

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 140 of 2017

STATE

V

MAIKA ROKORAUWA

Counsel : Ms. Swastika Sharma for the State
Ms. Anisha Singh with Ms. Shantel Hazelman for the Accused

Dates of Trial : 8-10 April 2019

Summing Up : 12 April 2019

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

SUMMING UP

Madam Assessors and Gentleman Assessor,

[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 opinion. You must take all evidence into consideration, before you proceed to form your opinion. 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 charges 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 charges 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, the document tendered as a prosecution exhibit and the 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 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 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, KMK, was 16 years old at the time of the alleged incidents (turning 17), and was 18 years (turning 19) old when she testified in Court (She said her date of birth was 1 June 2000). 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 her experience concerning the offences 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 their 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 is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it 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, you may conclude that the underlying reliability of the account is unaffected.
- [18] However, if there is no acceptable explanation for the inconsistency 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 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 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 and consider him or her to be reliable as a witness.
- [19] Madam Assessors and Gentleman Assessor, 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.
- [20] 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.
- [21] 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 charges. 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.

- [22] 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 offences charged.
- [23] 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.
- [24] 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.
- [25] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, 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 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.
- [26] 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.
- [27] 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 offences charged. It is not his task to prove his innocence.
- [28] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?

- [29] 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 offences 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.
- [30] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, 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.
- [31] 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.
- [32] 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 by having a closed court proceedings the complainant is relieved of any mental pressure to describe the often unpleasant incidents. 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.
- [33] Let us now look at the charges contained in the Amended Information.
- [34] There are two charges preferred by DPP, against the accused:

COUNT ONE

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Act of 2009.

Particulars of Offence

MAIKA ROKORAUWA, on the 2nd day of May 2017, at Cunningham, in the Central Division, assaulted **KMK** thereby causing actual bodily harm.

COUNT TWO

Statement of Offence

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

Particulars of Offence

MAIKA ROKORAUWA, on the 2nd day of May 2017, at Cunningham, in the Central Division, had carnal knowledge of **KMK** by inserting his penis into the anus of **KMK**, without her consent.

- [35] As per Count One, the accused is charged with Assault Causing Actual Bodily Harm, contrary to Section 275 Crimes Act No. 44 of 2009 (Crimes Act).
- [36] In terms of Section 275 of the Crimes Act “A person commits a summary offence if he or she commits an assault occasioning actual bodily harm.”
- [37] As you may be aware, the law provides that an offence consists of what is known as physical elements and fault elements (mental element). If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, it is said that intention is the fault element for that physical element.
- [38] When reading Section 275 of the Crimes Act it is clear that the said provision does not specify a fault element. Thus intention would be the fault element for that offence.
- [39] Therefore, in order to prove the offence of Assault Causing Actual Bodily Harm, the prosecution must establish beyond any reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 2 May 2017);
 - (iii) at Cunningham, in the Central Division;
 - (iv) intentionally assaulted the complainant, KMK; and
 - (v) thereby caused actual bodily harm to the complainant, KMK.
- [40] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [41] The second element relates to the specific day 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.

[42] The fourth element relates to the actual assault. The prosecution should prove beyond any reasonable doubt that the accused assaulted the complainant and he did so intentionally. A person is said to have intention with respect to conduct if he or she means to engage in that conduct.

[43] With regard to the final element, the prosecution should prove beyond any reasonable doubt that actual bodily harm was caused to the complainant, as a result of the assault.

[44] The term ‘harm’ has been defined at Section 4(1) of the Crimes Act to mean: *“any bodily hurt, disease or disorder (including harm to a person’s mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).”*

[45] As per Count Two, the accused has been charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.

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

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

[47] 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;

[48] 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.

[49] 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.

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

- (i) The accused;
- (ii) On the specified day (in this case the 2 May 2017);
- (iii) At Cunningham, in the Central Division;
- (iv) Penetrated the anus of KMK with his penis (inserted his penis into the anus of KMK);
- (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 she was consenting.

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

[52] The second element relates to the specific time period during 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.

[53] 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.

[54] 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 her consent.

[55] 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.

[56] Apart from proving that the complainant did not consent for the accused to penetrate her 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 she consented. The accused was reckless, if the accused realised there was a risk that she 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.

[57] A woman 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 16 years of age at the time of the alleged incident, and therefore, she had the mental capacity to consent.

[58] 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 as Sexual Offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

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

[60] 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 "*Final Agreed Facts*" without placing necessary evidence to prove them:

1. KM is the complainant in this matter.
2. MAIKA ROKORAUWA is the accused in this matter.

3. The complainant and the accused met at the playground near Grantham Road.
4. This is the first time that the complainant and the accused met.
5. The complainant was sitting on the see-saw.
6. The accused joined the complainant and they had a conversation.
7. The accused said to the complainant that he wanted to train with her.

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

Case for the Prosecution

[62] The prosecution, in support of their case, called the complainant, KMK, PC 5165 Koshal Dutt and Dr. Kitione Waqanisau. The prosecution also tendered the following document as a prosecution exhibit:

Prosecution Exhibit **PE1** - The Medical Examination Report of the complainant.

[63] Evidence of the complainant KMK

- (i) *The complainant said her date of birth was 1 June 2000. So she is currently 18 years. She will be turning 19 on the 1 June this year.*
- (ii) *She is currently living with her parents and her brother at Cunningham Stage 2. She is schooling at Suva Sangam College and is in Form 7.*
- (iii) *The complainant testified that on 2 May 2017, she had left home around 3.00 in the morning for her morning walk. She said that she told her mum that she was going for her morning walk.*
- (iv) *She usually goes for her morning walk on Tuesdays, Thursdays and Saturdays. On Tuesdays she walks from Cunningham to Tamavua and back; while on Thursdays and Saturdays she walks from Cunningham to Nabua and back.*
- (v) *She testified that on 2 May 2017, she had taken the route from Cunningham to Nabua. Later she testified that although 2 May 2017 was a Tuesday, she had decided to walk from Cunningham to Nabua.*
- (vi) *While walking that day she had gone to the playground on Grantham Road to rest. She said she went to the playground because she was tired. The playground is located on Grantham Road. When asked whether the playground had a name, she said “Jittu Estate”.*

- (vii) *She was sitting on the swing in the playground. She said “someone saw me sitting in the playground”. She said it was a guy and later said his name was Maika. The time was around 3.15 in the morning.*
- (viii) *When Maika noticed her sitting on the swing, he came and asked to join her, she said “Yes”. He introduced himself, saying he is from Ra. She had said that she is living in Cunningham and she is from Kadavu.*
- (ix) *Thereafter, Maika had asked her if he could show her where he lives. The witness had said yes. When asked why she said yes, the witness said “because I thought he was a very nice person”.*
- (x) *Thereafter, they took the shortcut opposite New World and from there to Jittu. Then he had shown the complainant his house. It was in the squatter settlement in Gaji. The witness said that she couldn’t see the house (properly) because it was dark.*
- (xi) *Thereafter, Maika had taken her to another house in the same place. She didn’t know whose house that was. Then he had taken her to a small room in that house. There was no one else in that room. The witness described the approximate size of the room to be 2m x 1.5m. She said this was a long post wooden house and it was dark inside the room. There was a small bed inside this room.*
- (xii) *Maika told her to come inside and sat beside her on the bed. Then he started to kiss her and touch inside her t-shirt. Thereafter, he had put his hands inside her pants. He had then told her to lie on the bed and to take off all her clothes. At the time she was wearing a t-shirt and long tights and bra and a panty inside. The complainant had taken off her clothes. Thereafter, Maika had taken off his clothes. He had come on top of her while she was lying on top of the bed. He had then started to kiss her and suck her nipples and lick her vagina. Thereafter, he had told her to suck his penis and she had done so. Then he had licked her anus while she was sucking his penis.*
- (xiii) *Then Maika had told her to lay down on the bed and inserted his penis into her vagina. The witness testified that he did it two times and on both times he had ejaculated into her vagina.*
- (xiv) *The witness testified that she had agreed to all the above sexual acts, and that it had been done with her consent.*
- (xv) *She said it must have been around 4.00 in the morning at that time. The witness also said that all these acts happened within about 5 minutes.*
- (xvi) *Thereafter, she had asked Maika to give back her clothes. However, he had been holding her clothes and didn’t want to give it back to her. She had begged him again for her clothes. “But he didn’t want to give it because he wanted to do it again”.*

- (xvii) Thereafter, Maika had gone outside, to his house, to go and change. He had taken her clothes with him. At this point, the witness had come outside of the room. She had noticed her bra lying on the floor. She had picked up her bra and worn it. She had then looked for something to wear. She had seen a grey vest hanging on the front porch. She had taken that vest and worn it. She had then run through the shortcut from where they came to this wooden house.
- (xviii) At this stage, Maika had come after her holding her clothes. He had called her and given back her clothes. The witness had gone to a nearby cassava patch and worn her clothes there. At this time, Maika had been standing at the new housing block. She said she felt frightened while she was wearing her clothes because Maika didn't want to give back her clothes when they were in the wooden house.
- (xix) Maika had then come and asked her if they could go for training. She had said yes. The two of them had then walked to the playground. Maika had asked for her name, and she said her name was Kuini. She had done so, because she didn't want Maika to know her real name. Maika had also asked her where she stayed. She had replied that she lived in Cunningham Stage 4.
- (xx) From the playground they had walked to Nabua and run up to Cunningham Road. This had taken about 15 minutes. It had still been dark.
- (xxi) While walking inside Cunningham Road, Maika had asked her to have sex with him. But she had refused. Maika had then taken her down to the cassava patch. The witness testified that he had forcefully pulled her to the cassava patch. This cassava patch was besides the footpath on Cunningham Road.
- (xxii) At the cassava patch, Maika sat down and told her to sit beside him. She had done so. He had then started to kiss her and make love bites on her neck. She had told him to stop this because it was painful. The witness demonstrated in Court how Maika bit her neck.
- (xxiii) Thereafter, Maika had told her to touch his penis. She had done so. She said she did so because she was scared. She said she was scared "Because he will do something bad to me. So I did whatever he told me".
- (xxiv) Maika had again asked her for sex. "But I told him no, because I have to go home because my mum is waiting for me". Maika had then stood up to check if someone is walking by. The witness had also stood up. Then he had caught her. When asked to explain, she said thus "He caught me when I was standing. He picked up something hard and threw onto my

forehead". She hadn't known what was thrown at her, because it was still dark. Maika had picked up the object from the cassava patch.

- (xxv) When asked to show exactly where on her forehead she was struck, the witness showed the center of her forehead. She said that she felt unconscious for about 10 seconds. Later, she said she had a blackout. Then she said her forehead had been bleeding.*
- (xxvi) At this stage, Maika had started to talk harshly to her asking her to take off her pants. So she took off her pants. She said she was scared "Because he threw a stone at my forehead". Thereafter, Maika had told her to bend over and started to put his penis into her anus. She said she had bent over because she was scared that he might do something bad to her. When she had bent over she said he had ejaculated his penis into her anus. It had been painful. She had tried to scream. However, Maika had blocked her mouth with his hands so that no one could hear her.*
- (xxvii) The witness said that Maika had stopped when he had penetrated his penis into her anus. The witness was asked, whether she gave consent to Maika to insert his penis into her anus and she said "No".*
- (xxviii) Thereafter, she had walked up to Cunningham. A Police vehicle had seen her walking and also seen her bleeding from her forehead. The officers in the vehicle had asked her to get inside. They had then gone to Centre Point to look for Maika. However, he was not there. She had then told the Police officers that he lives in Jittu Estate. So they had gone to Nabua. They had seen Maika at Grantham junction. The Police Officers had taken Maika into the vehicle and they had all gone to the Valelevu Police Station.*
- (xxix) The complainant identified Maika as the accused in the dock.*
- (xxx) Several suggestions were put to the complainant by the defence counsel in cross examination.*
- (xxxi) The following further questions and suggestions were also put to the complainant in cross examination:*

Q. Now whilst Maika was away, you had then run away from this bedroom?

A. Yes.

Q. Maika had later met you on the road?

A. Yes.

Q. You two, then talked with each other for a few minutes?

A. Yes.

- Q. *It is then that you had asked him to have sex with you?*
- A. *No.*
- Q. *However, Maika's penis was not erect at this time, isn't it?*
- A. *Yes.*
- Q. *And during this time, you were in the cassava patch near Cunningham?*
- A. *No.*
- Q. *You would agree that if Maika's penis was not erect, he did not ejaculate as well?*
- A. *Yes.*
- Q. *However, you would agree that you had given Maika consent to have sex with you at this time?*
- A. *No.*
- Q. *You would agree with me that at this time whilst at the cassava patch at Cunningham, you and Maika had taken off your clothes?*
- A. *No.*
- Q. *Are you telling Court that at the cassava patch, you and Maika had never taken off your clothes?*
- A. *No.*
- Q. *You would agree that your mother was waiting at home for you?*
- A. *Yes.*
- Q. *And you wanted to go home?*
- A. *Yes.*
- Q. *And you told Maika, not to follow you because your parents may see you?*
- A. *Yes.*
- Q. *So both of you then parted ways to go your separate ways?*
- A. *Yes.*
- Q. *This is went Maika had playfully thrown something at you?*

A Yes.

Q. When Maika had thrown something it had mistakenly hit your head?

A. Yes.

Q. You would agree with me that you had received a small injury on your forehead?

A. No it is a big wound.

(xxxii) In re-examination the witness was asked whether Maika had playfully thrown something at her. The witness said, "He did it on purpose not playfully".

[64] Evidence PC 5165 Koshal Dutt

- (i) He is currently based at the Valelevu Police Station.
- (ii) On 2 May 2017, he had been based at the Valelevu Police Station, CID Branch. He had been doing night duty.
- (iii) He described that while he was on night patrol in the Cunningham area, around 4.00 in the morning he had seen the complainant walking towards Cunningham Road. Upon checking on her, he had seen that her face was covered in blood.
- (iv) He had directed the complainant to get into the vehicle and taken her to the Valelevu Police Station.
- (v) He had also arrested the accused and taken him to the Valelevu Police Station.

[65] Evidence Dr. Kitione Waqanisau

- (i) The Doctor testified that he is currently serving at the Lautoka Hospital. He has been practising as a Medical Officer for the past 10 years. He obtained an MBBS Degree from the Fiji School of Medicine in 2007 and a Master's Degree in Obstetrics and Gynaecology, from the Fiji National University, in 2015. He specializes in Obstetrics and Gynaecology.
- (ii) He testified to the medical examination conducted on the complainant, KMK, on 2 May 2017, at 13:10 Hours, at the Medical Services Pacific Clinic (MSPC). At the time he was based at the Colonial War Memorial Hospital (CWM Hospital). The Medical Examination Report was tendered to Court as Prosecution Exhibit **PE 1**.

- (iii) *The Doctor testified to the “initial impression of the person to be examined”, as found in column D11 of the Report. Therein, it is stated that “She was clothed in the same clothing she wore this morning during the incident. Clothing was stained with blood”.*
- (iv) *He further testified to the specific medical findings as found in column D12 of the Report. He said there was a facial injury which is indicated at Appendix 1 of the Report. There was also bruising on both sides of her neck.*
- (v) *Doctor Kitone further described the facial injuries. There was a haematoma on the forehead, laceration on the left cheek, laceration on the right jaw and bruising of the neck; with one extra laceration on the chest.*
- (vi) *The Doctor explained that a haematoma is when the collection of blood happens underneath the skin. The usual causes for a haematoma is blunt trauma. Blunt trauma is trauma elicited by a blunt object. The witness said he could not specify the object in this instance. The size of the haematoma was around 5cm x 4cm.*
- (vii) *The haematoma was located above the eye brow but below the front hairline. The Doctor demonstrated as to where exactly the haematoma was.*
- (viii) *When asked as to how the haematoma appeared to him, the Doctor explained that it looks like a swelling that is purple and covered with blood clots. In his opinion, this was a serious injury that could have led to brain damage. However, this patient did not show any signs of brain injury.*
- (ix) *The Doctor confirmed that in his professional opinion, when this injury was caused, there was a possibility of the person suffering the injury having a black out.*
- (x) *The witness explained that “lacerations are a break in the skin exposing the inner tissue”. As indicated earlier, lacerations were found on the left cheek and right jaw and also on the chest.*
- (xi) *The Doctor said that a good definition for bruising is “an injury in which the skin is intact and blood released from damaged vessels remains under the surface. There were two bruises on the neck, one on the left side of the neck and the other on the right side. The bruises appeared to him as dull red in colour and circular in shape”. The probable cause for*

the bruising on the neck could be from love bites or even strangulation. I directed the Assessors that no evidence of strangulation has been elicited in evidence.

- (xii) The Doctor continued that he had examined the head, neck, chest and vaginal areas of the complainant.*
- (xiii) From his professional expertise, the Doctor was asked to describe the anal anatomy. He explained that the location of the anus is posterior to the vaginal opening and it is approximately 2 to 3 cm's in diameter and consists of two smooth muscles called the internal and external sphincter. The function of the anus is to retain faecal matter within the rectum until it can be discharged appropriately.*
- (xiv) The Doctor was asked as to what degree of force needed to be exerted on the anus for injuries to occur? He answered by saying that he doesn't have the exact number of force – but he said that it doesn't take a lot of force.*
- (xv) The Doctor was asked "In your expert opinion, if there are no injuries on the anus, could that rule out penetration?" The Doctor said "No".*
- (xvi) In cross examination, the Doctor agreed that the complainant did not require stitches for injuries on the forehead. He also agreed that in respect of the complainant, he has not recorded the exact measurements of the haematoma in his Report. The evidence he was giving in Court with regard to the measurement of haematoma was an estimated figure.*
- (xvii) The Doctor also agreed that there was no anal examination done on the complainant. He also agreed that he would examine and record any visible injuries seen on a patient. The Doctor further agreed that based on his Report, there was no anal examination done, because the patient had not relayed to him of any anal penetration.*

[66] 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.

[67] 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

[68] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, KMK, PC 5165 Koshal Dutt and Dr. Kitione Waqanisau, to prove its case.

[69] The prosecution is relying on the evidence of the Medical Officer, Dr. Kitione Waqanisau. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.

[70] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.

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

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

[73] 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 beyond reasonable doubt.

[74] The accused is totally denying that the incident he is charged for in counts one and two took place. The position taken up by the accused is that the complainant consented to have sex with him at the cassava patch. With regard to the injury caused to the complainant's forehead, the position taken by the defence is that the accused had playfully thrown something at the complainant and that he had no intention to cause injury to her.

[75] I wish to reiterate that the complainant had stated that she agreed and consented to the acts of sexual intercourse which took place in the room inside the wooden house. In relation to those incidents, the complainant also testified that "she was scared", "he forcefully put his hands into my pants", and "I was frightened knowing that he will do something bad to me". However, since she has agreed that the acts of sexual

intercourse took place with consent, I ask you to disregard all the above statements made by the complainant. You should not draw any adverse inference against the accused by such evidence.

[76] I also wish to direct you on the evidence of PC Koshal Dutt. He testified that the accused admitted that he wilfully assaulted the complainant and forced her. Admissions made verbally or in written form to a Police Officer can be made admissible in evidence, as long as those statements are made voluntarily. However, in this case, there is no evidence put forward by the Prosecution to establish that the said admissions were made voluntarily. Therefore, I direct you that you should disregard those admissions made by the accused to PC Koshal Dutt.

[77] I have explained to you how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. However, if there is no acceptable explanation for the inconsistency 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 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 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 and consider him or her to be reliable as a witness.

[78] 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.

[79] 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 two offences, beyond any reasonable doubt.

[80] You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the other count as well.

[81] 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 charges;*

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

[82] Any re directions the parties may request?

[83] Madam Assessors and Gentleman Assessor, 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 charges 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.

[84] Your possible opinions should be as follows:

Count One

Assault Causing Actual Bodily Harm - Guilty or Not Guilty

Count Two

Rape- Guilty or Not Guilty

[85] I thank you for your patient hearing.



A handwritten signature in black ink, appearing to read "Riyaz Hamza".

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT SUVA

Dated this 12th Day of April 2019

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