

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 32 of 2015

STATE

V

APAKUKI SAUDROMU

Counsel : Ms. S. Naibe with Mr. A. Singh for the State.
: Mr. K. Tunidau for the Accused.

Dates of Hearing : 22, 23, 24, 25, October, 2018
Closing Speeches : 29 October, 2018
Date of Summing Up : 30 October, 2018

SUMMING UP

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

Ladies and Gentleman Assessors

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

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion

of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

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

BURDEN OF PROOF AND STANDARD OF PROOF

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

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

FIRST COUNT

Statement of Offence

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

Particulars of Offence

APAKUKI SAUDROMU between the 1st day of January, 2014 and the 31st day of January, 2014 at Lautoka in the Western Division, unlawfully and indecently assaulted “**MB**”.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

APAKUKI SAUDROMU between the 1st day of September, 2014 and the 30th day of September, 2014 at Yasawa in the Western Division, penetrated the vagina of “**MB**” with his penis, without the consent of “**MB**”.

14. To prove count one the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant “**MB**”.
15. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence.
16. The words “unlawfully” and “indecently” in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
17. Assault is the unlawful use of force on the complainant “**MB**” by the act of sucking her breast.

18. In respect of the count of indecent assault the accused has denied all the elements of the offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant “MB” by sucking her breast.
19. If you are satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then you must find the accused guilty of the offence of indecent assault. However, if you have a reasonable doubt in respect of any elements of the offence of indecent assault then you must find the accused not guilty of the first count.
20. To prove count two the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant “MB” with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.
21. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time that is between the 1st day of September, 2014 and the 30th day of September, 2014.
22. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.

23. The second element is the act of penetration of the complainant's vagina by the penis.
24. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
25. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
26. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
27. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
28. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offence he is charged with.
29. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
30. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant

and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.

31. You must be satisfied that the prosecution has proved all the elements of both the offences beyond reasonable doubt in order for you to find the accused guilty of either or both the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or both the offences, then you must find the accused not guilty.
32. In this case, the accused is charged with two offences, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

ADMITTED FACTS

33. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.
34. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
35. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

36. The prosecution called two (2) witnesses to prove its case against the accused.
37. The complainant "MB" recalled in the year 2014 she was 17 years of age and a Form 5 student her father died when she was in class three and her mother remarried. In January, 2014 the accused who was her paternal uncle came to her house and sought permission from her grandfather with whom she was staying to take her to his home at Kashmir and support her education. Thereafter the complainant started schooling from the house of the accused.
38. After the school started she had a boil on her right breast, as a result of this boil during night time she did not wear any top and slept wearing her skirt only. One night whilst sleeping she felt someone was sucking her breast. When she woke up she saw it was the accused her uncle, at this time she was alone in the bedroom. When the complainant saw her uncle she was scared and nervous, he sat on the bed and told her not to tell anyone about what he had done.
39. The complainant shared the bedroom with the daughter of the accused who on that night was sleeping in the sitting room. The light in the bedroom wasn't on but there was light from the bathroom which was opposite the bedroom.
40. The next day she told the baby-sitter who was a live in house girl and Niko the son of the accused. They said nothing, however, the sister of the accused came and scolded her. After this the complainant left school and went home to stay with her grandfather she did not go to school thereafter.
41. In September, 2014 the accused came to the house of the complainant. She was surprised and nervous to see him, the accused asked permission from

the complainant's grandfather so that he could take the complainant to Yasawa. The complainant's grandfather granted permission for the complainant to go to Yasawa and they were to bring some fish for him upon return.

42. The complainant did not tell her grandfather what the accused had done to her at his house in January. The complainant went with the accused to the Lautoka wharf and in his fibre boat both went to Yasawa an elderly man also accompanied them to Yasawa.
43. At Waya Island the complainant saw that the hotel was under construction and there were a few workers there. There were two quarters, in one of the quarters the complainant stayed with the accused.
44. In the room the complainant slept on the mattress whereas the accused slept on the bed. While sleeping the complainant felt someone sitting beside her. When she woke up she saw her uncle. At this time he pushed her back on the mattress and told her to take off her pants. After this the accused inserted his penis into her vagina for about three minutes. The complainant was scared and ashamed of herself at this time.
45. The complainant did not consent to what the accused had done to her. According to the complainant the accused forced her she did not raise an alarm because she was afraid. The accused told her not to tell anyone about the incident.
46. When the accused went to sleep the complainant started to cry. Next morning both came to Lautoka wharf and from there she went home alone. When the complainant arrived home her grandfather was there but she did not tell him anything about what the accused had done to her she was afraid of her grandfather and she did not know how he will react if she told him since he suffered from high blood pressure.

47. The complainant did not report both the incidents to the police because she was afraid the police will arrest the accused and he will fight with her aunty (his wife) and what her parents will do to her if they came to know about what the accused had done to her.

Ladies and Gentleman Assessors

48. Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for a child of 17 years not to complain about what she had gone through to her grandfather when she went home after both the incidents. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full or not at all as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
49. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in this case did not inform her grandfather immediately after she went home from the house of the accused and after returning from Yasawa Island. The incidents were reported after the complainant's mother had taken her to the Police Station.
50. Furthermore, on a Sunday at lunch time one of the neighbour's came with a phone saying that someone wanted to speak to her. When the complainant answered the phone it was the accused. The accused wanted to come home the complainant replied "no", he wanted to come because according to him no one knew what had happened between the two.
51. The complainant went to her cousin's house, after 2pm she came home and was afraid to see the accused at home. After having lunch the accused

asked the complainant's grandfather if the complainant could show him the house of her cousin Inoke who lived at Tagaloli. Her grandfather granted her permission to go with the accused. The complainant went with the accused because there was nobody at home to take him to Tagaloli.

52. At Tagaloli the accused had a chat with her cousin since it was late in the afternoon about 5 pm no bus service was available so it was suggested by the complainant's cousin Inoke that the accused and the complainant stay overnight and leave the next day.
53. The accused went to sleep while the complainant, her cousin and his wife watched a movie. In the middle of the night Inoke came and woke up the complainant since her mother and grandfather were there. At this time the complainant's mother came into the house grabbed her, started to punch and slap her, took her to the car and then to the Police Station.
54. At the Police Station the complainant lodged a complaint against the accused. According to the complainant her mother knew about what had happened to her in Yasawa Island since her mother told her to tell the police about what had happened to her at Yasawa Island. Furthermore, the complainant recalled making a withdrawal of complaint statement. She was with her mother when the wife of the accused called her mother asking them to meet at their house in Kashmir.
55. At the house of the accused the wife of the accused gave her a piece of paper which was a withdrawal letter. The wife of the accused also gave a blank piece of paper and told the complainant to copy the contents of the letter in her own hand writing. The complainant copied the letter and they came with the younger brother of the accused and delivered the letter to court.
56. The complainant did not want to withdraw this case she wrote the letter because the wife of the accused had told her to write the letter. The complainant did not tell anyone or report the matter despite having lots of opportunities to do so because she was scared something will happen to her. The complainant identified the accused in court.

57. In cross examination the complainant denied that she was uncontrollable since she was drinking liquor and would go dancing at the Qaravatu. The complainant agreed that she slept in one bedroom with Kelera Adikula and Paulini and that the accused eldest son Niko was her boyfriend.
58. The complainant agreed that she and Kelera used to sleep out from the house and go dancing at the Hunters Nightclub on Friday's and would usually arrive home around 3 or 4 o'clock the next morning.
59. The complainant agreed that she would not go to school and would roam around in Lautoka City or stay at the village with Kelera. She did not inform the accused or his wife since she did not want them to know. Every night she slept in the bedroom with Kelera and Paulini. The bedroom lights were switched off but the light from the bathroom came into the bedroom since the bedroom door was open at night. There was one bed in the bedroom sometimes she slept with Kelera while Paulini slept in the sitting room. The complainant denied on the night of the alleged incident Paulini and Kelera were sleeping in the bedroom.
60. When it was put to the complainant that never in any given night she had slept alone in the bedroom because it was always occupied by her, Kelera and Paulini the complainant agreed. The complainant stated that she told the truth that the accused had come into the night and sucked her breast. She also denied it was Niko her boyfriend who had sucked her breast.
61. The complainant maintained that in respect of the Yasawa incident she had gone alone with the accused and she did not know that no female was allowed into the construction site.
62. The complainant also maintained that after the incident in the house she told Niko Koroï the son of the accused and the house girl Anasivo Sera. Even after eight months of the January incident the complainant felt scared and did not want to see the face of the accused but she went to Yasawa with

the accused because her grandfather had given permission and if she did not go her grandfather would ask a lot of questions and suspect that something was happening or had happened between the two.

63. She did not tell her grandfather about the January incident because of his health. The complainant agreed that she had hand written the letter withdrawing her case and also signed the same which was marked as defence exhibit no. 1. When the complainant went to Kashmir with her mother and stepfather the accused was not there. The complainant and her mother did not know the reason why they were going to Kashmir. She denied writing the letter with her mother and then had gone to advise the wife of the accused about it. The complainant maintained she copied the letter written by the wife of the accused. She was forced to write the letter by the accused wife who was beside her. She did not refuse and also at that time she did not know what to do since she was scared. The contents were true because she copied it.
64. The letter was delivered to the office of the Director of Public Prosecutions by the younger brother of the accused. The complainant denied that she had lied about the two incidents.
65. The final prosecution witness was Mereani Batiki the mother of the complainant she recalled on 9 November, 2014 at about 10.30pm the witness received a call from the complainant's grandfather asking that she should go and look for the complainant since she was not at home after going with the accused to show him her cousin's house at Tagaloli.
66. At the house of Inoke the witness called the complainant and questioned her but the complainant did not respond. The witness started to beat the complainant so that she could tell her what was happening. The reason was that the accused had been explained about the route to Inoke's house yet she went with the accused to show her cousin's house.

67. From Tagaloli they all went to the Police Station because of the complainant's age. After returning from the Police Station the witness questioned the complainant and she explained to the witness that the accused had done two things to her one in Yasawa and one in Nabukavesi, Navua the complainant was ashamed when telling the witness.
68. The witness stated the reason why the complainant was at the house of the accused was because the accused had requested them if it was hard for the grandfather to take care of the complainant then he would take her home and support her education. The witness did not receive any complaints about the complainant from anyone including the wife of the accused.
69. In cross examination the witness agreed the complainant had told her something happened in Yasawa and something happened in Nabukavesi but did not explain. The witness denied influencing the complainant with her husband to write the letter of withdrawal.
70. The witness explained that the complainant came to her home since the wife of the accused had already called the complainant telling her that she will write a letter for the complainant who has to copy it in her own handwriting, that's the reason why the accused younger brother came with them to the DPP's office. They left him to deliver the letter and then they went home.
71. The witness maintained that the wife of the accused had called her for the purpose of writing a letter but she did not ask what the letter was about and it was the wife of the accused who had written the letter and the complainant copied it. Before the witness went and delivered the letter she could have torn or burnt the letter but she did not.
72. In re-examination the witness clarified that the letter was given to the accused younger brother to go and deliver it at the DPP's office. The wife of the accused had wanted to give the letter to the witness but the witness

refused to take the letter so the letter was given to Viliame the younger brother of the accused.

73. This was the prosecution case.

Ladies and Gentleman Assessors

74. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.

75. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also called witnesses.

DEFENCE CASE

76. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath and call witnesses. You must then take into account what the accused and his witnesses adduced in evidence when considering the issues of fact which you are determining.

77. The accused informed the court that he is a boat captain employed by a company known as Liku Sundown and the hotel's name is Waya Bay Resort.

78. The accused is a Master/Engineer class 6 accredited boat captain. His certificate of competency was marked and tendered as defence exhibit no. 2. The boat captained by the accused could carry either cargo or a maximum of 8 passengers. Family members are allowed to board the boat provided the

supervisor allows. The accused has been employed as a boat captain since 2005.

79. In 2014 Waya Bay Resort was under construction the workers were from Lautoka and from the nearby village. The accused denied committing the two offences as alleged according to him the complainant was lying. The complainant was his niece.
80. In January 2014 the complainant went to stay at the house of the accused, he had not approached the grandfather of the complainant to allow her to come and stay at his house. It was an aunt of the complainant who had requested the accused for the complainant to come and stay at his house and attend school. The accused agreed he felt sorry for the complainant who had repeated Form 5.
81. The accused has a 3 bedroom house the 3rd bedroom was occupied by the complainant, Kelera and Paulini. The accused stated that he did not suck the breast of the complainant as alleged the complainant was lying.
82. The accused also said the complainant was lying when she said they had slept together at the hotel quarters because the hotel rules did not allow this, one section was occupied by workers from Lautoka and the other section was occupied by workers from the village. The accused denied raping the complainant as alleged he said the complainant had lied to the court.
83. According to the accused after three weeks of work the workers from Lautoka would leave the Island. The accused denied having any knowledge about the withdrawal letter written by the complainant. The accused stated that on one occasion he had gone to the complainant's grandfather to ask about the house of the complainant's cousin Inoke. The complainant's grandfather requested the complainant to take him to Inoke's house.

84. The reason for going to Inoke's house was at one time he had taken Inoke to the hotel where Inoke had fallen sick so he had taken Inoke to the hospital. Inoke had requested the accused to visit him.
85. In cross examination the accused stated that females were not allowed to go and sleep in the Island his children only went for a swim and then went home. The accused could sleep on the Island if requested by the supervisor. During 2014 there were instances he had spent a night at Waya Bay Resort. The accused first came to know the complainant in 2014 at a funeral, it was a lie that he had gone to Matawalu and had requested the complainant to come and stay at his house. He also did not know the complainant's mother but he accepted the complainant in his house on the basis of what the complainant's aunty had told him.
86. When the complainant was staying with the accused she was a good child but later he came to know that she was not attending school. The accused did not inform the complainant's grandfather about this since there was no contact between the two.
87. According to the accused the reason why the complainant left his house was, one evening when he came home he saw his aunt crying. He was told that the complainant had taken the aunt's card to withdraw money. He scolded the complainant so she left his house because she had stolen his aunt's money. The accused denied making up a story he did not report this to police or to the complainant's grandfather.
88. The complainant and the accused were in good relationship when the complainant was staying at his house and there were no problems between the two.
89. The accused did not know why the complainant had made such serious allegations against him. The relationship between the accused and the complainant was good even after the allegation of stealing. The accused

denied asking the complainant's grandfather for his permission to take the complainant with him to Waya Bay Resort. The accused did not tell the complainant's grandfather about the complainant stealing money since he was waiting for the complainant to pay back the money.

90. The complainant did not pay the money to his aunt so the accused paid his aunt. The accused maintained that he did not know anything about the withdrawal letter he was in remand when the letter was written. He came to know about the letter when he came out of remand he was informed by his children that a letter was given to office of the DPP. Kelera had told the accused that she and the complainant had written the letter about the withdrawal of the case. The accused agreed Kelera had said that she wrote the letter but he did not read the letter. Upon further questioning the accused then also said that according to Kelera the complainant wrote the letter while sitting with Kelera.
91. The accused denied committing the offences as alleged by the complainant according to the accused the complainant had lied to court. The accused clarified he was in remand for this matter in 2015.
92. The second defence witness Niko Koroï the son of the accused informed the court that in 2014 he had a boyfriend girlfriend relationship with the complainant. During the time the complainant was at his house nothing unusual happened. The witness knew the complainant had a boil on her breast which was in the month of January, 2014.
93. The complainant did not tell the witness that the accused had sucked her breast and he does not know why she left his house.
94. In cross examination the witness agreed when the complainant was staying with them she maintained good behaviour. The witness maintained he did not know why the complainant had left his house, despite being in a relationship he did not have time to ask her for the reason since he did not

have any time to contact her. The witness thought the complainant had gone home for a visit he did not inquire with his family members why she had left their house. He found out the reason when his father was remanded and that's when he realized the complainant left his house for good.

95. The witness agreed he was close to his father, respected him and as a son he does not want to see anything happening to his father and that he wants to see that his father is protected and that nothing happens to him.
96. The witness will not go to any extent to protect his father or save his father or anything of that sort he came to court to tell the truth. The witness maintained the complainant did not tell him what his father had done to her.
97. The third defence witness was Melaia Galio Koroï the wife of the accused. They have been married for 23 years with 4 children. The family never had any difficulties, no family problems, a happy family the accused is a good hearted man.
98. The witness knows her husband faces two charges there was an investigation carried out by the police but they did not approach her for a statement. The witness did not go to the resort since it was under construction even being the wife of the accused she was not allowed.
99. The complainant was the niece of the accused, in 2014 she was a Form 5 student. The complainant slept in one of the bedrooms with Kelera and Paulini.
100. The accused and the witness slept in one bedroom there hasn't been any night both have not slept together. The witness stated that she will know if the accused leaves the bed.

101. The complainant stole about \$400.00 belonging to the aunt of the accused. The accused was angry with her and that was the reason why the complainant left their home.

Ladies and Gentleman Assessors

102. You will recall when the complainant was giving evidence the defence did not put to her the allegation of stealing money belonging to the aunt of the accused. As a matter of law it was for the defence to put this suggestion to the complainant. This witness informed the court about a piece of evidence which was not put to the complainant. You will also note the prosecution in its cross examination of the accused, this witness and Kelera (DW7) questioned these witnesses who told the court about the money allegedly stolen by the complainant. It is for you to decide what weight you attach to the answers given by these witnesses as to the reason why the complainant had left the house of the accused when such a proposition was not put to the complainant by the defence.

103. The witness was told by the complainant that she had a boil in her breast. She had told the complainant whenever she goes to sleep she was not to wear her bra because it will affect her boil. The witness was not aware of any day the accused had gone to the Island with the complainant. When shown the letter of withdrawal (defence exhibit no. 1) the witness did not recognize the document she mentioned that she did not know about the contents of the letter as well.

104. The witness recalled in 2015 when the accused was in remand the complainant, her stepfather and mother had come home to apologize for what the complainant had done because she was a liar. They came asking the witness to do something she told them she could not do anything.

105. According to the witness she had not called the complainant and her parents home. They had come during midday and were sitting in the kitchen while the witness was preparing tea. At this time the accused

brother Viliame was at home with his 6 Filipino friends, Kelera was also at home that day.

106. The witness stated that she did not force the complainant to write the letter the complainant and her parents told the witness that they wanted to go to the DPP's office so Viliame went with them.
107. In cross examination the witness denied that before coming to court she had discussed the case with the accused. She was aware that her evidence was very important to the determination of this case. The witness agreed she did not go to the police with the information she had, according to her police did not come to her. The witness maintained that in her family there was always happiness.
108. In 2014 her relationship with the accused was good and there weren't any problems in her marriage. The complainant had left her house in 2014 all of a sudden. The witness stated when she came to know about the money stolen by the complainant she was angry and the accused was angry as well the next day the complainant left the house.
109. The witness did not lodge a police complaint and she did not know if the accused had made a complaint as well. The witness stated that she will know if the accused would leave the bed at night but she will not follow him and also she will know whether the accused was going to the bathroom or doing something else. The witness agreed she was told by the accused that ladies were not allowed into the resort since it was under construction.
110. She agreed she knew how to get the matter withdrawn in court. The witness denied that she had prepared the letter of withdrawal which was copied by the complainant in her hand writing and to make sure it ended up at the DPP's office she denied sending Viliame with the complainant. The witness agreed Viliame knew the DPP's office and that is why he went with

the complainant and her parents since they did not know where the office of the DPP was.

111. The witness agreed she loved the accused, he was a good loyal husband. She does not want to see him behind bars but she came to court to tell the truth.
112. The fourth defence witness Avitesh Kumar informed the court that in 2014 he was employed by Liku Sundown Company as a supervisor doing construction and joinery works at the Waya Bay Resort which was under construction at that time.
113. The witness was supervising about 30 workers, at that time they stayed at the dormitories one was for the boys from the village and the other for the boys from the mainland. It was one building divided by a partition. According to the witness the accused comes to see him when he brings the boat to the island. The witness is the first person to go and see the accused who sometimes brings building materials and groceries.
114. According to the witness females were not allowed in the resort since it was under construction and to avoid anyone getting hurt that is why he never took his wife to the resort. The family members can go during the day for a swim but were not allowed to go to the construction site. The witness was able to recall in 2014 the accused youngest son and two daughters had gone for a swim during the day and went back.
115. In cross examination the witness agreed females were not allowed at the construction site. The witness knew the accused very well and he has worked with the accused till now. There were some Yalobi Villagers working under his supervision at the time and Yalobi Village was only few meters away there is a mountain on the other side about 3 kilometers away. The witness was able to remember in 2014 the accused had brought his two daughters and a son to the island he knew the two daughters by face not

their names. The accused would spend the night at the dormitory with the boys from the village when he came late to the Island.

116. The fifth defence witness Viliame Sukanaivalu the younger brother of the accused informed the court that in 2015 he was a crew in a fishing vessel, he came to Fiji from Asia. At home he came to know about the allegations against the accused.
117. The witness was with his friends from Philippines they all went to the house of the accused at Kashmir. Mela the wife of the accused and her children were at home with Buna.
118. The witness and his friends were served breakfast at the porch of the accused house. After a while the complainant came with her parents she had a letter in her hand wanting to go to the office of the DPP but they did not know where the office was. The witness could not remember the names of the complainant's parents although there were related to the witness.
119. The witness did not ask the complainant what the letter was about and also he did not see the contents of the letter. The complainant and her parents stayed at the house for 10 minutes. The witness did not hear the discussions that took place between Mela, the complainant and her family.
120. The witness joined the complainant and her parents in going to the office of the DPP he knew where the office was but did not know the reason why the complainant and her parents were going to the office of the DPP. At the DPP's office all went into the office whereby the complainant gave the letter to an officer there.
121. In cross examination the witness agreed that the accused was his elder brother but he could not recall the age difference. The witness has a good relationship with the accused and they are very close. He agreed the wife of the accused, Buna and the children were at home. The witness was sitting

in the porch while the complainant, her parents, Buna, Mela and the children were inside the house.

122. In respect of the letter the witness stated it was already folded and the complainant was holding it in her hand but she did not tell him it was a letter. The witness agreed he didn't know what it was. He overheard the conversation inside the house that the complainant and her parents were trying to go to the office of the DPP as a result he volunteered to assist them.
123. The wife of the accused did not ask the witness to take the complainant and her parents to the DPP's office. The witness agreed he wanted to do everything in his power to help the accused but denied that he was told by the wife of the accused to deliver the letter to the DPP's office and that he was not lying in court.
124. The sixth defence witness was Nasivo Sera the accused was her uncle she has been staying at her uncle's house from 2013 till now, she is the baby-sitter.
125. The witness slept in the sitting room with the youngest son of the accused Apakuki Junior. In 2014 the complainant had a boil on her breast. According to the witness the complainant never told her anything about the accused sucking her breast in the night when she had a boil on her breast. She never conversed with the complainant in this regard. The witness could not recall whether the complainant had come to the house of the accused in 2015.
126. In cross examination the witness stated that from 2013 she had been employed by the accused and his family. The witness agreed that the complainant in 2014 was at the house of the accused she left and never came back. The witness maintained that the complainant did not tell her anything about what the accused had done to her.

127. She agreed her relationship with accused family was very strong. The witness stated she knew the accused was in remand for this case but she did not know anything about the case yet she came to court to tell the truth. She had not discussed the case with anyone.
128. The final defence witness was Kelera Adikula also known as Buna, in 2014 she was staying with the accused and his family. The accused was her uncle. She used to sleep with the complainant in a bedroom on the bed whereas Pauline used to sleep on the mattress. The door of the bedroom was always kept closed when they slept. The accused and his wife paid for her education.
129. In 2014 the complainant had a boil under her breast for three days this was shown to her by the complainant. During these days the witness slept with the complainant on the same bed and both were good friends. In March, 2015 the complainant came home with her parents at this time the accused was remanded in custody. The complainant and her parents were talking with the wife of the accused the witness did not know what they were discussing.
130. When the complainant entered the house she was holding a fullscap paper folded in her hand, they were in the house for about 10 minutes. The witness did not speak to the complainant or to her parents during the 10 minutes the complainant and her parents were at home. She does not know where they went to from the house of the accused they were accompanied by Viliame.
131. In cross examination the witness agreed she was older then the complainant, were good friends had a good relationship, went to school together, slept in the same bed, treated the complainant like her own sister, missed her when she left but did not inquire why she had left but came to know that she was scolded for stealing from home.

132. The witness agreed she did not know what was written in that fullscap and agreed it was a blank fullscap. When the complainant and her parents came she was in the kitchen while her aunt and the complainant and her parents were in the living room. When it was suggested that the witness and her aunt had forced the complainant to write the letter the witness stated that the complainant was lying.
133. The witness agreed she was very close to her uncle and aunt (accused and his wife) and she wouldn't want to see her aunt unhappy or upset because of the accused she denied discussing the case with the accused and her aunty before coming to court.
134. This was the defence case.

ANALYSIS

135. The prosecution alleges in January, 2014 the complainant started schooling from the house of the accused. After the school started she had a boil on her right breast, as a result of this boil during night time she did not wear any top and was sleeping wearing her skirt only. One night whilst sleeping she felt someone was sucking her breast. When she woke up she saw it was the accused her uncle, at this time she was alone in the bedroom. When the complainant saw her uncle she was scared and nervous, he sat on the bed and told her not to tell anyone about what he had done.
136. After this the complainant left school and went home to stay with her grandfather she did not go to school thereafter. The complainant did not tell her grandfather what the accused had done to her.
137. In September, 2014 the accused came to the house of the complainant. She was surprised and nervous to see him, the accused asked permission from the complainant's grandfather so that he could take the complainant to

Yasawa. The complainant's grandfather granted permission for the complainant to go to Yasawa and they were to bring some fish for him upon return.

138. The complainant went with the accused to Yasawa. At Waya Island the complainant saw that the hotel was under construction and there were a few workers there. There were two quarters in one of the quarters the complainant stayed with the accused.
139. In the room the complainant slept on the mattress whereas the accused slept on the bed. While sleeping the complainant felt someone sitting beside her. When she woke up she saw her uncle. At this time he pushed her back on the mattress and told her to take off her pants. After this the accused inserted his penis into her vagina for about three minutes. The complainant was scared and ashamed of herself at this time.
140. The complainant did not consent to what the accused had done to her. According to the complainant the accused forced her she did not raise an alarm because she was afraid of the accused. The accused told her not to tell anyone about the incident.
141. When the accused went to sleep the complainant started to cry. Next morning both came to Lautoka wharf and from there she went home alone. When the complainant arrived home her grandfather was there but she did not tell him anything about what the accused had done to her.
142. The accused on the other hand denied all the allegations saying that the complainant had lied to the court he did not do anything as alleged. The accused has a 3 bedroom house the 3rd bedroom was occupied by the complainant, Kelera and Paulini. The accused stated that he did not suck the breast of the complainant as alleged the complainant was lying.

143. In 2014 Waya Bay Resort was under construction the complainant was lying when she said they had slept together at the hotel quarters because the hotel rules did not allow this, one section was occupied by workers from Lautoka and the other section was occupied by workers from the villages. The accused denied raping the complainant as alleged he said the complainant had lied to the court.
144. The son of the accused informed the court that in 2014 he had a boyfriend girlfriend relationship with the complainant. During the time the complainant was at his house nothing unusual happened. The witness knew the complainant had a boil on her breast which was in the month of January, 2014. The complainant did not tell him that the accused had sucked her breast and he does not know why she left his house.
145. The wife of the accused informed the court that she did not go to the resort since it was under construction even being the wife of the accused she was not allowed. The complainant slept in one of the bedrooms with Kelera and Paulini.
146. The accused and the witness slept in one bedroom there hasn't been any night both have not slept together. The witness stated that she will know if the accused leaves the bed.
147. The witness was told by the complainant that she had a boil in her breast. She had told the complainant whenever she goes to sleep she was not to wear her bra because it will affect her boil. The witness was not aware of any day the accused had gone to the Island with the complainant.
148. Avitesh Kumar informed the court that in 2014 he was employed by Liku Sundown Company as a supervisor doing construction and joinery works at the Waya Bay Resort which was under construction at that time.

149. He supervised about 30 workers they stayed at the dormitory one was for the boys from the village and the other for the boys from the mainland. It was one building divided by a partition.
150. According to the witness females were not allowed in the resort since it was under construction and to avoid anyone getting hurt that is why he never took his wife to the resort.
151. Viliame Sukanaivalu the younger brother of the accused informed the court that in 2015 he was a crew in a fishing vessel, when he came to Fiji he came to know about the allegations against the accused. The witness with his friends from Philippines went to the house of the accused at Kashmir. Mela wife of the accused and her children were at home with Buna.
152. After a while the complainant came with her parents with a letter in her hand wanting to go to the office of the DPP but they did not know where the office was. The witness joined the complainant and her parents in going to the office of the DPP. He knew where the office was but did not know the reason why the complainant and her parents were going to the office of the DPP.
153. Nasivo Sera was the baby-sitter employed by the accused. In 2014 the complainant had a boil in her breast. According to the witness the complainant never told her anything about the accused sucking her breast in the night when she had a boil on her breast. She never conversed with the complainant in this regard.
154. Kelera Adikula also known as Buna informed the court in 2014 she was staying with the accused and his family. The accused was her uncle. She used to sleep with the complainant in the bedroom on the bed whereas Pauline used to sleep on the mattress. The door of the bedroom was always kept closed when they slept.

155. In 2014 the complainant had a boil under her breast for three days this was shown to her by the complainant. During these days the witness slept with the complainant on the same bed and she slept on the side of the bed both were good friends. In March, 2015 the complainant came home with her parents at this time the accused was remanded in custody. The complainant and her parents were talking with the wife of the accused the witness did not know what they were discussing.
156. When the complainant entered the house she was holding a fullscap paper folded in her hand, they were in the house for about 10 minutes. The witness did not speak to the complainant or to her parents during the 10 minutes the complainant and her parents were at home. She does not know where they went to from the house of the accused but Viliame went with them.

Ladies and Gentleman Assessors

157. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
158. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
159. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a

witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

160. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
161. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
162. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt for all the counts. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
163. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
164. In this case, the accused is charged with one count of indecent assault and one count of rape, as mentioned earlier you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

165. Your possible opinions are:-

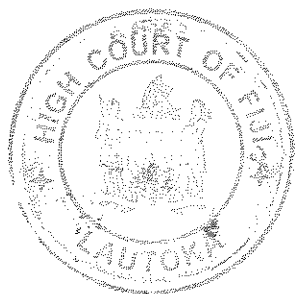
Count One: **INDECENT ASSAULT**: GUILTY OR NOT GUILTY

Count Two: **RAPE**: GUILTY OR NOT GUILTY

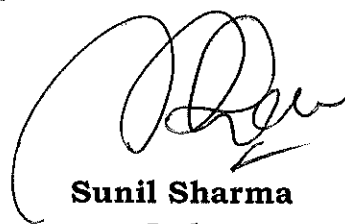
Ladies and Gentleman Assessors

166. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.

167. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



**At Lautoka
30 October, 2018**


**Sunil Sharma
Judge**

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. Kevueli Tunidau Lawyers for the Accused.