

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 316 of 2015**

**STATE**

**V**

**PAULA SERU**

**Counsel** : Ms. Lavenia Bogitini for the State  
Ms. Lavinia David with Mr. Uraia Koroï for the Accused

**Dates of Trial** : 29-31 January 2019

**Summing Up** : 1 February 2019

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

### **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, the document tendered as a prosecution exhibit 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 and the exhibits 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 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 they have 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, LL, was merely 3 years old at the time of the alleged incident (2 years and 11 months to be precise), and was 6 years old when she testified in Court [Her mother testified that the complainant's date of birth was 26 July 2012]. 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 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]** You heard in this case the evidence of Rigieta Saulekaleka, the mother of the complainant. She said that the complainant had come and told her “mum Seru wants to touch my mimi and then he will give me chewing gum”. When asked the exact words the complainant had used, the witness repeated what she said before “mum Seru wants to touch my mimi and then he will give me chewing gum”. You should consider whether this could be regarded as a complaint made by the complainant of the alleged incident. If so you should also consider whether she made that complaint without delay and whether she sufficiently complained of the offence the accused is charged with.
- [18]** The complainant need not specifically disclose all of the ingredients of the offence and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that the complainant made a prompt and a proper complaint, then you may consider that her credibility is strengthened in view of that recent complaint.
- [19]** It must be borne in mind that the complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [20]** 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.
- [21]** 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.

- [22] 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.
- [23] 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.
- [24] 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.
- [25] 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.
- [26] 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.
- [27] 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.

- [28]** 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 fact and the inferences that could be drawn from them.
- [29]** 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.
- [30]** 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.
- [31]** 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?
- [32]** 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.
- [33]** 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.
- [34]** You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the victim 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.
- [35]** I must also explain to you as to the reason for the use of screen, 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 a

screen is placed, 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.

[36] The same applies for permitting a closed court proceedings and also for permitting a support person to sit beside her when the complainant gave evidence in this case. The same also applies to the further measures that were taken in this case whereby the Judge and all Counsel dispensed with their wigs and gowns at the time the complainant was testifying and where the Judge sat at the Court Officers' table below to hear the complainant's testimony.

[37] Let us now look at the charge contained in the Information.

[38] There is one charge preferred by DPP, against the accused:

### **FIRST COUNT**

#### **Statement of Offence**

**RAPE**: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree 44 of 2009.

#### **Particulars of Offence**

**PAULA SERU**, on the 22<sup>nd</sup> day of June 2015, at Mualevu Village, Vanuabalavu, in the Central Division, penetrated the vagina of **LL**, a 3 year old girl, with his finger.

[39] Section 207(1) of the Crimes Act No. 44 of 2009 (Crimes Act) reads as follows:

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

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

*(2) A person rapes another person if —*

*(a) ...*

*(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.*

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

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

(2) A person rapes another person if —

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

**[42]** Section 207(3) of the Crimes Act provides that “For this section, a child under the age of 13 years is incapable of giving consent.”

**[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 day (in this case the 22 June 2015);
- (iii) At Mualevu Village, Vanuabalavu, in the Central Division;
- (iv) Penetrated the vagina of LL with his finger; and
- (v) At the time LL was a child under 13 years of age.

**[44]** 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.

**[45]** 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.

**[46]** The fourth element involves the penetration of the vagina of LL by the accused, with his finger. It must be noted that, in terms of the law, 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 into the complainant's vagina. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his finger to any extent.

**[47]** The final element is that at the time of the incident LL was a child under 13 years of age.

**[48]** The issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As indicted earlier, the complainant in this case was 3 years old (actually 2 years and 11 months) at the time of the alleged incident, and therefore, she had no mental capacity to consent.

**[49]** 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.

**[50]** If you are satisfied beyond any reasonable doubt that the accused, on 22 June 2015, penetrated the vagina of LL with his finger, then you must find him guilty of the charge of Rape.

**[51]** If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of Rape.

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

**[53]** 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 *“Amended Admitted Facts”* without placing necessary evidence to prove them:

1. The complainant is LL, 3 year old girl of Boitaci Village in Vanuabalavu [as at 22<sup>nd</sup> June 2015].
2. Paula Seru of Mualevu Village is charged with Rape contrary to Section 207 (1) (2) (b) and (3) of the Crimes Act.
3. The complainant was medically examined by Dr. Ilikini Naitini on the 22<sup>nd</sup> July 2015.
4. The complainant’s mother is one Rigieta Saulekaleka, 20 years old of Boitaci Village, Vanuabalavu [as at 22<sup>nd</sup> June 2015].
5. The complainant and her mother were at Mualevu Village on the 22<sup>nd</sup> June 2015.
6. Paula Seru was at Mualevu Village on the 22<sup>nd</sup> June 2015.

**[54]** Since the prosecution and the defence have consented to treat the above facts as *“Amended 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**

[55] The prosecution, in support of their case, called the complainant, LL, her mother, Rigieta Saulekaleka, and the Medical Officer, Dr. Ilikini Naitini. The prosecution also tendered the following document as a prosecution exhibit:

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

### **[56] Evidence of the complainant LL**

- (i) *It is already agreed between the parties that the complainant is LL, 3 year old girl of Boitaci Village in Vanuabalavu [as at 22<sup>nd</sup> June 2015].*
- (ii) *The complainant said that her mother's name is Rigieta Saulekaleka.*
- (ii) *The name of her school is Mualevu and she is in Class 1.*
- (iv) *When asked as to what happened to her in Lau, the witness said "Seru told me that he was going to buy me chewing gum and then he touched my vagina". The witness used the term "mimi" to refer to her vagina.*
- (v) *The witness was then asked the following questions:*
  - Q. *What did Seru use to touch your mimi?*
  - A. *His finger. The witness also showed her right index finger.*
  - Q. *What did he do with his finger?*
  - A. *He touched my mimi.*
  - Q. *When you say he touched your mimi with his finger – can you tell us if the finger went inside the mimi or outside the mimi?*
  - A. *Inside the mimi.*
  - Q. *How did you feel when he put his finger inside your mimi?*
  - A. *No answer was given by the witness to this question.*
  - Q. *Do you remember what you were wearing when this happened?*
  - A. *My clothes.*
  - Q. *What type of clothes?*
  - A. *No answer was given by the witness to this question.*
  - Q. *Do you remember where Seru did this?*
  - A. *I was standing near at home.*

- Q. *When Seru used his finger to touch your mimi, how were you positioned? Were you sitting, standing or lying down?*
- A. *I was standing.*
- Q. *What about Seru – when he was using his finger on your mimi, how was he positioned? Was he sitting, standing or lying down?*
- A. *Lying down.*
- Q. *When Seru was doing this, was there anyone else around you?*
- A. *No.*
- Q. *When this was happening, do you know where your mum was?*
- A. *She was playing with her mobile phone at the door.*
- Q. *When Seru did this to you, do you know which village you were at?*
- A. *At Mualevu.*
- Q. *You said when Seru did this, you were standing near at home – near whose home did Seru do this?*
- A. *Near Selai's home.*
- Q. *Where was your home?*
- A. *At Boitaci.*
- Q. *You said that Seru told you that he was going to buy you some chewing gum? Did Seru give you any chewing gum?*
- A. *No.*
- Q. *When Seru's finger went inside your mimi, did you feel anything?*
- A. *No.*
- Q. *When Seru put his finger inside your mimi, what were you doing?*
- A. *I was inside a room.*
- Q. *When Seru put his finger inside your mimi, what were you doing at that time?*
- A. *Nothing.*
- Q. *LL, you told us that you were standing near at Selai's home when Seru did this to you? You said no one else was around?*

- A. *The witness answered yes to the first part of the question.*
- Q. *Was this day time or night time?*
- A. *Day time.*
- Q. *And did Seru say anything to you?*
- A. *Yes.*
- Q. *What did Seru tell you?*
- A. *Seru told me that he was going to give me chewing gum.*
- Q. *And you told us that Seru had touched your mimi – do you know where the/your mimi is?*
- A. *Yes.*
- Q. *Can you show us on the doll where the mimi is?*
- A. *The witness lifts up the front part of the dress/frock of the doll and pointed to the groin area of the doll.*
- Q. *After Seru had put his finger in your mimi, did you tell anybody of what he did?*
- A. *Yes.*
- Q. *Who did you tell?*
- A. *I went and told my mother.*
- Q. *Do you know when you told your mother?*
- A. *At day time.*
- Q. *Now, LL, do you know any other name for him (Seru)?*
- A. *No answer was given by the witness to this question.*
- Q. *How do you know Seru?*
- A. *At Kavula.*
- Q. *Can you tell us how do you feel about Seru?*
- A. *No.*
- Q. *Do you still remember Seru's face?*
- A. *No answer was given by the witness to this question.*
- Q. *Do you remember going to a Doctor after Seru did this to you?*
- A. *No.*
- Q. *When Seru did this to you (put his finger into your mimi) and you were standing near Selai's home, was it sore or not?*

- A. *It was painful.*
- Q. *When Seru was putting his finger into your mimi, do you remember if he was doing it for a short time or long time.*
- A. *Short time.*
- (vi) *The witness positively identified the accused in Court.*
- (viii) *The defence counsel submitted that since the instructions received from the accused, were not coherent and rational instructions, and since the complainant's evidence has been consistent throughout her evidence in chief, she is not in a position to put forth any cross examination.*

**[57] Evidence of Rigieta Saulekaleka**

- (i) *She is the mother of the complainant LL. She resides at Boitaci Village in Vanuabalavu, Lau.*
- (ii) *She testified that the complainant is her daughter. The complainant's date of birth is 26 July 2012.*
- (iii) *During the period 22 June 2015, she was living at Boitaci Village. On that particular day she recalls being at Mualevu Village, with her daughter, the complainant. They had gone to attend the church service and had slept at Mualevu.*
- (iv) *Later the witness testified that she and the complainant had been staying at her aunt, Maraia's house in Mualevu.*
- (v) *The witness testified that whilst at Mualevu, in the morning of 22 June 2015, she was at home. The complainant was outside but near to the house. After a while, the complainant came back running inside to tell her what Seru had done to her.*
- (vi) *The complainant had come and told her "mum Seru wants to touch my mimi and then he will give me chewing gum". When asked the exact words the complainant had used, the witness repeated what she said before "mum Seru wants to touch my mimi and then he will give me chewing gum".*
- (vii) *When the witness was asked as to what the complainant meant when she referred to the term "mimi"? The witness said, it meant her vagina.*
- (viii) *When the complainant had informed her of this, the witness said that she was angry and continued "I was frustrated – thinking that my daughter was still small and thinking of the consequences of what Seru had done to her."*

(ix) *The witness was then asked the following questions in examination in chief:*

Q. *From your knowledge what did Seru do to your daughter?*

A. *To my knowledge, Seru had touched my daughter, as no one else was near that house. It was only Seru and my daughter.*

Q. *How do you know that Seru had touched your daughter?*

A. *I believed in what my daughter said. When I came out to confront Seru, he turned away from me and started walking away. I have an aunt, she was a school teacher (her aunt Maraia). I had relayed the incident to my aunt, who is a school teacher. My aunt came out of the house, and started calling Seru's name, but he got into a carrier to go back to his place.*

Q. *Can you explain, when you said Seru had touched your daughter, what do you mean by this?*

A. *To my understanding, Seru tried to touch my daughter's vagina.*

Q. *On 22 June 2015 – do you recall what LL was wearing?*

A. *The dress that she wore to church on Sunday.*

Q. *What day of the week was that (22 June 2015)?*

A. *It was a Monday.*

Q. *You told us that you thought that Seru had tried to touch your daughter's vagina? What did LL say with respect to that?*

A. *LL told me that if Seru touches her mimi, then Seru will give her chewing gum.*

Q. *Rigieta, from apart from what you told us, that Seru told LL that he will give her chewing gum, if he touched her mimi – did LL say anything else?*

A. *No.*

(x) *The witness said that the matter was reported to the Police about 2 to 3 weeks after 22 June 2015. When asked why she did not report the matter immediately to the Police, the witness replied that she did not go to the Police immediately after the incident, because to her knowledge, if she reports against him, the Police will not take action against him. She had finally reported the matter for the accused not to do this again.*

- (xi) *The witness further testified that at the time, the complainant had initially told her about what Seru had done to her, she was scared and not in her right state of mind.*
- (xii) *The witness also confirmed that the complainant had not received any chewing gum from Seru.*
- (xiii) *The witness was then asked the following further questions in examination in chief:*
- Q. *Can you clarify to us, how do you know that she (complainant) ran into the house after he told her what he wanted to do?*
- A. *I saw her running towards me. By looking at her face, I felt something was wrong. When she reached me, she told what had happened.*
- Q. *How do you know that she ran immediately after Seru told her this?*
- A. *I know my Lord. I saw him walk past the house to go to the house he was staying. My daughter was outside. It was not even 5 minutes when I saw him walk past that house again and my daughter ran towards me.*
- Q. *You said that it was not even 5 minutes when you saw Seru walk past the house again and your daughter ran towards you. Within that 5 minutes did you see either Seru or LL?*
- A. *I was in the house. Through the window I could see my daughter and Seru. I could see Seru standing at the door but not clearly. My daughter was outside.*
- Q. *Was LL anywhere close by to Seru?*
- A. *Yes. End of the witness box would be door. Seru was inside and my daughter outside. At one point I could not see her whole body, I could only see half of her standing outside.*
- Q. *Whose door and whose house was that?*
- A. *It was my aunt's house. My aunt has two houses. We were staying in one house and Seru was staying in the other house.*
- Q. *The aunt is the school teacher?*
- A. *Yes. Maraia.*
- Q. *Where was Maraia staying?*
- A. *In the house that we were staying.*
- Q. *Why was Seru staying in the other house?*

A. *He had visited my aunt and was staying in the other house.*

Q. *Was he only visiting?*

A. *Yes. Visiting.*

Q. *Does Seru stay in your aunt's other house permanently?*

A. *He visited my aunt then he stayed for 1-2 weeks.*

Q. *Is Seru related to you or your aunt?*

A. *No.*

.....

Q. *Your aunt's two houses, how far apart are they?*

A. *The witness showed from the witness box to the wall at the end of the court house. This is about 5-6 meters.*

Q. *How were you able to see that Seru was inside at one point of time, while your daughter was outside? From where you were, how were you able to see this?*

A. *I could see his hat.*

Q. *From where you were, were you able to hear what was going on?*

A. *No.*

Q. *While you were observing them, what were you doing?*

A. *I was at home, getting our stuff ready for us to leave.*

.....

Q. *Did LL say that Seru touched her mimi?*

A. *No.*

Q. *How did you say "To my knowledge, Seru had touched my daughter, as no one else was near that house. It was only Seru and my daughter?"*

A. *To my knowledge, Seru had touched my daughter, because when I tried to confront him, he then walked away from us.*

(xiv) *The following questions were asked from the witness in cross examination:*

Q. *You had seen Seru and LL at one of Maraia's houses. Who all lives in that house?*

A. *Seru and Maraia's son, Taufa Late.*

Q. *Is Maraia known by any other name?*

A. *No.*

Q. *In Maraia's house, where you had resided, who all live there?*

A. *Maraia and her husband, Laisenia Nawa.*

Q. *Anybody else?*

A. *No.*

**[58] Evidence of Dr. Ilikini Naitini**

- (i) *He is practising as a Medical Officer since 2012. Currently he is serving as the Emergency Medicine Registrar of the Colonial War Memorial Hospital (CWMH), Emergency Department. He has been attached to CWM Hospital since late 2016.*
- (ii) *He testified to the medical examination conducted on LL on 22 July 2015, at 13:00 Hours, at the Lomaloma Hospital in Vanuabalavu. The Medical Examination Report was tendered to Court as Prosecution Exhibit **PE 1**.*
- (iii) *He further testified to the specific medical findings as found in column D12 of the Report. He said there was redness around the vagina. No abrasion or laceration noted. Can't appreciate the hymen.*
- (iv) *The Doctor explained as to what he meant by the term "can't appreciate the hymen". In this case, he did not see the hymen instantly. However, he said that could be due to two reasons:*

  - 1. *The patient was very uncomfortable and kept on moving which made the examination not so easy.*
  - 2. *He was only in his 2<sup>nd</sup> year of practice and the patient was a very young kid.*
- (v) *The Doctor testified that the hymen is a fibrous membrane that covers the external opening of the vagina. Normally the hymen is more obvious. In this examination, it could be there, probably right inside and I must have missed it or it might have not been there.*
- (vi) *The Doctor further explained that the redness was on the labia minora, which is the inner wall of the vagina. There were no abrasion or laceration on the vagina or labia majora or labia minora. He said that*

*usually, a full pelvic examination is done for a fully grown female to see lacerations or abrasions. But since this was a child, I did only a visual examination without the use of speculum.*

- (vii) In the Doctor's opinion, if a fully grown adult male's finger is inserted into a child's vagina, it will perforate the hymen and it could cause abrasions or bruising if applied with force.*
- (viii) Usually for children the healing process is fast. For a healthy child, it would take 10-14 days for a wound/injury to heal. However, if it is a deep wound it will take longer to heal.*
- (ix) Based on the Doctor's evidence, he was asked what he would expect to see, if a month had passed from the time the adult inserted the finger into the child's vagina. The Doctor said the answers could vary:*
  - 1. If the finger has got long finger nails it could cause minor lacerations and abrasions into the vaginal vault and if it is applied with force repeatedly.*
  - 2. If it is applied gently, only once, it could just break the hymen and cause redness and abrasions in the vaginal vault.*

*However, both the above possibilities would not be visible after a month. For a child, it heals very well.*

- (x) The Doctor stated that the inability to appreciate the hymen does not entirely rule out the possibility of penetration. Similarly, the absence of any visible injuries in the vagina, and the absence of any foul smelling discharge at the time of examination, does not rule out the possibility of penetration.*

**[59]** 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 give sworn evidence from the witness box and/or call witnesses on his behalf. He could also address Court by himself or through his counsel. 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. 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

- [60] The above is a brief summary of the evidence led at this trial. The prosecution called the complainant, LL, her mother, Rigieta Saulekaleka, and the Medical Officer, Dr. Ilikini Naitini, to prove its case.
- [61] The prosecution is relying on the evidence of the Medical Officer, Dr. Ilikini Naitini. 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.
- [62] 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.
- [63] 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.
- [64] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [65] 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. Based on the said agreed facts, the fact that the complainant and her mother were at Mualevu Village, on the 22 June 2015, and also the fact that Paula Seru was at Mualevu Village, on the 22 June 2015 is proved. It is also proved that the complainant was 3 years old at the time of the alleged incident. Both the complainant and her mother have clearly identified the accused, Paula Seru, as the person who committed the alleged offence. Therefore, the only element left for the prosecution to prove is whether the accused penetrated the complainant's vagina, with his finger.
- [66] 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 count of Rape, 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 of Rape, beyond any reasonable doubt.

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

[68] Any re directions the parties may request?

[69] 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 of Rape 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.

[70] Your possible opinions should be as follows:

**First Count**

Rape- Guilty or Not Guilty

[71] 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 1<sup>st</sup> Day of February 2019

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