Section 207 (2) (a) of the Crimes Act reads as;

- (2) A person rapes another person if —
 - (a) The person has carnal knowledge with or of the other person without the other person's consent;
 - (b) The person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent;

19. Section 207 (3) of the Crimes Act reads thus;

207. (3) For this section, a child under the age of 13 years is incapable of giving consent.

20. Accordingly, in this case, to prove the offence of Rape as for the alleged counts the prosecution must prove the following elements beyond a reasonable doubt.

- (i) The accused;
- (ii) Penetrated the vagina of Mitchell Pritika Avantika Lal with his finger or had carnal knowledge with Mitchell Pritika Avantika Lal; and
- (iii) At the alleged time, Mitchell Pritika Avantika Lal was under the age of 13 years.

21. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence. Though there is no doubt that the accused is Barma Nand and he is well known to the complainant, you should carefully consider the evidence and conclude whether the accused is the one who committed the alleged act.

22. In the second element 'carnal knowledge' means having sexual intercourse or the penetration of Mitchell Pritika Avantika Lal's vagina; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of

penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of Mitchell Pritika Avantika Lal with his penis or finger as the count may be, to any extent.

23. The third and the final element required for the counts is the complainant Mitchell Pritika Avantika Lal to be under the age of 13 years at the time of the alleged offences. As a child below the age of 13 years is incapable of giving the consent in law, it is immaterial whether the complainant, Mitchell Pritika Avantika Lal consented to the alleged act or not. Here in this case this element is not contested and it is admitted that she was under the age of 13 years at the time of the alleged offences.
24. If you find a reasonable doubt in respect of any of the first two elements, in regards to any of the above two counts of rape, you shall give the benefit of that doubt to the accused and find the accused not guilty of the alleged count of Rape.

Summary of evidence

25. The PW1, Mitchell Pritika Avantika Lal is the main witness for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. However, in analyzing her evidence, you should always be mindful that she was around 10 years old when the alleged incidents happened to her. Her evidence is that;
 - i) She is 14 years old now and a form 3 student, at Ba Sangam school and currently lives in Sarava, Ba with her aunty, Manjula.

- ii) She was born on 08th of September 2005, and a copy of her Certificate of Birth is marked and produced as PE3.
- iii) The witness states that her mother lives in Tuvu, Lautoka and her father has passed away.
- iv) From January, 2015 to October, 2016 she had been residing at her step-father, Barma Nand's house at Vatumami, in Rakiraki and was attending the Penang Sangam Primary School, in Rakiraki.
- v) In the year 2015, she was in class 4, one day when she was at home in her room, setting her clothes, Barma Nand (The Accused) has come in to her room, pushed her on to the bed, took off her clothes, touched her body and inserted his finger in to her vagina.
- vi) After that she has gone to the wash room and when wiped her private part with the toilet paper, she has seen blood on it. Then she has mentioned that to her mother, and the mother has said that the blood is not from the boil, somebody has done something.
- vii) She has not told her mother that Barma Nand did that because Barma Nand has threatened her that if she tells someone, he will kill her. She has felt pain when Barma Nand inserted his finger in to her vagina.
- viii) In 2016, she was in class 5. One day when she was in her bed room, wrapped in a towel after a shower, Barma Nand has come there and pushed her from the back for her to fall on the bed and when fell, took off her towel, kissed her all over her body and thereafter penetrated her vagina with his fingers and that has been really painful.
- ix) He has done it for a long time and at that time her mother was at the kitchen. She has not told her as he has threatened her not to tell anyone.
- x) Again somewhere in January 2016, when she was at home, laying on her bed, the accused has gone into the room, turned her around, taken her clothes off, touched her body and has inserted his penis into her vagina. That has been painful and she has pushed him away and he has gone away.

- xi) Again one night, when she went to the washroom, the accused has followed her into the washroom and at there, has taken her clothes off and started touching her private parts. It has been painful and when told so, the accused has gone away. When she woke up on the following morning, she could not walk or even sit properly. On that day too, he has inserted his fingers into her vagina.
- xii) She identifies the accused as Barma Nand, her step-father.

26. This witness has been subjected to cross examination at length by the defense. Answering the cross examination, PW1 says that;

- i) She has an aunt by the name Urmia Devi.
- ii) When asked of an incident in 2016, which her aunty and her husband were called to because Barma and the witness's mother were fighting a lot, the witness denies that and states that her mother went to a funeral and when her aunty Urmila came to drop her mother, Barma chase her aunty away.
- iii) She knows Saleshini, Barma Nand's daughter. When she was in class 4 at Penang Sangam Primary school, Saleshini was at form 3 or 4 at the secondary school. When she comes back from school, her mother would be there at home.
- iv) She has a brother named Anjesh. He is about 6 years elder to her. In 2015 her brother Anjesh was not staying with them. He was with her aunty Manjula Devi then.
- v) The witness has come to stay with Barma Nand because her mother came to stay with him. Barma Nand was her step-father and she used to call him 'papa'.
- vi) She knows Rajnesh, the son of Barma Nand, who stayed with them at Barma Nand's house. There were Barma Nand, his daughter Saleshini, his son Rajnesh, the witness's mother Madhu Lata and her, initially and later they were joined by Anjesh, her biological brother.

- vii) Barma used to send her to the shop to buy things even late in the afternoon, wearing short length shorts and when she refused he used to beat her.
- viii) The house they lived was a big house and not a small house. When the witness stayed there it has three separate bed rooms. When shown the sketch plan of the house, PE2 asked, the witness states that at the time of the incidents, her mom and Barma were occupying the newly built room in the sketch.
- ix) The alleged incidents (other than the one in the washroom) have happened in the bedroom 'A' in the sketch. At the time of an incident, her mother has been there in the kitchen. The kitchen was about 15 feet away from her bedroom. That day she could not shout as the accused was covering her mouth. That was not at the 1st incident. At the 1st incident she did not shout as the accused threatened her to not to tell anyone.
- x) Speaking further of the 1st incident the witness states that it happened during the day time. At that time Saleshini was not there as she goes to Reshma's house.
- xi) The accused does not go to work on regular basis. He went to work only during the cane cutting season.
- xii) She gave the statement to the police when she was 10 years old. At that time her aunty, Urmila was there with her. She spoke to the police officer in Hindi. Aunty Urmila did most of the talking. Aunty Urmila said to the police, what she has told to Aunty Urmila.
- xiii) The defense points out an inconsistency with her statement to the police where she has told that papa has dressed her after the first incident. She denies stating so to the police.
- xiv) The witness says that she cannot read English. The police officer has written in English what she said in Hindi Language.
- xv) When she saw blood on the toilet paper, she has told it to her mother. Her mother has inspected her private area and has said blood is not coming

from the boil. Blood has come from her vagina. She has told her mother when asked that papa has done that to her. Then mother has gone to complain it to the police and Barma Nand has gone to the police station and told them that her mother is mental.

- xvi) She did not complain of the incidents then to the police officers. The defense points out another inconsistency in her statement to the police in what her mother said after having examined her private part. Her explanation was that it is wrong and police has not written what she told them. In her statement to the police, her mother has signed next to her. She is unaware how her mother's signature came there. She has not understood the contents but has signed the statement because the police officer has asked her to do so.
- xvii) After the alleged first incident, she and her mother came back to stay with Barma Nand. The alleged second incident has happened when she was in class 5 in the year 2016. One afternoon, after returning from school, she has had a bath and was still in a towel, in her room. Barma Nand has come from behind and pushed her on to the bed. She has fell face-down on the bed and the accused has turned her around. He has kissed her and inserted his finger into her vagina. In describing this incident in her evidence before, the witness has not mentioned that the accused has turned her around. The defense alleges that the witness has changed her version. State submits that was only an omission. You the assessors should decide whether that would be a change of the version or an omission.
- xviii) The witness admits that Barma Nand has chased her aunty Urmila, out of his house once. But she denies that aunty Urmila threatened Barma Nand soon thereafter. By the time that happened, the first two incidents have already taken place.
- xix) The third incident has happened when she was laying down on the bed. Then the accused has come and turned her around, removed her clothes and inserted his penis into her vagina. He has inserted his penis into her

vagina a few times. She has been in pain and though told, the accused has not stopped it. But when she was in real pain, she pushed him away, and the accused has gone away. She states that this was the second incident. It is apparent that the witness is unable to recollect the sequence of events. My direction to you is, you should look into the incident and decide whether such happened or not and need not be much concerned about the sequence of events or the time durations of the alleged incidents, as sequence and the periods are not material ingredients of the alleged offences.

- xx) The defense points out another inconsistency in her statement in regards to the above said incident with her evidence. The witness admits that she has mentioned in her statement that the accused has licked her vagina and did not say such in her evidence. The explanation offered was that she forgot to tell us about that. The witness states that the prosecution has given her a copy of her statement to the police and she read it a little bit at home. Though a statement could be used to refresh the memory of a witness, it would be highly improper to furnish them with the copies of their statements beforehand and if the prosecution has done such, it should be thoroughly condemned. You should carefully analyze her evidence and decide whether it has influenced her evidence and if so, to what extent. You should also ponder, if she has studied it well at home and relied upon it, would there be such inconsistencies as already pointed out by the defense.
- xxi) The next incident has happened when she went to the washroom one night. The accused has followed her there and removed her clothes and has inserted his finger into her vagina. The accused has not done anything thereafter.
- xxii) The witness admits that she did not make any complaint against the accused to the Rakiraki police station or to welfare officers.

- xxiii) On the following day of the incident that took place in the washroom, she could not walk or sit properly. Her mother has taken her to the hospital. But neither she nor her mother did complain to any one there.
 - xxiv) The witness admits that her aunty, Urmila took her to the police station to lodge the complaint. Thereafter, she was referred for a medical examination. Then, she was alone with the doctor and she has related the story to her. She has told the doctor that her step-father used to kiss her and inserts his finger in to her vagina. She has not told the doctor that he has inserted his penis into her vagina.
 - xxv) When suggested that this story was concocted by the witness and her aunty, Urmila, the witness denies.
27. In re-examination, the witness states;
- i) The witness states that she did not inform the alleged incidents to the nurse and the doctor at Rakiraki hospital because the accused has threatened her to not to tell.
 - ii) She states that she told aunty Urmila of the incidents when she was asked by her. Thereafter, aunty Urmila took her to Ba police station to lodge a complaint.
28. The PW2 was Urmila Wati. She is married to Harish and lives in Moto, Ba. Her evidence was that;
- i) Madhu Lata the mother of Mitchell, is her sister-in-law (her husband's sister) and on 09th of November 2016, her husband has received a telephone call that Madhu has gone mad and she is in a cell at Rakiraki police station and they have come to the Rakiraki police station.
 - ii) By the time they went there, Madhu was already released from the cell and then her husband, Harish with two police officers, together with Madhu and her daughter Mitchell went to Barma Nand's place.

- iii) After two hours, they came back and Madhu and her daughter looked disturbed and were crying. The police officers told her to take them home and once settled ask them as to what happened. She took them home and after a few days asked Mitchell as to what happened as Mitchell could not sit properly.
- iv) Mitchell was frightened, but told her that her step-father has kissed her and put his finger and the penis into her. Later she informed her husband about the incidents and he brought them to the Ba police station to lodge a complaint.
- v) Mitchell and her mother had been with her for about a week and thereafter has gone to Madhu's sister, Manjula's place in Sarava, Ba.

29. In answering the cross-examination posed on behalf of the accused, the witness states that;

- i) She was having a good relationship with her sister-in-law and that there was no fight during their stay with them.
- ii) She recalls the time she went to Barma Nand's house to sort out some differences between Barma and Madhu. She had gone there because Madhu has come alone around 7.00pm one night and told that Barma has kept Mitchell and asked her to go and wanted her to take her back to home on the following day. So on the next day she took her sister-in-law back to Barma's house. There she has had an argument with Barma and he has chased her out of the house at around 6.00pm. When she was chased out, she did not threaten Barma, but said that God will see into it.
- iii) At Rakiraki police station, she had seen Madhu and Mitchell, quite disturbed and they have cried on her shoulder. She admits that she has not told the police of her observation of them being disturbed. Her explanation to it was that whatever question she was asked, she answered.

- iv) Defense points out an inconsistency in regards to the time Madhu and Mitchell came back to the station having gone to Barma's house. In evidence she said they returned in two hours and in her statement it is mentioned that they returned after 1 hour. Her explanation was that they returned between 1 to 2 hours. As I have explained to you, firstly you should decide how relevant this is to the issues you are considering and accordingly give it an appropriate weight.
 - v) Mitchell has told her that her step-father kissed her on the chin, fingered her and put his penis into her vagina. She has told the police what was related to her by Mitchell.
 - vi) When Mitchell gave her statement to the police, Mitchell was alone with her mother and the police officer Shivani, who recorded it. The witness states that she was not present with Mitchell and was far away, when Mitchell gave her statement to the police.
30. The next witness called for the prosecution or the PW3 was Dr. Ranita Vikashini Maharaj. Her evidence was that;
- (i) She is a MBBS qualified doctor with 10 years of experience, working at Ba Mission hospital.
 - (ii) On 12th of November 2016, she remembers examining a patient Mitchell Pritika Avantika Lal and completing the police medical form.
 - (iii) The said medical form is marked and produced as PE4. The patient has informed that her step-father used to kiss her 2 to 3 times a week and insert his finger into her vagina. She has also said that her step father has threatened to kill her if tells it to anyone. As for her findings, the patient's hymen was not intact and she did not have any other visible injuries. She is unable to tell how or when that has happened.
 - (iv) In cross examination she states that there could be many reasons for a hymen to be not-intact. Inserting a finger could be a cause of such. However, some were born without a hymen and some have very thin

membranes, which would break comparatively easily. She is unable to confirm whether Mitchell was born without a hymen or the reason for her hymen to be not-intact.

- (v) Mitchell did not inform her that her step-father did insert his penis into her vagina. If it was informed, she would have recorded it.

31. With the leading of the above evidence and marking and producing PE1 to PE4, the prosecution closed their case and the Court being satisfied that on the face of it, the prosecution has adduced sufficient evidence covering the elements of the alleged 1st and 2nd counts, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused. Since the prosecution failed to adduce sufficient evidence covering the elements of the 3rd and 4th counts, the court acquitted the accused of the 3rd and the 4th counts.

32. The accused having understood his rights elected to give evidence on his behalf. His evidence is that;

- i) He lives in Vatumami, Rakiraki. Since January 2015 to October 2016 Madhu Lata and Mitchell stayed with him.
- ii) At that time his daughter Saleshini, His son Rajnesh, Mitchell, Mitchell's mother and Mitchell's brother stayed with him there. Mitchell and her mother came to stay with them in January 2015 and her brother Anjesh came to stay with them in October 2015.
- iii) Madhu Lata and Mitchell were in Suva and he brought them to his home in January 2015. At that time his daughter Saleshini was in form 3 at Penang High School and he has got Mitchell admitted to class 4 at the Penang Primary School.
- iv) His house is a two bed room house and Mitchell was sharing a room with Saleshini, Rajnesh occupied the other and later shared it with Anjesh,

- while he slept in the sitting room with Madhu. Though there shows a newly built room in the sketch PE2, it was under construction at that time.
- v) His brother who lives about 25 yards away is his immediate neighbor. The accused states that Mitchell and Saleshini used to sleep together and had a cordial relationship.
 - vi) When queried of the alleged incidents, the accused denies them. He never growled at or beat up Mitchell. Mitchell was just like his daughter Saleshini to him. Madhu got only \$50 in cash and \$25 in vouchers for a month and he used to buy books for Mitchell.
 - vii) He has been farming for a living and cuts about 200 tons of sugar cane per year. In addition to that he was the headman and the treasurer of the gang and when harvesting is over, used to work in the 10 acres of cane field which he grows.
 - viii) The witness states that he never used to stay at home. He leaves home by 6.00am every day during the crushing time. Then comes home for lunch at 1.00pm and goes back at 2.00pm. Then he comes back between 6.00pm and 7.00pm.
 - ix) During the off season, where there is no crushing, he leaves home at 6.00am to tie his cattle and then he will work in his farm. He comes home around 8.00am to have his breakfast and will go back to the farm. Then comes home around 1.00pm for lunch and goes back at 2.00pm to the farm and comes back home between 6.00 and 7.00pm.
 - x) He has asked Harish and Urmila to come to his house to resolve the issues between him and Madhu. The accused states that he chased Urmila from his house once because she said that it was his fault and not the fault of Madhu. At that time Urmila threatened him that 'you better watch out, you see what I am going to do to you'. However, it is pertinent to note that there was never a suggestion even up to this time that Urmila falsely accused or framed Barma Nand, in relation to the alleged incidents.

- xi) On the 7th of November 2016, he has taken Mitchell and Anjesh to the police station. He has taken them because every time the mother fights, she hit them. When he reached the police station, the mother has started shouting loudly. Then the police has put her in a room and locked. He has been at the police station with Mitchell and Anjesh. Then police asked him to take them to social welfare. When he went there, a social welfare officer came to the police station. Mitchell complained to the social welfare officer that her mother beats her up. She did not complain of the alleged incidents to the police officers or to the welfare officers.
- xii) Then he called Harish and told him to take Madhu to their place and they came and took Madhu and Mitchell to their place. After a week, he was informed of the allegations and was accordingly charged.
- xiii) When asked for the third time of the reason for Mitchell to make these serious allegations, the accused states that it is because her aunty Urmila warned him, when he chased her away.
- xiv) The accused denies that he has done any of the alleged acts to Mitchell on any occasion.

33. In cross examination, the accused states that;

- i) His wife has passed away in 2008 and he took Madhu Lata as his partner in January 2015.
- ii) The accused admits Madhu Lata did all the house work including the washing of their clothes and making food. The accused says that his daughter Saleshini used to help Madhu Lata. When it is questioned by the court whether he instructed his counsel to challenge it, when Mitchell in her evidence stated that Saleshini did not help with the house work at all, the accused concedes that he did not.
- iii) The witness admits that Madhu shared her social welfare allowance with the family.

- iv) The accused says that Urmila has framed him and denies the allegations leveled against him.
34. In re-examination the accused states that Urmila has framed him because she threatened him that day when she was chased out of his house.
 35. With leading the above evidence of the accused, defense closed their case.
 36. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
 37. There is an important point which needs your additional attention. That is the fact that PW1 was only 14 years now and she related of the incidents allegedly have happened when she was 10 years old. Therefore, when analyzing her evidence, you should not apply the same standards you would apply to grown-ups evidence.
 38. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offences have been proven beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

39. The Accused has indicated his stance through his evidence. His stance is that he did not do the alleged acts. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.

With the submission of the accused's stance, one of the three situations given below would arise;

- (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged counts.
40. Any re-directions? *none*
41. Lady and Gentleman 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. You have the copies of the documents tendered as exhibit "PE 1" to "PE 4". When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

42. Your opinion should be;
In respect of the 1st and 2nd counts, whether the accused is guilty or not guilty.



Chamath S. Morais

JUDGE

Solicitors for the State : *Office of the Director of Public Prosecutions, Lautoka*
Solicitors for the Accused : *Jiten Reddy Lawyers, Suva*