

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No: HAC 52 of 2012

BETWEEN:

THE STATE

AND:

PENAIA VALEVESI

Counsel: Mr M. Maitava for State
Ms M. Tarai for Accused

Date of Hearing: 7-10 July 2014

SUMMING UP

- [1] Ladies and Gentleman Assessors, it is now my duty to sum up the case to you. We have differing roles in this trial. I have to give you directions on the law and you must accept those directions. You are to decide the facts applying those directions and to give me your opinions as to the Accused's guilt or innocence.
- [2] In going through the evidence I may express an opinion. If you do not agree with that opinion, you are free to ignore it and to form another view of that piece of evidence. I may omit some evidence which you think significant. Nonetheless you may give that evidence such weight as you consider appropriate. You are free to form your own opinions.
- [3] At the end of this summing up, and after you have given your individual opinions, the final decision on the facts rests with me. I am not bound to conform to your opinions. However in arriving at my judgment I shall place much reliance upon your opinions.

- [4] The burden of proof rests throughout the trial upon the State. In our system of justice there is a presumption of innocence in favour of an Accused. The State brings the charge against the Accused. Therefore it is for the State to prove the charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.
- [5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty of the charge. If you entertain a reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of the charge.
- [6] The Accused elected to give evidence. I must remind you that when an accused gives evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. If you believe him or do not feel sure of his guilt, then your opinion must be not guilty. If you reject his evidence as being untrue; that does not mean that he is automatically guilty of the offence. The situation would then be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be guilty.
- [7] You must decide this case upon the evidence presented to you. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [8] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state his or her individual opinions orally on the charge against the Accused, which opinions will

be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.

- [9] However it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions.
- [10] Those opinions must be based solely upon the evidence. Evidence consists of sworn testimony of the witnesses, what each witness has told the court in the witness box. Neither speculation nor theories of one's own constitute evidence. Media coverage, idle talk, or gossip are similarly not evidence. Put out of your mind when considering your opinions, anything you may have read in the newspapers about this case. Focus solely on the evidence which you have seen, heard, or examined in this court.
- [11] This summing up is not evidence either, nor are counsel's opening or closing addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [12] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness' answer is evidence. If he or she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [13] In arriving at your opinions, use the common sense you bring to bear in your daily lives, at home and at work. Observe and assess the witnesses' evidence and demeanour together with all of the evidence in the case. You can accept part of a witness's testimony 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 be wide of the mark about another.
- [14] If you have formed a moral opinion on the conduct alleged in this case, put that to one side. Consistent with your oath, you should put away both prejudice and sympathy. Approach your assessment of the evidence dispassionately. Bring a cool detachment to your task of examining whether the case against the Accused has been proved before you.

- [15] I turn now to deal with what the prosecution must prove. The Accused is charged with one count of rape. The offence of rape is made of certain elements. The first element requires proof of penetration of the complainant's vagina. Penetration can occur either by use of an object, finger or penis. The slightest penetration is sufficient. The prosecution alleges that the Accused penetrated the complainant's vagina with his fingers.
- [16] The second element of rape is that when the Accused had penetrated the complainant's vagina, he did so without her consent. The law is that a child under the age of 13 years is incapable of giving consent to any form of sexual penetration. In this case, it is not in dispute that when the alleged charge arose, the complainant was 5 years old. She was born on 27 September 2007. Her birth certificate is PE1. So in this case, it is not necessary to prove lack of consent because the complainant was incapable of giving consent due to her tender age.
- [17] The real issue for you to consider is whether the Accused penetrated the complainant's vagina using his fingers.
- [18] In relating what happened the complainant said she was on her way to the village shop when the Accused called her inside a house and told her to remove her underwear. After she had removed her underwear, the Accused rubbed her vagina with his fingers. She said she did not feel good when the Accused touched her vagina. When she returned home she did not complain to her mother. She said she told her mother that the Accused poked her vagina the next day.
- [19] The complainant's mother Kuini said that when she questioned the complainant, the complainant told her that the Accused had touched her private parts.
- [20] In a case of sexual offence, recent complaint evidence is led to show consistency on the part of the complainant. In this case the complaint was not really volunteered. It was brought to light by the prodding of a concerned mother. Secondly, the complaint was made some days after the incident and could hardly be regarded as recent. While

this evidence is before you, very little assistance however can be derived from this particular evidence for the reasons I have given.

- [21] The next piece of evidence is the medical evidence. The complainant was medically examined by Dr Temo on 7 September 2012 while the alleged rape occurred on 20 August 2012. Upon examination Dr Temo found mild bruising along the introitus of the complainant's vagina and her hymen was partially perforated. In Dr Temo's professional medical opinion the injuries were consistent with vaginal penetration. In cross-examination Dr Temo accepted that it was possible the injuries could have resulted from a fall. What weight you attach to Dr Temo's medical opinion is a matter for you. Dr Temo is not in a position to confirm whether it was the Accused who caused the injuries to the complainant. However, the medical evidence may assist you to decide whether there was a penetration of the complainant's vagina as alleged by her.
- [22] When the Accused gave evidence he did not place his identity as an issue. You will recall the complainant referred the Accused as 'Vesi'. The Accused in his evidence admitted that he was also known as Vesi. The Accused told the court that on the date of the allegation, he was asleep inside a house when the complainant walked in and jumped into the bed that he was sleeping on and woke him up. He slapped the complainant in her cheek and chased her out of the house. The Accused said he did not penetrate the complainant's vagina with his fingers. So what the Accused says is that he was with the complainant in the house where the alleged incident occurred, but he did not penetrate the complainant's vagina with his fingers.
- [23] The only evidence that implicates the Accused is of the complainant. Did the complainant tell the truth in court or is she an unreliable witness? What weight you give to the recent complaint evidence is a matter for you bearing in mind the complainant was only 5 years old at the time of the alleged offence. Whether the medical evidence assists you to decide the issue of penetration? These are matters for you to consider along with all my directions before you arrive at your opinions.

- [24] To return to the charge before you. If you believe the complainant is telling you the truth that the Accused rubbed her vagina with his fingers and that you feel sure that there was penetration of the complainant's vagina no matter how slight by the Accused with his fingers, you may express an opinion that the Accused is guilty. But if you do not believe the complainant or if you feel not sure that the Accused penetrated the complainant's vagina with his fingers, you must express an opinion of not guilty. Your possible opinions are either guilty or not guilty.
- [25] You may retire now and when you are ready, the Court will reconvene to receive your opinions.



Daniel Goundar

JUDGE

At Labasa
10 July 2014



Solicitors:
Office of the Director of Public Prosecutions for State
Office of the Director of Legal Aid Commission for Accused