

IN THE HIGH COURT OF FIJI

AT LABASA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 23 of 2018

STATE

V

ZOHEB ALI

Counsel : Ms. Dharshani Rao for the State
Ms. Karen Boseiwaqa with Ms. Margarita Bosetimoala for the
Accused

Dates of Trial : 23 - 25 September 2019

Summing Up : 26 September 2019

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "OI".

SUMMING UP

Madam Assessor and Gentlemen Assessors,

[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box and any admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11] As I already indicated to you, a matter which will be of primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and 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 correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15] According to the evidence you heard in this case, the complainant, OI, was about 15 years old at the time of the alleged incident as set out in the Information and was one year older when he testified in Court. Experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of his experience concerning the offence the accused is charged with.

- [16]** You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [17]** In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [18]** This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [19]** However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies and omissions in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission 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 his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency or omission and consider him or her to be reliable as a witness.
- [20]** Lady and Gentlemen Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [21]** Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.

- [22] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not guilty of the charge. I have used the term “*question of fact*”. A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [23] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [24] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [25] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [26] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this morning, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out through the door to the Court room although you have not seen that. I think with that example you will understand the relationship between primary facts and the inferences that could be drawn from them.
- [27] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.

- [28] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. It is not his task to prove his innocence.
- [29] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [30] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [31] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [32] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [33] I must also explain to you as to the reason for permitting a closed court proceedings, when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when proceedings are closed court, the complainant is relieved of any mental pressure to describe the often unpleasant incidents which allegedly took place. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [34] The same applies for permitting a support person, namely the complainant's maternal grandmother, to sit beside him when the complainant gave evidence in this case. Again you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [35] Let us now look at the charge contained in the Information filed by the Director of Public Prosecutions (DPP).
- [36] There is one charge preferred by the DPP, against the accused:

Statement of Offence

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

Particulars of Offence

ZOHEB ALI, on 7 March 2018, at Seaqaqa, Labasa, in the Northern Division, penetrated the anus of **OI**, with his penis, without his consent.

[37] As you would notice the accused has been charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act No 44 of 2009 (Crimes Act).

[38] Let me now explain the elements of this charge.

[39] Section 207(1) of the Crimes Act reads as follows:

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

[40] Section 207(2) (a) of the Crimes Act is reproduced below.

(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;

[41] Therefore, when Section 207(1) is read with Section 207(2) (a) it would read as follows:

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

(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.

[42] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207(2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis. The law provides that carnal knowledge includes sodomy, which is anal sexual intercourse or anal penetration.

[43] Therefore, in order for the prosecution to prove the count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified date (in this case between 7 March 2018);
- (iii) At Seaqaqa, Labasa, in the Northern Division;

- (iv) Penetrated the anus of the complainant OI with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not he was consenting.

[44] Let me now elaborate on these elements in respect of the charge.

[45] The first element is concerned with the identity of the person who committed the offence. The prosecution must prove beyond any reasonable doubt that the accused and no one else committed the offence.

[46] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[47] The fourth element involves the penetration of the complainant's anus; 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 or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the anus of the complainant with his penis to any extent.

[48] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's anus, with his penis, without his consent.

[49] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

- (a) by force; or
- (b) by threat or intimidation; or
- (c) by fear of bodily harm; or
- (d) by exercise of authority; or
- (e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[50] Apart from proving that the complainant did not consent for the accused to penetrate his anus with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not he consented. The accused was reckless, if the accused realised there was a risk that he was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[51] A person of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was about 15 years of age at the time of the alleged incident, and therefore, he had the mental capacity to consent.

[52] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence. Rape is obviously considered a Sexual Offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

[53] If you are satisfied beyond any reasonable doubt that the accused, on 7 March 2018, at Seaqaqa, Labasa, penetrated the complainant's anus with his penis, then you must find him guilty of the count of Rape.

[54] If you find that the prosecution has failed to establish any of these elements in relation to the count of Rape, then you must find him not guilty of Rape.

[55] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[56] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Admitted Facts*" without placing necessary evidence to prove them:

1. BACKGROUND

1.1 The person charged is Zoheb Ali, 25 years, Labourer, residing at Valelawa, Seaqaqa, Labasa. He is also known as Patrick.

1.2 Zoheb Ali was known to OI, the complainant.

2. FACTS

- 2.1 On 7 March 2018, at Seaqaqa, sometimes late in the evening, OI and Zoheb Ali met near the Valelawa Primary School Compound.
- 2.2 After meeting Zoheb Ali and OI walked to Voloca Shopping Centre and left the shop together.

3. ARREST AND CAUTION INTERVIEW

- 3.1 On 15 March 2018, at the Seaqaqa Police Station Zoheb Ali was interviewed under caution and formally charged.

[57] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[58] The prosecution, in support of their case, called the complainant, OI, his uncle, Taito Saqacala, and a school teacher, Tokasa Raiwalui.

[59] Evidence of the complainant OI

- (i) *The complainant testified that he currently resides at Nakilikoso in Labasa. He has lived in Kilikoso since this year. Before that he lived in Dreketi in Valelawa. He was living with his uncle – Master Taito who was a school teacher. His house was in the school area – Valelawa Primary School.*
- (ii) *At the time he lived with his uncle, he was going to school. He was attending Ahamadiya Muslim Secondary School and was in form 3 last year.*
- (iii) *On 7 March 2018, he went to Voloca Shopping Centre. The complainant testified that on that day he had gone to one of his teachers – Master Prasad – to ask questions regarding Maths. While he was there, his uncle sent his sister to call for him as Patrick had come. [The complainant said he does not know the accused by his name Zoheb Ali but he knew him as Patrick].*
- (iv) *The complainant said that Patrick used to work at the Valelawa Primary School. He always used to come to the school compound to cut grass. He said he had seen Patrick cutting grass in the school compound about three times before.*

- (v) *The complainant testified that his uncle had told him to go with Patrick to the stores. When he came home his mother had also told him to go. Patrick and he had walked to the shopping centre. The witness said that it takes about 2 hours (one way) from the school premises to the shopping centre. When they left it was late in the evening but there was light at the time – the complainant said it was after 4.00 in the afternoon.*
- (vi) *After reaching the Voloca Shopping Centre Patrick had given something to the shop owner to be left in the fridge. Patrick and the shop owner had a conversation for about 10 minutes. The complainant had been standing outside waiting for Patrick.*
- (vii) *Thereafter, Patrick and the complainant had been walking back. The complainant had told Patrick that they walk quicker so that he can go back and do his homework. But Patrick had been slowing down from behind. It was dark at the time. The witness said that Patrick had been walking 8 to 10 metres behind him.*
- (viii) *The witness was asked the following further questions in evidence in chief:*

Q. *What happened next?*

A. *While I was taking the lead, he then ran from behind and he swung me. And he bit my neck.*

Q. *Who is he?*

A. *Patrick.*

Q. *How do you know he ran?*

A. *I looked back and I saw him running.*

Q. *When you say he swung you?*

A. *He got hold of me. He got on top of me and he swung me and he bit my neck.*

Q. *How did Patrick swing you?*

A. *Witness demonstrated in court how this happened.*

Q. *You showed us that you were swung towards your right?*

A. *Yes.*

Q. *How did you feel when this happened?*

- A. *I was afraid.*
- Q. *What happened as a result of being swung?*
- A. *I tried to brace myself, as a result I felt down on the ground.*
- Q. *Which part of the road were you walking on?*
- A. *I was on the right side of the road.*
- Q. *Did you fall on the road?*
- A. *I fell down the slope.*
- Q. *How high is the road?*
- A. *From where I am sitting to the floor.*
- Q. *How long is the slope/how far does the slope go?*
- A. *From where I am sitting right up to the end of the door.*
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- Q. *When you say he whom are you referring to?*
- A. *Patrick.*
- Q. *Did Patrick say anything when he swung you and threw you down the slope?*
- A. *No.*
- Q. *Did you say anything when he did this?*
- A. *No.*
- Q. *You said you fell. Did you get hurt?*
- A. *No.*
- Q. *How far down the slope did you stop?*
- A. *I slipped down towards the mango tree. Afterwards he came and kicked me.*
- Q. *How far is the mango tree?*

- A. *Witness said from where he is to the edge of the defence bar table – about 4 metres.*
- Q. *You said you fell – then you say you slipped?*
- A. *From the time he threw me I stopped at the mango tree. Then he came and kicked me.*
- Q. *How did you stop near the mango tree?*
- A. *I was lying down near the mango tree.*
- Q. *What was your position?*
- A. *I was lying down facing upwards.*
- Q. *How did Patrick come down to you?*
- A. *He came down the slope and afterwards he kicked me on my ribs.*
- Q. *How many times did Patrick kick you?*
- A. *Once.*
- Q. *How was that kick?*
- A. *He forcefully kicked me.*
- Q. *Which side of your ribs?*
- A. *On the right – witness showed in court the area he was referring to.*
- Q. *How did that make you feel?*
- A. *I was afraid and I tried to stand up but I couldn't.*
- Q. *How did it feel on your ribs – that kick?*
- A. *I was really in pain.*
- Q. *What were you afraid of?*
- A. *The word that Patrick uttered to me.*
- Q. *What did Patrick say?*
- A. *That he would kill me.*

- Q. *In what language did he say that in?*
- A. *In English.*
- Q. *How did he utter those words?*
- A. *"Kneel down if not I will kill you."*
- Q. *Did you believe Patrick that he could kill you at that place?*
- A. *Yes.*
- Q. *You said you tried to get up?*
- A. *Yes. I was not able to get up.*
- Q. *Did you kneel down?*
- A. *Yes.*
- Q. *What happened next?*
- A. *He spat on his hand, and he pulled his zip down and he put his penis out and he started to wet his penis with the saliva in his hand. And he pulled my trousers down and he got hold of both my hands from the back and he started to put his penis into my anus [the witness used the itaukei term boci for penis].*
- Q. *What happened next?*
- A. *After he ejaculated afterwards he pulled up his trousers afterwards he went up the slope. Afterwards I put on my clothes and crawled up the slope. Afterwards I broke a stick from the road side. After I came to a place which was a bit flat, I used the stick to support me in walking.*
- Q. *Why did you need support in walking?*
- A. *Because I was unable to walk properly.*
- Q. *Why not?*
- A. *Because all my body was paining.*
- Q. *What caused the pain?*

A. *Because when he got hold of me and threw me down the slope, from there he kicked me. And I tried to stand up but I couldn't because all my body was numb.*

Q. *How were you able to see Patrick remove his zip and take his penis out etc?*

A. *I was kneeling down – when I looked up all I could see was Patrick was doing that.*

Q. *Were you facing Patrick at the time you were kneeling?*

A. *When I looked back all that I could see was what Patrick was doing. Afterwards I looked down again.*

Q. *Were you facing Patrick?*

A. *I was kneeling down on my knees. I was lying down. I tried to kneel on my knees to look back. I lied down again when I saw him doing that. I was lying down on my stomach. Then I tried to look back. I saw him doing that then I lied down again.*

Q. *What did you think he was trying to do?*

A. *From the words he uttered he tried to lift me up to the mango tree. He told me to go to the mango tree. He told me he couldn't do it very well and told me to go up to the mango tree where he can do it very well.*

Q. *What did you think was happening? What did he try to do?*

A. *He tried to have sex with me.*

Q. *Did you say anything when Patrick started doing that?*

A. *All I told was for him not to do it.*

.....

Q. *And what did he do after that?*

A. *And he pulled me up and take me to the mango tree.*

Q. *Then?*

A. *Afterwards he had sex with me.*

Q. What exactly did he do?

A. He got hold of me on to the mango tree and he started to insert his penis into my anus. After that he ejaculated and he went.

- (ix) The witness testified that at the time he was wearing a lee-trouser with zip and buttons and he was wearing an underwear inside. His trouser was lose. Patrick had pulled down both his trouser and underwear.
- (x) The complainant then testified as to how he had walked back home. On reaching home he had not told anyone about the incident. He said he was scared to tell anyone. He had his dinner, took a bath and then did his homework.
- (xi) The next day he had gone to school. A friend of his named Alena is the first person who had seen the love bite on his neck. Then one Master Mani called him and took him to the Principal. The complainant said this is because of the love bite on the right side of his neck. The Principal had taken him to the Vice Principal who had questioned him about the love bite on his neck. Thereafter, the Vice Principal had requested for Ms. Raiwalui to come. The complainant had told Ms. Raiwalui about what happened.
- (xii) Thereafter the matter had been reported to the police and his statement had been recorded.
- (xiii) The witness was cross examined at length by the counsel for the defence.
- (xiv) The accused is totally denying the allegation of Rape against him. He only admits to giving a bite on the complainant's neck and that too on the insistence of the complainant.
- (xv) The defence suggested to the witness that he had failed to inform the Police the following matters, which he testified to in Court:
 - (i) That the complainant never told the police about what Patrick did to him while the complainant was lying down.
 - (ii) That when he was lying beside the mango tree that Patrick kicked him on his ribs.
 - (iii) That apart from mentioning the love bite on his neck the fact that Patrick had sucked his neck.

(xvi) *The Defence also highlighted the following inconsistency in the complainant's evidence vis a vis his Police Statement:*

In his testimony in Court the witness said that he was lying down when Patrick had pulled his trousers. However, in his statement to the police it is stated thus: "So, I was still standing, Patrick pulled down my ¾ pants,....."

[60] Evidence of Taito Sagacala

- (i) *He is a school teacher by profession and teaching Year 5 (students) at Valelawa Primary School. This is said to be his 5th year as a teacher. He had also taught at Valelawa District School.*
- (ii) *The witness said that he resides at the Valelawa school compound – in the school quarters. He was living with his two nieces, two nephews and his sister. The complainant was a nephew of his (his sister's son). The complainant had been living with him since the beginning of 2018 and was a form 3 student at Ahamadiya Muslim Secondary School at that time.*
- (ii) *The witness testified that in March 2018, he was teaching at Valelawa Primary School. On 7 March 2018, he was at the school compound when Patrick came to the school compound seeking permission for the complainant to accompany him to the Voloca Shopping Centre. The witness said that Patrick lived at a settlement near the Valelawa Primary School. He had seen Patrick in the school compound. Patrick had been working as a cleaner for the school for one week.*
- (iv) *At the time the complainant was at the Assistant Head Teacher, Mr Abinesh Prasad's quarters. One of his niece's (another of his sister's daughter's and a cousin of the complainant), had gone to call the complainant. The complainant had arrived, and Patrick and the complainant had gone together to the shop (Voloca Shopping Centre)*
- (v) *Later that evening he had seen the complainant return home. He doesn't recall the time. He had asked the complainant where Patrick was. The complainant replied that Patrick went to his place.*
- (vi) *The witness described the nature of the road from Valelawa Primary School to the Voloca Shopping Centre. He said "it is a bit far from the school and 20 km away from the main road. It is a gravel road. It is forest along the main road. You have to climb a mountain (hill). Road is on the side of the hill... From where the gravel road meets the tarseal road – the*

shop is about 400m away. ” The witness said the main road he was referring to is the Dreketi/Labasa highway.

[61] Evidence of Tokasa Raiwalui

- (i) *She is a school teacher at Ahamadiya Muslim Secondary School. She has been a school teacher for 14 years. The first six years was at Seaqaqa Central College and thereafter, at Ahamadiya Muslim Secondary School. She teaches English and Fijian for Years 9 to 13 (Form 3 to 7).*
- (ii) *She said that she is the Child Protection Officer (CPO) at Ahamadiya Muslim Secondary School. She broadly described her role as CPO was to look into the welfare of students.*
- (iii) *The witness testified that on 1^h of March 2018, she had interviewed the complainant in the school library. The complainant’s form teacher Ms Amelia Disavoka had informed her about the matter. She testified to what the complainant told her as follows:*

“I just asked OI of what happened. He explained everything and I was writing it down. OI told me that Patrick went to his uncle and requested if OI could accompany him to Voloca Shop. Upon returning OI told Patrick for them to walk fast, but Patrick told for them to walk slowly. OI started running and Patrick pulled his hand. OI told him to release him. But Patrick was reluctant to do so. OI said Patrick put a mark on his neck and pushed him to a nearby forest, tied his hand and told him to remove his clothes. OI also mentioned that Patrick told him if he didn’t remove his clothes he will kill him.”
- (iv) *Ms. Raiwalui said that she came to know about this incident on 10 March 2018, which was a Saturday. According to her recollection the incident had taken place on the previous Saturday, which was 3 March 2018.*
- (v) *After conducting the interview, she had taken the matter up with the Vice Principal of the school, who in turn informed the Principal. Thereafter the Principal had informed the police, because straight after that a police officer had come to the school.*
- (vi) *The witness testified that she cannot remember the age of the complainant. However, he was a form 3 student. When asked as to how old a form 3 student would generally be, she said 15 years.*

[62] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were

his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[63] In this case, the accused opted to remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

Analysis

[64] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, OI, his uncle, Taito Saqacala, and a school teacher, Tokasa Raiwalui, to prove its case.

[65] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

[66] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.

[67] In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved.

[68] The fact that the accused, Zoheb Ali is also known as Patrick and that he was known to the complainant has been agreed. It is also agreed that on 7 March 2018, sometimes late in the evening, the complainant and the accused met near the Valelawa Primary School Compound. It is further agreed that after meeting, the accused and the complainant walked to Voloca Shopping Centre and that they left the shop together.

[69] The accused is totally denying the allegation of Rape against him. He only admits to giving a bite on the complainant's neck and that too on the insistence of the complainant.

[70] The defence also showed certain inconsistencies and omissions in the evidence given by the complainant, during his testimony in Court. I have already directed you on how you should deal with inconsistencies and omissions. You should first decide whether those inconsistencies and omissions are significant. That is, whether those inconsistencies and omissions are fundamental to the issues you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistencies and omissions, you may conclude that the underlying reliability of the witness is unaffected. However, if there is no acceptable explanation for the inconsistencies and omissions, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question.

[71] To what extent such inconsistencies and omissions in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.

[72] It is for you as judges of fact to consider the totality of the evidence and come to a finding on all of the above matters.

[73] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence, beyond any reasonable doubt.

[74] In summary, and before I conclude my summing up let me repeat some important points in following form:

- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge;*
- ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge has been established beyond any reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[75] Any re directions the parties may request?

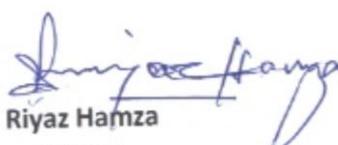
[76] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the charge separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[77] Your possible opinions should be as follows:

Count of Rape- Guilty or Not Guilty

[78] I thank you for your patient hearing.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LABASA

Dated this 26th Day of September 2019

Solicitors for the State : **Office of the Director of Public Prosecutions, Labasa**
Solicitors for the Accused : **Office of the Legal Aid Commission, Labasa**