

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 124 of 2014

STATE

V

KENI BURENIVALU

Counsel : Mr. A. Singh for the State.
: Ms. V. Narara with Ms. V. Diroi for the Accused.

Dates of Hearing : 13, 14, 15 September, 2017
Closing Speeches : 18 September, 2017
Date of Summing Up : 19 September, 2017

SUMMING UP

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

Madam and Gentlemen 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 the following offence: (a copy of the information is with you).

COUNT ONE

Statement of Offence

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

Particulars of Offence

KENI BURENIVALU between the 1st day of June, 2014 and the 30th day of June, 2014 at Yasawa in the Western Division penetrated the anus of "**SL**" with his penis, without the consent of "**SL**".

- [14] To prove the offence of rape the prosecution must prove the following elements beyond reasonable doubt:

(a) The accused;

- (b) Penetrated the anus of the complainant “**SL**” with his penis;
- (c) Without his consent;
- (d) The accused knew or believed the complainant “**SL**” was not consenting or didn’t care if he was not consenting at the time.

[15] The first element of the offence is concerned with the identity of the person who allegedly committed the offence.

[16] The second element is the act of penetration of the complainant’s anus by the accused with his penis.

[17] The slightest of penetration of the complainant’s anus by the accused’s penis is sufficient to satisfy the act of penetration.

[18] In respect of the third element that is of consent, you should bear in mind that consent means to agree freely and voluntarily and out of his 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.

[19] If you are satisfied that the accused had penetrated the anus of the complainant with his penis and he had not consented to this act of the accused, you are then required to consider the last element of the offence.

[20] That is whether the accused knew or believed that the complainant was not consenting or did not care if he was not consenting at the time.

[21] You will have to look at the conduct of both the complainant and accused at the time and the surrounding circumstances to decide this issue.

AMENDED ADMITTED FACTS

[22] In this trial the prosecution and defence have agreed to certain facts which have been made available to you titled as amended admitted facts.

[23] The admitted facts are as follows:

1. *The victim in this matter is "SL" ("victim") 16 years old of Nalauwaki village, Yasawa.*
2. *The accused in this matter is Keni Burenivalu ("Accused"), 24 years, former kitchen-hand at Octopus Resort, also of Nalauwaki Village, Yasawa.*
3. *The alleged offence took place in Nalauwaki village, Yasawa.*
4. *The Head Chef of Octopus Resort at the time of the alleged offence is Muni Sachindra Goundar.*
5. *The accused was caution interviewed by WDC 3692 Asenaca on the 29th of August, 2014.*
6. *The accused was charged by DC 3830 Apenisa on the 29th of September, 2014.*

[24] In this trial the accused has denied all the elements of the offence of rape he has been charged with. It is for the Prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the anus of the complainant with his penis without his consent and the accused knew or believed the complainant was not consenting or didn't care if he was not consenting at the time that is between the 1st of June, 2014 and 30th of June, 2014.

[25] If you are satisfied beyond reasonable doubt that the prosecution has proved beyond reasonable doubt that the accused has inserted his penis into the complainant's anus without his consent then you must find the accused guilty of the count of rape. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offence.

[26] 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.

[27] 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 salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

[28] The prosecution called seven (7) witnesses to prove the allegation against the accused.

[29] The first witness for the prosecution was the complainant "SL" who informed the court that in the year 2014 he was 16 years of age educated up to class 3. He lived at Nalauwaki village in Yasawa with his aunt Taina Nalesu.

[30] The Octopus Resort was on the Island and it took about 15 minutes to go to the Resort from the village on foot by a track. On Sunday 29th June, 2014 at about 10am the complainant walked to the Octopus Resort from the village taking with him lunch for his uncle Kafoa. At the Resort he gave the lunch to his uncle and then played billiard with some of the Resort Staff.

[31] After 2pm the complainant left the Resort on his way to the village he was called by his uncle Keni the accused. The complainant knows the accused from a longtime, however, his relationship with the accused was not good because the accused used to verbally abuse him by swearing at him.

- [32] The accused called the complainant gave his phone to watch a pornographic movie both the complainant and the accused watched the movie for 10 minutes. There was no one else present when they were watching the movie.
- [33] After watching the movie the accused took off the shorts of the complainant and took out his penis and inserted it inside the anus of the complainant. The complainant did not consent for the accused to do this, he shouted but the accused told him not to shout.
- [34] According to the complainant the accused had inserted his penis into his anus for about 10 minutes. When the accused was inserting his penis into his anus the complainant felt weak. After the accused had finished he told the complainant not to tell anyone in the village and then left.
- [35] On the same day the complainant told his uncle and aunt Kafoa and Meresiana about the incident which had happened after 3pm at the pig pen along the track that used to go to the Resort from the village.
- [36] A few days after the incident the village Nurse came to see the complainant she took him to a room where he showed her the injuries on his anus. The complainant was thereafter brought to the Lautoka Hospital for medical examination.
- [37] In cross examination the complainant stated that he informed the Nurse after two days of the incident and that he was certain the incident happened on 29th June, 2014 because it was painful what the accused had done to him.
- [38] After telling his uncle Kafoa and aunt Meresiana of what the accused had done to him he told his aunt Taina Nalesu. Furthermore, after the incident the complainant had met Paulini who was related to him but he did not tell her anything about the incident because he was afraid of her.

Madam and Gentlemen Assessors

- [39] 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 16 years not to complain to Paulini. 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 as to what had happened could be due to shame or shyness when talking about matters of sexual nature.
- [40] The complainant agreed that he was not in a good relationship with the accused and hated him for a longtime since the accused used to verbally abuse him but he told the truth about the incident. The complainant was bleeding and could not walk properly.
- [41] The complainant was referred to his police statement dated 3rd July, 2014 which he had given to the Police when everything was fresh in his mind. The complainant was referred to the last sentence in his police statement that he told his uncle Solo about what had happened to him on Tuesday 1st July, 2014. The complainant maintained that it was correct that he told his uncle and aunt Kafoa and Meresiana about the incident on 29 June, 2014 and not what was written in the police statement.

Madam and Gentlemen Assessors

- [42] I will now explain to you the purpose of considering the previously made statement of the witness with his evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
- [43] It is obvious that the passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.

- [44] If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue you are considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.
- [45] Furthermore the complainant agreed that before his medical examination in June, 2014 he was swimming in the village river with Manoa, Jone and some other boys. These boys had punched him and used a stick to beat him and also inserted the stick into his anus for 2 minutes which was painful. The stick was about one feet long he received injuries but he was not bleeding.
- [46] The complainant informed his uncle Kafoa and aunt Meresiana of what the boys had done to him on the same day this happened to him. The complainant maintained the accused had raped him after what Manoa, Jone and the other boys had done to him in the river. The complainant denied fabricating a story against the accused.
- [47] In re-examination the complainant confirmed that he was assaulted by the boys at the river and this happened before he met the accused and that these were two separate incidents.
- [48] The second prosecution witness was Sheemal Sharma a Staff Nurse who graduated with a Diploma in Nursing from the Fiji National University in the year 2012. The witness started working at the Lautoka Hospital as an intern after completing her 12 months internship she was based in the ICU Department for about 7 months.

- [49] In February, 2013 the witness was posted to Yalobi Nursing Station as a District Nurse. One of the villages under her area of responsibility was Nalauwaki village. As a District Nurse she did everything on her own there was no Doctor present at the Nursing Station.
- [50] On 2nd July, 2014 the witness visited Nalauwaki village as part of her scheduled trip. At the request of the Turaga ni Koro the witness with village health worker Repeka and village health worker from Yalobi Mereoni went to Taina's house. The witness knows Taina who was the complainant's aunty.
- [51] At the house of Taina she saw the complainant lying on his stomach he spoke in the Itaukei language about the incident which was translated by Taina to the witness.
- [52] When the witness approached the complainant she could smell infection as a result of infected wound. She saw the complainant had difficulty in sitting up and walking around.
- [53] Upon examination of the injury the witness saw multiple anal tears also there were abrasions or scratches in the inner part of his buttocks caused by friction. Upon advice of her superiors the complainant was brought to Lautoka Police Station and then taken to Lautoka Hospital.
- [54] According to the witness the complainant's anal tears were not possible by falling or sitting on something the injuries were consistent with the story the complainant had told her which was that the accused had penetrated his anus with his penis.
- [55] In cross examination the witness agreed that it was possible to get lacerations, injuries and tears of the kind seen on the complainant if a stick was inserted into his anus. The witness agreed that if there was an injury to the anus and it was infected there will be foul smell coming from the injury.

- [56] The third Prosecution witness was Muni Gounder who informed the court that he was the Head Chef at the Octopus Resort in the year 2014. He knows the accused who was a Cook in the Resort.
- [57] On 22nd June, 2014 the witness was at work doing the morning shift from 6am to 2.30pm the accused was also doing the same shift. The Resort kitchen roster for the week ending 18 to 24 June, 2014 was tendered and marked as prosecution exhibit no. 1. The witness did not meet the accused after the accused had finished his shift furthermore no staff is allowed to stay at the Resort premises after the shift had ended.
- [58] In cross examination the witness stated that on 22nd June he had not directed the accused to defrost the meat and clean the deep freezers. Moreover the witness was not able to remember if the accused had on 29th June sustained injury at work or had come to give him a sick sheet.
- [59] The fourth prosecution witness was Paulini Lewasea she is from Nalauwaki village she knows the complainant who calls her grandmother. On 22nd June, 2014 the witness was working at the Resort she started her shift at 6am and finished at 3pm. On her way home at the pig pen she met the accused who is her cousin. According to the witness the accused had left the Resort before her at 3pm he was sweating and he told the witness that he had sprained his ankle that was the reason why he was still there although he had left the Resort earlier than her. When the witness had seen the accused earlier in the day he was not injured.
- [60] In cross examination the witness stated that she did not see the complainant when she met the accused.
- [61] The fifth prosecution witness was Taina Tuvou she informed the court that the complainant was her nephew and she knew him since birth he lived with his father.

- [62] According to the witness the complainant attended primary school up to Class 1 at Ratu Naivalu Primary School then went to Special School in Lautoka for 2 years. The reason why the complainant went to the Special School was because he did not know how to read or write he was a slow learner he could not identify simple objects such as kitchen utensils. He did not improve at the Special School so he returned to the village and stayed home with his father.
- [63] The witness was very close to the complainant who was not normal like the others, things had to be repeated to him 3 or 4 times then he would react, he would not really know what he was told, he does not know dates and time. According to the witness the complainant and the accused had a good relationship. The witness was related to the accused.
- [64] In June, 2014 something unusual happened to the complainant. According to the witness the complainant had told her that when he was coming to the village from the Resort the accused called him and showed movies on his phone.
- [65] After that the accused took off the complainant's pants then took out his penis and inserted it in his anus. The complainant had told this to her about 2 days after the incident in June, 2014 and also that it was a Sunday when Tai Vuni had come to the village to preach. According to the witness Tai Vuni had come to the village on 22nd June. After hearing this witness cried and went to see the village Headman Turaga ni Koro and asked him to come and see the complainant.
- [66] The witness bathe the complainant since he was smelly she informed the Nurse what the complainant had told her by interpreting whatever the complainant was telling the Nurse Sheemal.

[67] The Nurse examined the complainant and told her that since the complainant had injuries she took him with her.

[68] In cross examination the witness stated that in June, 2014 the complainant was staying with Kafoa and Meresiana. The reason why the witness had bathe the complainant was because flies would sit on his pants and puss was coming out of the injury.

[69] The witness whilst bathing the complainant used hot and cold water with salt. The complainant was examined by the Nurse after almost a week of the incident. The complainant did not tell her anything about Manoa and Jone doing something to him.

Madam and Gentlemen Assessors

[70] You are entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant complained to her aunt Taina Nalesu immediately after the incident and therefore is more likely to be truthful. On the other hand, the defence says that the complainant made up a story to implicate the accused since the complainant hated the accused and therefore should not be believed.

[71] It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to his credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in his conduct and in his explanation of it.

[72] The sixth prosecution witness was Dr. Jona Nabaro who graduated with MBBS degree from the Fiji School of Medicine in the year 2008 and also

graduated with a Post Graduate Diploma in Emergency Medicine from the Fiji National University in the year 2014. Doctor Nabaro is currently based at the Lautoka Hospital.

[73] On 3rd July 2014 Dr. Nabaro had examined the complainant at the Lautoka Hospital. The Fiji Police Medical Examination Form dated 3rd July, 2014 was tendered and marked as prosecution exhibit no. 2.

[74] The specific Medical findings of the Doctor at D (12) of the Medical Examination Form were as follows:

- “(a) patient says he has pain when passing Bowl;*
- (b) also has PR bleeding, when he passes stool;*
- (c) soft tissue injury around the anus, tears and abrasions and anal mucosa foul smelling discharge noted, nil active bleeding.”*

[75] The professional opinion of the Doctor at D (14) was:

“injury sustained appears to match history of assault given by patient”

[76] In the opinion of the Doctor the history related by the complainant and his findings were consistent with the history related. The Doctor explained that forceful penile penetration into anus will cause soft tissue injury and abrasions.

[77] According to the Doctor the cause of the foul smell by the infection was possibly by the forceful intercourse by penis.

[78] In cross examination the Doctor was referred to Appendix 2 of the Medical Examination Form in particular to the glossary section of the term “History” which states:

“The patient’s account of what happened to him or her. Note that the use of this word by a Clinician does not necessarily imply that the account is true.”

[79] The Doctor agreed that the History related by the complainant could possibly not be true as per Appendix 2 of the Medical Examination Form.

- [80] According to the Doctor's findings at D (12) the injuries were possibly a few days old because there was no active bleeding it was possible the injuries would have begun to heal.
- [81] If the injuries were sustained on 22nd June, it would be visible but less evident and there is a possibility there would be scarring but whether it would have healed the Doctor was unable to give a definite answer.
- [82] The Doctor agreed that the injury caused to the anal region could also have been caused by a stick and it was possible the insertion of stick could have caused the foul smell and discharge. Furthermore the Doctor stated that warm water and salt could have assisted in healing the wound.
- [83] In re-examination the Doctor clarified that because there was no active bleeding it could be possible that the incident happened on 22nd June 2014 and the victim was examined on 3rd July, 2014.
- [84] The Doctor also stated that regardless of whether the injuries were sustained on the 22nd or the 29th it was possible that the injuries would have been the same due to infection.

Madam and Gentlemen Assessors

- [85] You have heard the evidence of Dr. Nabaro who has been called as an expert witness on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The Medical Report of the complainant is before you and what the Doctor said in his evidence as a whole is to assist you.

- [86] An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the Doctor.
- [87] You should remember that this evidence of the Doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
- [88] The final Prosecution witness was Cpl 3692 Asenaca Taufu who was the investigating officer she received a report on 3rd July, 2014 in respect of this case. The report was lodged by the Staff Nurse Sheemal of Nalauwaki village. The witness recorded the statement of the victim and the Nurse thereafter the victim was escorted to the Hospital for medical examination. According to the witness she was present at the time of the medical examination.
- [89] The victim was 16 years of age his parents were not present an adult is to be present when the victim was a minor in this case the Nurse was present when the witness was recording the victim's statement and was also present when he was medically examined. The Nurse gave her consent for the complainant to be medically examined.
- [90] The suspect was arrested and brought to the Police Station where the witness interviewed him after this she went to the Nalauwaki village and talked to the people of the village. During this inquiry the witness was able to get other statements recorded and managed to get the exact date of the offence.

[91] There was no report of any other boys assaulting the victim. According to the villagers the date of the incident was 22nd June which was a Sunday since one Tai Vuni from another village had come to preach at the Nalauwaki Village. The witness re-interviewed the suspect based on the 22nd June allegation.

[92] In cross examination the witness informed the court that she confirmed the date of the incident to be 22nd June from Taina, Paulini and the suspect's supervisor the Chef of the Resort. This date was then confirmed by the complainant that it was the day Tai Vuni had come to preach in the village, however, this was not documented.

[93] This was the end of the prosecution case.

Madam and Gentlemen Assessors

[94] 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.

[95] He could have remained silent but he chose to give sworn evidence and be subjected to cross examination.

DEFENCE CASE

[96] The accused informed the court that he knows the complainant who used to call him uncle the relationship between the two was good until the middle of 2014. On 22nd June, 2014 the accused was working at the Octopus Resort he started his shift at 6am which finishes at 2.30pm but on this day he knocked off at 3pm. The reason for extra half an hour was that he cleaned the deep freezers as told by one of the chef's in the morning shift.

[97] The accused left the Resort at about 3.15pm and went home alone on his way he did not meet anyone, the accused informed the court that Paulini

was doing morning shift that day. On this day while the accused was at work all the female staff of the Resort had gone home early.

Madam and Gentlemen Assessors

- [98] You will recall that during the cross examination of Paulini by the defence it was not put to her that on 22nd June 2014 she had not met the accused on her way home and that she had left the Resort early. Since the above was not put to the witness by defence you are directed to disregard this aspect of the accused evidence.
- [99] On 29th June, 2014 the accused was not at work he was supposed to start work at 2.00pm but did not since he had sprained his leg.
- [100] Next day was Sunday, he still did not go to work, he went to Yalobi to see the Nurse in respect of his injury. On his return the accused went to the Chef to give him his sick sheet. Before going home from the Resort the accused informed one of the staff to call someone in the village and to inform his wife to come and wait for him on the road so that they could walk home together because of the pain he was experiencing from his injury.
- [101] The accused walked home with Wativote midway between the Hotel and the village he met his wife by this time Wativote had gone ahead. Whilst going home with his wife the accused did not meet the complainant. The accused denied penetrating the anus of the complainant with his penis he stated that this allegation was brought about by the complainant because one day he punched the complainant for what he had done to his elder brother's child.
- [102] In cross examination the accused agreed that the complainant was related to him and that the complainant was not a normal boy like the others. He was a slow learner and did not speak or write English. The accused knew that the complainant was bullied by the boys in the village but denied

bullying him. The accused was a Butcher and a Cook at the Octopus Resort whereas Paulini was working in the kitchen.

[103] The accused agreed that on 22nd June Paulini was doing morning shift, however, he stayed back to clean the chimney and the deep freezers and that his version was correct. He left for home at 3.15 pm and on the way he did not meet anyone.

[104] Furthermore the accused stated that Paulini had not told the truth in court although he had a good relationship with her. The reason why Paulini did not tell the truth was to protect her brother who was one of the boys who had gone to the river with the complainant to swim.

[105] The accused denied the allegations made against him by the complainant and specifically stated that he did not have a phone in the year 2014. The accused also stated that he was the one who was telling the truth and not the prosecution witnesses.

[106] The second defence witness was Wativote Ratu who informed the court that in 2014 he was staying in Nalauwaki village with his grandmother and uncle. In 2014 the witness was working at the Octopus Resort. The witness knows the accused his father was his cousin.

[107] On 29th June, 2014 he went to work in the morning shift from 6am to 2pm. After 3pm he left the Resort and met the accused at the beach. From there they walked together about midway between the Resort and the village the accused called his wife when she arrived he went ahead of them. He did not meet the complainant on the way.

[108] In cross-examination the witness stated that he knew the accused from his childhood days and apart from being related the witness and the accused were good friends. In the year 2014 the accused had a mobile phone which was an Alcatel one touch phone this phone would play videos.

[109] This was the defence case.

ANALYSIS

[110] The prosecution alleges that between the 1st day of June, 2014 and the 30th June, 2014 on a Sunday at about 10am the complainant walked to the Octopus Resort from the village taking with him lunch for his uncle Kafoa.

Madam and Gentlemen Assessors

[111] In this trial two dates of the alleged incident was mentioned in evidence by the prosecution witnesses. It is for you to consider whether or not the alleged incident happened on the 22nd or the 29th of June.

[112] After 2pm the complainant left the Resort, on his way to the village he was called by his uncle Keni the accused. The complainant knows the accused from a longtime, however, his relationship with the accused was not good.

[113] The complainant was called by the accused who gave his phone to the complainant to watch a pornographic movie. Both the complainant and the accused watched the movie for 10 minutes.

[114] After watching the movie the accused took off the shorts of the complainant and inserted his penis inside the anus of the complainant. The complainant did not consent to this he shouted but the accused told him not to shout.

[115] According to the complainant the accused had inserted his penis into his anus for about 10 minutes. When the accused was inserting his penis into his anus the complainant felt weak. After the accused had finished he told the complainant not to tell anyone in the village and then left.

[116] A few days after the incident the village Nurse came to see the complainant she took him to a room where he showed her the injuries on his anus. The

complainant was thereafter brought to the Lautoka Hospital for medical examination.

[117] The second prosecution witness was Sheemal Sharma a Staff Nurse on 2nd July, 2014 the witness visited Nalauwaki Village as part of her scheduled trip. At the request of the Turaga ni Koro the witness went to Taina's house.

[118] At the house of Taina she saw the complainant lying on his stomach when she approached the complainant she could smell that he had infected wound he also had difficulty in sitting up and walking around.

[119] Upon examination of the injury the witness saw multiple anal tears also there were abrasions or scratches in the inner part of his buttocks caused by friction. Upon advice of her superiors the complainant was brought to Lautoka Police Station and then taken to Lautoka Hospital.

[120] The third Prosecution witness was Muni Gounder who informed the court that he was the Head Chef of the Octopus Resort in the year 2014. On 22 June, 2014 the witness was at work doing the morning shift from 6am to 2.30pm the accused was also doing the same shift.

[121] The fourth prosecution witness was Paulini Lewasea on 22nd June, 2014 the witness was working at the Resort she started her shift at 6am and finished at 3pm. On her way home she met the accused who is her cousin. The accused was sweating he told the witness that he had sprained his ankle and that was the reason why he was still there although he had left the Resort earlier than her.

[122] The fifth prosecution witness was Taina Tuvou who was very close to the complainant he was not normal like the others, things had to be repeated to him 3 or 4 times then he would react, he would not really know what he was told he also does not know dates and time.

- [123] According to the witness the complainant and the accused had a good relationship. In June, 2014 something unusual happened to the complainant according to the witness the complainant had told her that when he was coming to the village from the Resort the accused called him and showed some movies on his phone.
- [124] After that the accused took off the complainant's pants then took out his penis and inserted it in his anus. The complainant had told this to her about 2 days after the incident in June, 2014. The incident according to the complainant happened on a Sunday when Tai Vuni had come to the village to preach. According to the witness Tai Vuni had come to the village on 22nd June.
- [125] The sixth prosecution witness was Dr. Jona Nabaro on 3rd July 2014 Dr. Nabaro had examined the complainant at the Lautoka Hospital.
- [126] The professional opinion of the Doctor was that the *"injury sustained appears to match history of assault given by patient."*
- [127] The Doctor explained that forceful penile penetration into anus will cause soft tissue injury and abrasions. In the opinion of the doctor the history related by the complainant and his findings were consistent.
- [128] The final Prosecution witness was Cpl 3692 Asenaca Taufu who was the investigating officer she received a report on 3rd July, 2014 in respect of this case. The report was lodged by the Staff Nurse Sheemal of Nalauwaki Village. There was no report of any other boys assaulting the victim.
- [129] According to the villagers the date of the incident was 22nd June, 2014 which was a Sunday since one Tai Vuni from another village had come to preach at Nalauwaki Village on this day.

Madam and Gentlemen Assessors

[130] 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 also decided to call a witness in his defence. The accused is not obliged to give evidence. He is not obliged to call any witnesses. He does not have to prove his innocence in effect he does not have to prove anything.

[131] However, the accused decided to give evidence and also call a witness on his behalf. 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.

[132] It is for you to decide whether you believe the evidence of the accused and his witness. If you consider that the account given by the defence through the evidence is or may be true, then you must find the accused not guilty.

[133] The accused denied penetrating the anus of the complainant with his penis he stated that this allegation was brought about by the complainant because one day he punched the complainant for what he had done to his elder brother's child. The accused also informed the court that he was the one telling the truth in court and not the prosecution witnesses.

[134] The second defence witness was Wativote Ratu who informed the court on 29th June, 2014 he went to work in the morning shift from 6am to 2pm. After 3pm he left the Resort and met the accused at the beach. From there they walked together about midway between the Resort and the village the accused called his wife when she arrived he went ahead of them. He did not meet the complainant on the way.

Madam and Gentlemen Assessors

- [135] You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.
- [136] You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence. In testing the credibility of a witness, you can consider whether there is a delay in making a complaint to someone or to an authority or to Police on the first available opportunity about the incident that is alleged to have occurred. If the complaint is prompt that usually leave no room for fabrication.
- [137] Bear in mind a late complaint does not necessarily signify a false complaint any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether in this case the complaint made to Taina Nalesu is genuine and what weight you attach to this.
- [138] 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.
- [139] 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.

[140] You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge 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 his or her previous statements 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.

[141] 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.

[142] If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused'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.

[143] The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

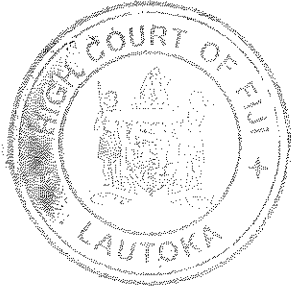
[144] Your possible opinions are:-


Count One: **RAPE**: GUILTY OR NOT GUILTY

Madam and Gentlemen Assessors

[145] 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 my staff so that the court can be reconvened.

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




Sunil Sharma
Judge

At Lautoka

19 September, 2017

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.