

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

**Criminal Case No.: HAC 67 of 2019**

**STATE**

**V**

**TIMOCI VUKI DAWAI**

**Counsel** : Mr. S. Seruvatu for the State.  
: Ms. K. Vulimainadave [LAC] for the Accused.

**Date of Hearing** : 16 September, 2020  
**Closing Speeches** : 18 September, 2020  
**Date of Summing Up** : 18 September, 2020

---

**SUMMING UP**

---

*(The names of the complainants are suppressed they will be referred to as "SM" and "AD" respectively.)*

Ladies and Gentleman Assessors

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

## **ROLE OF JUDGE AND ASSESSORS**

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.
3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

## **BURDEN OF PROOF AND STANDARD OF PROOF**

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy for either the accused or the complainants. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

## **INFORMATION**

13. The accused is charged with one count of rape, and one count of indecent assault (a copy of the amended information is with you).

**FIRST COUNT**  
**(Representative Count)**  
***Statement of Offence***

**RAPE**: Contrary to section 149 and 150 of the Penal Code, Cap 17.

***Particulars of Offence***

**TIMOCI VUKI DAWAI** between the 1<sup>st</sup> day of January, 2008, and the 31<sup>st</sup> day of December, 2008 at Nadi in the Western Division, had unlawful carnal knowledge of “SM” without her consent.

**SECOND COUNT**

***Statement of Offence***

**INDECENT ASSAULT**: Contrary to section 212(1) of the Crimes Act 2009.

***Particulars of Offence***

**TIMOCI VUKI DAWAI** on the 21<sup>st</sup> of March, 2019 at Nadi in the Western Division, indecently and unlawfully assaulted “AD”.

**REPRESENTATIVE COUNT**

**Ladies and Gentleman Assessors**

14. You will note that the first count is a representative count, which covers a period between the 1<sup>st</sup> day of January, 2008 and the 31<sup>th</sup> day of December, 2008. 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 count. The law says that it shall be sufficient for the prosecution to prove that between the specified dates mentioned in the first count at least one offence was committed.
15. To prove count one the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:

- (a) The accused;
  - (b) Had carnal knowledge of the complainant "SM";
  - (c) Without her consent;
  - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
16. Carnal knowledge means having sexual intercourse by penetrating the vagina of the complainant with the penis. In this trial the accused has denied committing the offence of rape. 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 without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
17. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
18. The second element is the act of penetration of the complainant's vagina by the penis.
19. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, than that consent is no consent at all.
20. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.

21. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
22. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
23. 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.
24. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
25. To prove count two the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
  - a) The accused;
  - b) Unlawfully and indecently;
  - c) Assaulted the complainant "AD" by touching her breast, stomach and kissing her neck.
26. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence.
27. The words "unlawfully" and "indecently" in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.

28. Assault is the unlawful use of force on the complainant "AD" by the act of touching her breast, stomach and kissing her neck.
29. In respect of the offence of indecent assault the accused has denied committing this offence.
30. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant "AD" by touching her breast, stomach and kissing her neck.
31. If you are satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then you must find the accused guilty. However, if you have a reasonable doubt in respect of any elements of the offence of indecent assault then you must find the accused not guilty.
32. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainants to be corroborated. This means if you are satisfied with the evidence given by the complainants and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainants.
33. In this case, the accused is charged with two offences, involving two complainants you should bear in mind that you are to consider the evidence in respect of each offence and each complainant separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.
34. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If

I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

### **PROSECUTION CASE**

35. The prosecution called two witnesses to prove the charges against the accused.
36. The first complainant "SM" informed the court that the accused is her biological father and she is the eldest of the 7 siblings. In the year 2008 she was 11 years of age and a class 6 student. In 2008 her father started touching, harassing and also had forceful sexual intercourse with her on two occasions.
37. In respect of the first incident the accused called the complainant from his bedroom when she went inside the bedroom the accused started touching her and then he removed her clothes. When she was lying on the bed, the accused went on top of her and put his penis into her vagina.
38. The complainant could not stop the accused since he was very strong when the accused was having sexual intercourse she had closed her eyes. She knew the accused had inserted his penis into her vagina because she had felt it.
39. The complainant did not say anything to the accused because she was afraid of him and had trusted him not to do such things to her. This incident happened during the daytime when her mother was at work. The complainant did not tell anyone about this incident because she was scared, she was thinking about her younger siblings and that her family will be separated if she complained.



40. In respect of the second incident it was night time the complainant was sleeping in the sitting room with her siblings when the accused woke her up and told her to sleep in the corner.
41. In the corner the accused started touching and harassing her she tried to push the hand of the accused away but he was forceful. Thereafter, the accused penetrated his penis into her vagina and had sexual intercourse with her after removing her clothes.
42. Although it was dark in the house the accused was the only one at home and she knew that he was the one who did all this to her. At this time the complainant's mother was at work the complainant went to sleep crying.
43. The complainant did not tell her mother because she was scared since she always thought about her younger siblings and at that time her youngest brother was born.
44. The accused kept on harassing her until her mother found out what he was doing to her. One night when her mother went to the washroom which was outside the house, the accused came to the complainant's bed and was touching her when her mother came and saw what he was doing. As a result the complainant's mother and the accused had an argument. The complainant told her mother that the accused had been harassing her but she did not give the specific details of what the accused had done to her.
45. The complainant did not tell her mother everything because she was not asked, at this time both were crying. According to the complainant she told her mother what had happened to her had been happening for a long time. The accused asked for forgiveness and she had forgiven him. The complainant had forgiven the accused because he was her father and she knew his weakness and she gave him a second chance.

46. In March, 2019 on a Wednesday the complainant and her sister "AD" went to town. In town "AD" told the complainant that when she was coming home from work, while they were standing at the door of the house, the accused had touched her sister which had made her sister uncomfortable.

#### Ladies and Gentleman Assessors

47. Complainants 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 complainant'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.
48. 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 "AD" had told her elder sister "SM" about what the accused had done to her the next day of the alleged incident.
49. This is commonly known as recent complaint evidence. The evidence given by "SM" is not evidence of what actually happened between the complainant and the accused since "SM" was not present and did not see what had happened between the complainant "AD" and the accused.
50. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant "AD" is a credible witness. The prosecution says the complainant told her sister "SM" about what the accused had done to her the next day of the alleged incident and therefore she is more likely to be truthful.

51. On the other hand, the defence says the complainant did not tell her sister everything in detail or fully because nothing had happened and therefore the complainant "AD" should not be believed.
52. 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 "AD" as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
53. According to the first complainant the incidents had affected her school work and at one stage she became suicidal, she could not sleep properly and on some days she had panic attacks. The complainant did not agree to have sex with the accused on the two occasions. She identified the accused in court.
54. In cross examination the complainant stated that she had told some of her school friends about what the accused had done to her but she did not tell this to the police. She also did not tell her relatives about what the accused had done to her.
55. The complainant agreed that both her hands were free, including her mouth and her legs. She could have shouted at the top of her voice but she did not because she was scared. The complainant had pushed the accused but he kept on coming on her and he was strong. When it was suggested to the complainant in respect of the second incident that she was lying down in between her siblings she disagreed and stated that she went to lie down in the corner. The complainant could have alerted her sibling by grabbing, shaking or kicking but she did not because she was trying to push the accused first and the sibling lying beside her was fast asleep.

56. Even after the second incident she was scared to tell anyone. After 2008 till 2019 it was after 10 years the matter was reported to the police.
57. The complainant agreed she had a good relationship with the accused but he did smack her and also scolded her when she did not help out with the household chores. The complainant also agreed that she had visited the accused at the remand centre and the cell block and had wanted to withdraw her complaint because she was thinking of her younger siblings since her mother was in Australia. The complainant maintained that both the incidents had happened.
58. In re-examination the complainant could not recall which sibling was sleeping beside her because it was dark. The complainant was not able to alert her sibling because the accused had come between her and the sibling. She also stated that she was close to her relatives who lived in Suva but not close to those relatives who lived nearby. The reason why she wanted to withdraw her complaint was because she wanted someone elder than her to look after her siblings and also she was thinking about the future of her younger siblings.
59. The second complainant "AD" informed the court that in March 2019, she had knocked off from work at about 11pm. The staff bus left at about 11.30pm when she reached town on her way home she met her father, the accused. While walking the accused put his right hand around her shoulder when they reached the front door of the house, she felt the accused right hand around her shoulder coming down into her breast and his left hand going on to her stomach.
60. At this time the accused was kissing her neck and he said "*you always hurt my feelings*". He was breathing heavily on her neck the complainant wanted to shout but she did not want to wake up the kids. She was so scared that she forgot the house door was locked on the outside and that she started

banging the door. The complainant was scared because she was very close to the accused.

61. The complainant was embarrassed to tell her elder sister "SM" about what the accused had done to her. The next day the complainant went to town with her elder sister "SM" and she told her sister about what the accused had done to her the previous night. Her sister was very angry when she heard what the complainant had told her. The second complainant identified the accused in court.
62. In cross examination the complainant agreed her mouth was not blocked and she could have shouted and also her hands were free but she did not do anything because she was very scared and all she wanted to do was to go inside the house.
63. The complainant agreed the accused would wait for her when she came back from work. She did not lie to her father for coming late from work. The complainant maintained that when the accused had wrapped his arm around her shoulder, his hand came on her breast.
64. When it was put to the complainant that the accused had never kissed her neck or had said what she told the court, the complainant responded that she remembered clearly what he had done to her.
65. The complainant agreed the report was lodged on the 24<sup>th</sup> of March, 2019 a few days after the incident. She agreed that she had visited the accused in the cell block not to withdraw her complaint but solely for the purpose of giving food and fruits to her father.
66. The complainant stated that she wished the accused had not touched her breast and stomach but he had done it. She did not make up a story against the accused.

67. This was the prosecution case.

### **DEFENCE CASE**

68. At the end of the prosecution case you heard me explain options to the accused he has those options because he does not have to prove anything. The burden of proving the accused guilt beyond reasonable doubt remains on the prosecution at all times.

69. The accused chose to remain silent and did not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent and not call any witness.

70. From the line of cross examination the defence takes the position that the accused did not commit the offences as alleged. The accused did not rape the first complainant by penetrating the vagina of the complainant with his penis on the two occasions mentioned by the complainant "SM".

71. The defence also states that the accused did not unlawfully and indecently assault the second complainant "AD". Both the complainants are the biological daughters of the accused, he had raised all his children like a father and a mother. The accused had a good relationship with both his daughters.

72. Both the complainants had made up a story against the accused to implicate the accused. He did not do anything as alleged.

73. This was the defence case.

### **ANALYSIS**

74. The prosecution alleges that the accused on two occasions between the 1<sup>st</sup> day of January, 2008 and 31<sup>st</sup> December, 2008 had forceful sexual

intercourse with the complainant "SM" firstly during the day time when her mother was at work in the accused bedroom. The accused started touching the complainant and then he removed her clothes went on top of her and penetrated her vagina with his penis.

75. The complainant could not stop the accused since he was strong she knew the accused had inserted his penis into her vagina because she had felt it.
76. In respect of the second incident it was night time the complainant was sleeping in the sitting room with her siblings the accused woke her up and told her to sleep in the corner.
77. In the corner the accused started touching and harassing her she tried to push the hand of the accused away from her but she could not. Thereafter, the accused penetrated her vagina with his penis and had sexual intercourse with her after removing her clothes.
78. The complainant's mother was at work, the complainant went to sleep crying.
79. The complainant did not tell her mother because she was scared since she always thought about her younger siblings and at that time her younger brother was born. The complainant did not consent to what the accused had done to her. The prosecution is asking you to also consider the fact that the first complainant was 11 years in 2008 when the alleged incidents took place. It is after 11 years in 2019 that she reported the matter to the police because of what the accused had done to her younger sister "AD". The first complainant wanted to withdraw the complaint not because the incidents did not happen but because there was no one to help her look after her siblings.
80. In respect of the second complainant "AD" the prosecution states that in March, 2019 the accused had unlawfully and indecently assaulted this

complainant by touching her breast, stomach and kissed her on her neck when he was standing in front of the house with the complainant. The prosecution also states that what the accused had done to the complainant was indecent and any right minded person would consider what the accused had done to his own daughter was indecent. This complainant had promptly told her elder sister "SM" about what the accused had done to her although not in complete detail.

81. On the other hand, the defence states the allegation is a made up story, in respect of the first complainant the defence contention is that the allegation dates back to 2008 which was only reported in 2019 after about 11 years. The first complainant was not under any threat by the accused she was a "free person" who could have told her friends or her relatives or her mother if the accused had indeed raped her as alleged. The complainant could have shouted or resisted the accused but she did not.
82. In respect of the second allegation by the first complainant the defence also says this cannot be believed because the complainant was sleeping in the sitting room with her siblings so if the accused had unlawful sexual intercourse as stated by the complainant it cannot be possible since the complainant had all the opportunity to alert her siblings sleeping beside her. The complainant did not since nothing had happened.
83. The defence contention is that you should not believe the first complainant since the accused had not done anything as narrated by her. The complainant on her own freewill had visited the accused at the cell block and the remand centre and had wanted to withdraw the complaint because nothing had happened. The defence is also asking you to consider the delay of 11 years after the alleged incidents in 2008, if indeed the allegations were true the complainant would have told someone. The defence is asking you not to believe that the complainant had told her school friends because she did tell this to the police.



84. In respect of the second complainant the defence says the accused was a concerned father who had always waited for his daughter “AD” in the middle of the night when she returned from work. If the accused had indeed done what this complainant had told the court then the complainant would have woken her other siblings and/or shouted to alert the neighbours.

Ladies and Gentleman Assessors

85. You have seen both the witnesses give evidence keep in mind that some witness react differently when giving evidence.
86. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witness is reliable and which one is not. You observed both the witnesses give evidence in court. You decide which witness was forthright and truthful and who was not. Which witness was straight forward? You may use your common sense when deciding on the facts. Assess the evidence of both the witnesses and their demeanour in arriving at your opinions.
87. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
88. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness

is consistent in his or her own evidence or with the other witness. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

89. 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.
90. If you accept the version of the defence you must find the accused not guilty of either or both the count. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
91. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
92. As I have mentioned earlier, in this case the accused is charged with more than one offence involving two complainants you should bear in mind that you are to consider the evidence in respect of each offence separately from the other. You must not assume that because the accused is guilty of one that he must be guilty of the other as well.
93. Your possible opinions are:-

Count One:            **RAPE**: ACCUSED - GUILTY OR NOT GUILTY.

Count Two:           **INDECENT ASSAULT**: ACCUSED - GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

94. 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.
95. 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**

18 September, 2020

Solicitors

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

**Office of the Legal Aid Commission for the Accused.**

