

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

**Criminal Case No.: HAC 45 of 2019**

**STATE**

**V**

**SIMISEI QOLI**

**Counsel** : Mr. T. Tuenuku for the State.  
: Ms. G. Henao for the Accused.

**Dates of Hearing** : 28 and 29 September, 2020

**Closing Speeches** : 30 September, 2020

**Date of Summing Up** : 30 September, 2020

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**SUMMING UP**

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*(The name of the complainant is suppressed she will be referred to as "T.V")*

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 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.

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

7. 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 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.
8. 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.

9. 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.
10. 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.
11. 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**

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

#### **COUNT ONE**

##### ***Statement of Offence***

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

##### ***Particulars of Offence***

**SIMISEI QOLI** on the 23<sup>rd</sup> day of February, 2019 at Vatukoula, in the Western Division, unlawfully and indecently assaulted “T.V” by touching her vagina.

## COUNT TWO

### *Statement of Offence*

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

### *Particulars of Offence*

**SIMISEI QOLI** on the 25<sup>th</sup> day of February, 2019 at Vatukoula, in the Western Division, penetrated the vagina of “T.V”, an 8 year old girl with his finger.

13. To prove count one the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
  - a) The accused;
  - b) Unlawfully and indecently;
  - c) Assaulted the complainant “T.V” by touching her vagina.
14. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offence.
15. 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.
16. The final element of assault is the unlawful use of force on the complainant by touching her vagina. You should ask yourself:
  - a) whether you consider the force which was used in touching her vagina was sexual in nature; and
  - b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.

17. 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 the offence of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused person not guilty.
18. In this trial the accused person has denied committing the offence 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 touched the vagina of the complainant.
19. To prove count two 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 "T.V" with his finger;
  - (c) "T.V" was below the age of 13 years.
20. The slightest of penetration of the complainant's vagina by the accused's finger 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 8 years at the time of the alleged offending. I therefore direct you that consent of the complainant is not an issue in regards to this count.
21. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
22. The second element is the act of penetration of the complainant's vagina by the accused with his finger.

23. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was 8 years in 2019 which establishes that she was below the age of 13 years at the time of the alleged incident.
24. If you are satisfied that the accused had penetrated the vagina of the complainant with his finger 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.
25. In this trial the accused has denied committing the offence of rape he is 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 finger.
26. 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.
27. If you are not satisfied that the accused had penetrated the vagina of the complainant with his finger then as a matter of law I direct you to consider the lesser offence of sexual assault in respect of the second count.
28. I direct you to consider the elements of the offence of sexual assault. You are to take into consideration the elements of the offence of sexual assault as I have mentioned a while ago under count one.
29. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offence of sexual assault, then you must find the accused person guilty of the offence of sexual assault. If on the other hand,

you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused person not guilty.

30. 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.
31. 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 of the other count. You must not also assume that because the accused is guilty of one count he must be guilty of the other count as well.

### **ADMITTED FACTS**

32. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
33. 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.
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. 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**

35. The prosecution called four witnesses to prove the charges against the accused.
36. The complainant informed the court that she is currently a class 4 student. On 25<sup>th</sup> February, 2019 she was living with her grandmother at Veiquwawa Settlement, Vatukoula, the accused was their neighbour. The complainant recalled the incident had happened on the day she told her aunt Bui about what the accused had done to her. It was late afternoon the complainant was at her home, the accused called her to come to his house.
37. After telling stories, the accused went into his house at this time he pulled the complainant's hand according to the complainant this was painful he then closed the door.
38. The accused laid her on the bed, removed her panty laid on top of her and was pushing himself he then started poking her vagina with his hand. The complainant felt pain and also felt the poking inside her vagina. The accused told her not to tell anyone about what he had done to her he then gave her 50 cents. After she left the house of the accused aunt Bui called the complainant.
39. Aunt Bui asked her what was in her hand, she told her aunt that the accused had given her 50 cents. When further questioned by her aunt she told her aunt about what the accused had done to her. The complainant was taken to the Vatukoula Police Station and then to the hospital for medical attention. The complainant recognized the accused in court.



40. In cross examination the complainant agreed that on 25<sup>th</sup> February, 2019 she had gone into the house of the accused. She was hungry but there was no food left, she confirmed that while she was sitting on the bed the accused came and sat beside her and poked her vagina. When it was suggested that the accused had not put his hand in her vagina the complainant maintained he had done this by putting his hand inside.
41. The complainant also stated that she told aunt the accused had put her on the bed and did bad things to her. Upon hearing this, the complainant was taken to the house of the accused by her aunt. When her aunt confronted the accused he denied doing anything to the complainant. When it was suggested to the complainant that she had never met the accused on 23<sup>rd</sup> the complainant said no.
42. Dr. Menisha Nand informed the court that she graduated with MBBS Degree from the University of Fiji in the year 2016. This is her fourth year as a Medical Practitioner. In 2019 she was a Medical Officer at the Tavua Hospital. On 25<sup>th</sup> February, 2019 the witness had examined the complainant at about 11pm. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit No. 1.
43. The witness had observed that the patient was calm and cooperative, looked nervous because she was initially seen by a male doctor but when the patient saw the witness she became approachable.
44. The specific medical findings were:
- a) Examination of vaginal area showed hymen was not intact. The witness explained hymen is a membrane or a tissue which was about 2 to 3 cm from the vaginal opening. Hymen could be either torn or broken;
  - b) No other signs of force or injuries or bleeding were noted.

The possible causes of hymen not being intact could be by the penetration of penis, finger, vigorous activities such as horse riding, etc.

45. In her professional opinion she was unable to comment on the age of the injury and the patient's hymen was not intact.
46. In cross examination the witness agreed there were different types and shapes of hymen and there can be instances when there is no hymen at all. In this case, the witness was able to come to her conclusion upon vaginal examination and she did not see any hymen. According to the witness she could not say how the hymen was broken or if the hymen was not there from birth.

#### Ladies and Gentleman Assessors

47. You have heard the evidence of Dr. Nand 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.
48. 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.

49. 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.
50. The third witness Adi Litia Asivino Vulilatabua informed the court that she knows the accused from many years. The complainant calls the witness aunt Bui, on 25<sup>th</sup> February, 2019 the witness was at home in the afternoon, she went to pay her dues to a couple in the village. On the way she saw the complainant leave her house and walk to the house of the accused. The accused and the complainant were talking outside the accused house.
51. When the witness was walking back to her house, she did not see the accused or the complainant when she went to the house of the accused she saw the door closed. From there, she went to the complainant's house the door of the house was also closed. After a while she saw a light in the accused's house the door opened and the complainant came out when the witness saw this she called out to the complainant.
52. The witness asked the complainant what was in her hand, she was told it was 50 cents when she asked the complainant who gave her the money she was quiet and crying then she said the accused gave it to her.
53. The witness then went to the house of the accused and confronted him she said to the accused, *"you know very well what you did was wrong but you did it."* When the witness said she will report the matter to the police the complainant started crying. At this time, the witness went to get the kindergarten teacher Ms. Aloesi. In the presence of the witness, Aloesi questioned the complainant who stated that the accused had put his hand and touched her vagina. The witness took the complainant to report the matter to the police. The witness identified the accused in court.

### Ladies and Gentleman Assessors

54. Complainant's 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.
55. 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 her aunt Bui that the accused had touched her vagina with his hand.
56. This is commonly known as recent complaint evidence. The evidence given by Adi Litia is not evidence of what actually happened between the complainant and the accused since Adi Litia was not present and did not see what had happened between the complainant and the accused.
57. 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 that the complainant told Adi Litia about what the accused had done to her was enough to raise an alarm that something wrong had been done to the complainant by the accused. Furthermore, the complainant was 8 years of age at the time cannot be expected to tell every detail of what had happened to her in front of the witness and Ms. Aloesi.
58. The complainant opened up to Adi Litia after Ms. Aloesi had questioned her which was quite natural considering the age of the complainant. Furthermore, the prosecution says the complainant was of such an age that she would be uncomfortable in talking about sexual matters to anyone. The

prosecution is asking you to consider that the complainant did relay relevant and important information to Adi Litia about what the accused had done to her and therefore she is more likely to be truthful.

59. 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 aunt Bui when she was questioned at the first instance about what had happened to her. Here the complainant did not volunteer the information but only after she was prompted by Ms. Aloesi because nothing had happened. Defence further says the complainant did not give the complete detail of what had happened so she should not be believed.
60. 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.
61. In cross examination the witness agreed that she did not tell the police that she had called Ms. Aloesi to speak to the complainant. However, she explained that the police officer Jese who was writing her police statement did not write this down.

#### Ladies and Gentleman Assessors

62. 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.

63. 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.
64. 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.
65. The final prosecution witness Cpl. 3833 Jese Marovia had caution interviewed the accused on 26<sup>th</sup> February, 2019 at the Vatukoula Police Station in the ITaukei language at the request of the accused. The original caution interview of the accused in the ITaukei language was marked and tendered a prosecution exhibit no. 2.
66. The witness did not force or threaten or make any false promises to the accused to give his answers. The witness also did not see any other police officer force or threaten the accused in any way. At the beginning of the caution interview W/Cpl. Makelesi was present as a witnessing officer but she had to leave for other duties as the interview commenced so she was not present and she did not sign the caution interview.
67. The witness had explained to the accused his rights during the caution interview but he did not wish to exercise those rights. The witness had also made an English translation of the caution interview. The English translation was marked and tendered as prosecution exhibit no. 3.

68. The witness also admitted that he overlooked to provide an English translation to the answers at Q.39 and Q.41 of the caution interview.
69. The English translation for answer to Q.39 and Q.41 are as follows:
- Q.39 When she was lying on your bed, what did you do?*
- Ans: I pulled up her dress and undo her panty.*
- Q.41 I put to you that you inserted your finger inside her vagina. What can you say about it?*
- Ans: Yes I do inserted my finger.*
70. The interview concluded before lunch time and the accused did not make any complaints.
71. In cross examination, the witness agreed the accused had come to the police station on his own and he had arrested and informed him of his rights. When it was put to the witness that he did not give the accused his rights, the witness disagreed.
72. The witness also disagreed that before the interview he got angry with the accused. He also denied that he wanted to punch the accused on his face. The witness had explained to the accused his right to remain silent in the ITaukei language.
73. The witness personally knows the accused and the relationship between them is like father and son. He denied telling the accused to admit the allegations so that he can get a lenient sentence. The accused signed the caution interview although the time the interview concluded was not recorded the witness remembers the interview had concluded before lunch break because he had served lunch to the accused after the interview. The witness denied the suggestion that it took longer than usual to complete the caution interview

because he was convincing the accused to admit the allegations to get a lenient sentence. The witness denied making any promises to the accused to admit the allegations.

Ladies and Gentleman Assessors

74. The caution interview of the accused is before you, the answers in the caution interview are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview.
75. During the cross examination of the interviewing police officer Jese the counsel for the accused had asked questions of this officer suggesting force by him on the accused to sign the caution interview and that the officer had made a false promise to the accused that if he admits the allegations he will get a lenient sentence from the court. This means counsel was putting to this witness that the admissions made by the accused contained in the caution interview was not voluntarily given by him and therefore you should disregard those admissions.
76. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his caution interview then you should disregard them. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.
77. Moreover, there are some parts of the caution interview that has been blacked out you are not to speculate why this is so, concentrate on the answers in the caution interview which are legible.



78. This was the prosecution case.

### **DEFENCE CASE**

#### Ladies and Gentleman Assessors

79. 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.
80. The accused could have remained silent but he chose to give sworn evidence and be subjected to cross examination. You must consider the evidence of the accused and give such weight as you think fit.
81. The accused informed the court that he has been residing in Veiquwawa Settlement for a long time. On 23<sup>rd</sup> February, 2019 he had a headache so he took panadol and slept early and woke up the next day. He knows the complainant who is his neighbour living with her grandmother about 10 steps away from his house. The accused did not meet the complainant on this day.
82. On Monday 25<sup>th</sup> February at about 6.30pm the accused had met the complainant when he was smoking in the porch of his house. The complainant came to ask for food but there was none in his house. After a while she asked for 50 cents for her spending money, the accused went inside his house followed by the complainant. From under the mattress the accused took out 50 cents and gave it to the complainant who was beside him.
83. The complainant was wearing a very short dress he observed the elastic of her undergarment was loose although she was a little girl she behaved like an adult. The accused did not lie on top of the complainant but made her lie

on his chest and he only touched her vagina. The accused denied that he had inserted his finger into the complainant's vagina.

84. Next morning the accused heard that Bui had reported the matter to the police so he went to the police station. Police Officer Jese was writing his answers he was forcing the accused to admit to the allegations. The accused was thinking not to sign the interview since he knew if he signs he will be admitting to the allegations. The accused was forced to sign and he was also told by Jese to admit to the allegations and that he will get a lenient sentence if not then he has to tell the court that he was not admitting to the allegations. There were other police officers present but he did not complain to them since he did not know what to say.
85. In cross examination, the accused denied that the complainant had come to his house on 23<sup>rd</sup> September 2019. He stated the complainant did not tell the truth in court.
86. In respect of the allegation of the 25<sup>th</sup> the accused admitted that he had met the complainant in his house, she was wearing very short clothes when he saw this he could not think straight and he became lustful and at this time he decided to touch the complainant's vagina.
87. According to the accused the complainant was 8 years old at the time but her behaviour was like an adult from the way she was sitting he could see her undergarments so he decided to touch her vagina. The accused knew it was wrong to touch the complainant's vagina and he also knew she will be mentally affected but he did it, however, he denied inserting his finger into the complainant's vagina.
88. Furthermore, the only reason why he admitted committing the two offences was because Jese had told him if he admits to the allegations he will get a lenient sentence. The accused agreed he had admitted committing the

offences in his caution interview. The accused denied sexually assaulting the complainant on 23<sup>rd</sup> February, 2019 and inserting his finger in the vagina of the complainant on the 25<sup>th</sup>.

89. This was the defence case.

### **ANALYSIS**

90. The prosecution alleges that the complainant who is the neighbour of the accused was called by the accused into his house on 23<sup>rd</sup> February, 2019 and touched her vagina. Although the complainant did not say this in her evidence she had told her aunt that the accused had touched her vagina.

91. In respect of the allegation of the 25<sup>th</sup> the prosecution alleges that the accused had called the complainant in his house laid her on his bed removed her panty lay on top of her and had inserted his finger into her vagina. The accused had also told the complainant not to tell anyone about what he had done to her so to keep her quiet about the incident he give the complainant 50 cents. Upon seeing her aunt the complainant told her aunt what the accused had done to her although not in complete detail.

92. The complainant was medically examined on the 25<sup>th</sup> the day of the second alleged incident although there were no injuries seen by the doctor the complainant's hymen was not intact.

93. On the other hand, the defence says the complainant did not tell the truth in court the accused had not met the complainant on the 23<sup>rd</sup> so how could he have sexually assaulted the complainant. The complainant in her evidence did not say anything about the 23<sup>rd</sup> incident. The fact that complainant told her aunt Bui that the accused had touched her vagina is not good enough because of lack of crucial details such as when the accused had done this

and how this had happened. In his caution interview the accused had denied sexually assaulting the complainant on the 23<sup>rd</sup> September.

94. As for the second allegation the defence is saying that the accused has been honest enough in saying that he only touched the vagina of the complainant on the 25<sup>th</sup> and had not inserted his finger into her vagina. The doctor did not see any sign of force or injuries or bleeding upon vaginal examination which was done on the same day of the allegation.
95. Although the hymen was not intact the doctor stated there could be other possible causes for the hymen to be torn or broken and she was unable to comment on the age of this injury. The defence is also saying if there was any poking by the finger to break the hymen there should have been some sort of bleeding or recent injury seen by the doctor.
96. Furthermore, the defence is also saying the caution interview is an out of court statement the confession was obtained after the interviewing officer had forced the accused to admit to the allegations and also made a false promise to the accused that if he admits he will get a lenient sentence. The accused trusted the police officer so he admitted to the allegations. The defence is asking you to consider the evidence given by the accused on oath which is the truth.

#### Ladies and Gentleman Assessors

97. 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.

98. 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 were 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.
99. 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.
100. 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.
101. 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 guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
102. The accused person is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
103. In this case the accused faces one count 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 count. You must not assume if the accused is guilty of one count that he must be guilty of the other count as well.

103. Your possible opinions are:-


1. COUNT ONE - **SEXUAL ASSAULT:** Accused - GUILTY OR NOT GUILTY.
2. COUNT TWO - **RAPE:** Accused - GUILTY OR NOT GUILTY.  
If you find the accused not guilty of rape then you are to consider whether the accused is guilty or not guilty of the lesser offence of **SEXUAL ASSAULT.**

Ladies and Gentleman Assessors

104. 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.

105. 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**

30 September, 2020

**Solicitors**

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

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