

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 334 OF 2012S

STATE

VS

PITA VUNIQUMU

Counsels : **Ms. A. Vavadakua for the State**
Mr. D. Toganivalu for Accused

Hearings : **7, 8 and 9 April, 2014**

Summing Up : **10 April, 2014**

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my 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 fact.
2. State and Defence Counsels 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 Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest 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 is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that 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.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. 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, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:

"... [read from the information]..."

D. THE MAIN ISSUES

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:

- (i) On count no. 1, did the accused, between 8 and 31 August 2009, at Nakasi in the Central Division, rape the complainant?
- (ii) On count no. 2, did the accused, between 10 October and 30 November 2009, at Nakasi in the Central Division, rape the complainant?

E. THE OFFENCES AND THEIR ELEMENTS

9. Count no. 1 and 2 involved the offence of rape. For the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused had sexual intercourse with the complainant, that is, his penis penetrated the complainant's vagina;
 - (ii) without the complainant's consent; and
 - (iii) he knew the complainant was not consenting to sex, at the time.
10. In law, the slightest penetration of the complainant's vagina by the accused's penis, is sufficient to constitute "sexual intercourse", and it's irrelevant whether or not the accused ejaculated.
11. Consent is 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 to herself, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all.
12. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to sex, at the time. You will have to look at the parties' conduct, at the time, and the surrounding circumstances, to decide this issue.

F. THE PROSECUTION'S CASE

13. The prosecution's case were as follows. In 2009, the accused, aged 49, worked as a doctor at Makoi Health Centre. His wife, aged 48, was one of the managers at a local telephone company. They have two children, a son and a daughter. The female complainant, aged 13 years in 2009, lived with the accused's family since she was in Class 3. She was the daughter of the accused's family's former house girl. She was not a blood relative of the accused's family, but she was

brought up in the family, as one of their own. The accused and his wife had paid for all her living expenses, including her school fees. The complainant attended a girl's school in Nausori.

14. According to the prosecution, the accused and his wife were treated as the complainant's parents, at her school. Sometime in 2009, the accused and his wife, were called to the complainant's school, regarding a disciplinary matter concerning the complainant. At the school, the accused and his wife were told that the complainant was showing a "sexual interest in girls" and she was found twice in the school toilet with a female companion. The accused was not pleased about the above, and at home, he disciplined the complainant by beating her.
15. As time passed, the accused and his wife were again called up to the complainant's school. At the school, the accused was informed about the complainant's allegations. The complainant had told her teachers that on two separate occasions, the accused unlawfully forced himself on her, and without her consent, inserted his penis into her vagina. The first occasion was in August 2009 in their bathroom. According to the complainant, it was after school. She was bathing. The accused came into the bathroom, and forcefully had sexual intercourse with her, without her consent.
16. The second occasion was sometime in October and November, 2009. According to the prosecution, the complainant arrived home at 5pm after school. She said, the accused was at home, in his bedroom. According to the prosecution, the accused called the complainant into his bedroom. In the bedroom, the accused forced himself on her, by penetrating her vagina with his penis, without her consent. According to the prosecution, the accused knew the complainant was not consenting to sex, on the two separate occasions.
17. The complainant's school reported the matter to the Social Welfare Department, which in turn reported the matter to police. An investigation was carried out. The accused was caution interviewed by police on 4 November 2009, and he appeared in the Nausori Magistrate Court on 26 July 2012. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

18. On 7 April 2014, the first day of the trial proper, the information was put to the accused, in the presence of his lawyer. He pleaded not guilty to both counts of rape. In other words, he denied the allegations against him. When the prosecution closed its case, wherein a prima facie case was found against him, he choose to give sworn evidence, in his defence. He called his son (DW2), his wife (DW3), a cousin (DW4) and a nurse (DW5), as his witnesses. That was his right, although the burden of proof is not on him

19. When caution interviewed by police on 4 November 2009, soon after the allegations surfaced, he denied the allegations to police [see Questions and Answers 27 to 48 of Prosecution Exhibit No. 1]. In his sworn evidence in court, he repeated the above denials. He confirmed, he and his wife were called to the complainant's school and told about the complainant's interest in girls and the two incidents in the school toilets. He said, he was so ashamed that he belted the complainant at home, as a disciplinary measure. This was in the presence of his wife and the complainant's biological mother. He said, it was agreed that she be sent back to her biological father, which she didn't like.

20. According to the accused, a few weeks after the above, he and his wife were called back to the complainant's school. It was then that he became aware of the complainant's rape allegations. He strongly denied the allegations against him, and he said, at the material times, he was at work or picking his wife from work, or being with his cousin for a "roko" massage. Because of the above, the accused is asking you, to find him not guilty as charged, and acquit him accordingly. That was the case for the defence.

G. ANALYSIS OF THE EVIDENCE

21. The State's case against the accused stands or falls, on whether or not, you, as assessors and judges of fact, accept the complainant's evidence. Your acceptance or otherwise of the complainant's evidence, will depend largely on your assessment of whether or not she was a credible witness. She had presented to you her version of events. This version of events had been challenged by the accused's version of events. He denied the allegations against him. He puts forth a version of events, which you will have to carefully weigh and compare with the complainant's version of events. You will also have to assess the credibility of the accused, as a

witness, and your acceptance or otherwise of his evidence, will largely depend on whether or not you find him to be a credible witness. You will also have to carefully look at all the other witnesses evidence, and come to a conclusion, on who of the two witnesses, that is, the complainant or the accused, is the credible one, and therefore to accept her or his version of events. You may, after considering the defence's version of events, thrown into having a reasonable doubt of his guilt. In other words, you have heard the complainant's version of events, but after carefully considering the defence's version of events, you are not sure of his guilt. In this case, you must give the benefit of the doubt to the accused, and find him not guilty as charged. If you accept the complainant's version of events, you must find the accused guilty as charged. If you accept the accused's version of events, you must find him not guilty as charged.

22. The contending version of events is very simple. The complainant said, on a date unknown between 8 and 31 August 2009, the accused came into the bathroom, while she was having her bath, and forcefully inserted his penis into her vagina, without her consent. According to her, he put his hand on her mouth, to avoid her raising the alarm, and thus well knew, she was not consenting to sex, at the time [count no. 1]. On the second incident, she recalled in October and November 2009, she returned from school after 5 pm. According to her, the accused was at home in his bedroom. She said, the accused called her into his bedroom. She said, the accused forcefully took off her clothes, and forcefully inserted his penis into her vagina, without her consent. According to her, he well knew she was not consenting to sex, at the time [count no. 2].

23. The complainant was thoroughly cross-examined by the defence. She admitted, she had lived with the accused family for 5 years. She admitted, the accused and his wife paid for her school fees. She admitted, school normally finishes at 2.30 pm, and she goes to Nausori, to catch the bus home. She admitted, at the age of 13 years old, she couldn't remember the actual dates of the incidents, but roughly told the police, the 2nd incident was on 13 October 2009. However, she said, she wasn't exactly sure about the 13 October 2009 date. She admitted, in cross-examination that, the accused and his wife were called to her school as guardians. The school told them about her "liking other girls". She admitted, the accused belted her, at home, after that. She admitted, she told the school about her rape allegations against the accused – she also admitted, she was caught in the school toilets twice with a girl, and that she liked the girl.

24. The accused, a doctor of 28 years experience, denied the allegations against him. He said, at all material times, he was either at work, picking up his wife after 4.30pm after her work, or at a cousin's house been massaged and treated for the "roko" problem (ie. difficulty in breathing etc). The police checked his workplace on 13 October 2009, and it was confirmed, he was at work at the material time. His son (DW2) gave evidence, and said he was always the first one to be at the family home after school at 4 pm in August, October and November 2009, and he noticed nothing unusual. He said, his father often come home with his mother. He said, he did not see his father rape the complainant. His mother (DW3) confirmed that the accused always bring her home after work at 4.30 pm, when he's doing morning shift at work. When he does night shift from 2 pm to 10 pm, she comes home by bus. DW4 said, the accused was with him on 14 October 2009.
25. So, you see the parties' version of events are inconsistent with each other. That is not unusual in this type of cases. We will now consider the complainant's medical report, tendered as Prosecution Exhibit No. 2. On 2 November 2009, Doctor Julia Singh (PW4) medically examined the complainant at CWM Hospital. In A(4) of the report, which is titled "Background information relevant to request for medical examination as related by person to be examined", the police wrote as follows, "...The victim allege that she was abused by uncle since 2003 until 13.10.09 inside his house at Nakasi..." In D(10) of the report, titled "History as related by the person to be examined", the doctor (PW4) wrote as follows, "...Has been sexually vagina penetration by her uncle for the past 5 years, lately once per week . Lately prior to these would be more frequent. She comes earlier than her aunt and cousin. Her uncle would then call her into the room and sexually assault her. Last sexual contact – 2 weeks ago. Last normal menstrual period: last week ..." In D(12) of her report, the doctor recorded her medical findings as follows, "...Hymen not intact, no laceration or recent injury noted. No evidence of any abnormal vagina discharge. Breasts – normal..." In D(14) of her report, the doctor wrote, "...consistent with her story..."
26. As a matter of law, a medical report is really not necessary to confirm or otherwise, the complainant's verbal evidence. In other words, an accused person can be convicted solely on the basis of the complainant's verbal evidence sworn in court. But for that verbal evidence to be accepted or rejected by you, as assessors and judges of fact, you have to establish whether or not

the complainant is a credible witness. Credibility is established, by examining all the evidence. In that light, the medical report becomes important, as a piece of evidence, to establish or otherwise, a witness' credibility.

27. On the face of it, the complainant's hymen was not intact. The doctor (PW4) and the accused, also a doctor, confirmed that a hymen could be broken via sexual and non-sexual means. Non-sexual means could include riding a horse, falling on a sharp object, etc. Sexual means could include penile or finger or fingers penetrations. As it stands, the report appeared to confirm the complainant's viewpoint, but when it was brought up in the evidence that the complainant was sexually attracted to another female at school, and the two were caught twice in the school toilets, the possibility of finger or fingers penetration comes into play, and the credibility of the complainant's view point was consequently shattered. There was a reasonable doubt as to whether or not the hymen not been intact was caused by a penis or finger.

28. Furthermore, the complainant's sworn evidence in court possibly can make you feel uncomfortable with the value and credibility of the medical report. In court, the complainant said, she was allegedly raped on two occasions, as itemized in count no. 1 and 2, yet she told the police, she had been abused from 2003 to 13 October 2009 (see A(4) of medical report). She told the doctor, she had been raped on numerous occasion by the accused for the last 5 years (see D(10) of the medical report). In effect, she had told different stories to the police, the doctor and the court. What you make of the medical report, is entirely a matter for you.

H. SUMMARY

29. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

30. Your possible opinions are as follows:

- (i) Count No.1 : Rape : Accused : Guilty or Not Guilty
- (ii) Count No. 2 : Rape : Accused : Guilty or Not Guilty

31. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.



Salesi Temo

JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused : **Toganivalu, Barristers & Solicitors, Suva.**