

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 011 OF 2014LAB

STATE

V

URAI CAUCAU

**Counsels : Ms. W. Elo for State
Ms. S. Dunn for Accused**

Hearings : 15 and 16 February, 2016

Summing Up : 17 February, 2016

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 they 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 so that you are not sure 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 ISSUE

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

- (i) Did the accused, on 20 December 2013, at Labasa in the Northern Division, rape the complainant?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was charged with "rape", contrary to Section 207 (1) and (2) (a) of the Crimes Decree 2009. 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", and she must have the necessary mental capacity to give her consent. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority over her, 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. On 20 December 2013, the female complainant (PW1) was 26 years old. She had 3 young children, and was living with them in a house in a village in

Cakaudrove. She was a solo mum. According to the prosecution, the accused and another visited her house on 20 December 2013. She was alone in the house.

14. .According to the prosecution, the accused came to the complainant's house on 20 December 2013, in the late afternoon. He came into her house, went to her settee and rested thereon. The complainant (PW1) was also in the house. According to the prosecution, the accused later pulled down her panty. He then inserted his penis into her vagina. The complainant resisted by pushing him down, but to no avail.
15. According to the prosecution, someone came and disturbed the two. The accused ran and hid behind the house, and later left the crime scene. The matter was reported to police. An investigation was carried out. On 24 December 2013, the accused appeared in the Labasa Magistrate Court.
16. 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

17. On 16 February 2016, the first day of the trial proper, the information was put to the accused in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was put to his defence, he choose to give sworn evidence and called no witness in his defence. That was his right.
18. The defence's case was very simple. On oath, he admitted he went to the complainant's house, at the material time. He said, he took some cassava to her. He said, he went into the complainant's house and rested. He said, he also slept in the same. He said, a while later, the complainant woke him up, then he went outside and went to a farm. He denied inserting his penis into the complainant's vagina at the material time.
19. Because of the above, he is asking you, as assessors and judges of facts, to find him not guilty as charged. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

20. When analyzing the evidence, bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. The burden to prove the accused's guilt beyond reasonable doubt stays with the prosecution from the start to the end of the trial. The accused is not required to prove his innocence or prove anything at all. The burden of proof is not on him.
21. Likewise, when analyzing the evidence, bear in mind the directions I gave you in paragraphs 9, 10, 11 and 12 hereof on the elements of the offence of rape. In this case, the prosecution called only one witness, the complainant (PW1) herself. For the prosecution, she is the most important witness. On the first element of rape, as discussed in paragraphs 9 (i) and 10 hereof, she said the accused inserted his penis into her vagina, at the material time. The accused, on the other hand, denied on oath that he penetrated the complainant's vagina, with his penis at the material time. So, this important first element of the offence of rape, is a contested issue between the parties.
22. As to the second element of rape, as discussed in paragraphs 9 (ii) and 11 hereof, the complainant appeared to say that, by her action at the time, that is to say, she pushed the accused down when he inserted his penis into her vagina, she was exhibiting her non-consent to the accused's actions, at the time. In other words, by pushing the accused down, she was, by her action, showing she was not consenting to the accused inserting his penis into her vagina, at the time. The accused, in his sworn evidence, denied forcefully inserting his penis into PW1's vagina, at the material time. He denied ever inserting his penis into her vagina, at all. So the second element of rape, as discussed in paragraphs 9 (ii) and 11 hereof, was also a contested issue, in this case.
23. On the third element of rape, as discussed in paragraphs 9 (iii) and 12 hereof, the prosecution's case was that, when the complainant pushed the accused down after he inserted his penis into her vagina, he must have known at the time that she was not consenting to sex with him. The accused's answer was that he did not ever inserted his penis into PW1's vagina at the material time. So, the third element of rape, as discussed in paragraphs 9 (iii) and 12 hereof, was also a contested issue between the parties.
24. This case was really one where you either accept or reject either parties' version of events. It was the words of the complainant as against that of the accused. You have watched the complainant

and the accused give evidence in the courtroom. You have observed their demeanours while they were giving evidence in the courtroom. Who do you think was the credible witness of the two? Who do you think was the evasive witness of the two? Who do you think, from your point of view, was telling the truth? If you think the complainant (PW1) was the credible witness, you must find the accused guilty as charged. If you think otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.

I. **SUMMARY**

25. 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.
26. Your possible opinions are as follow:
(i) Rape : Guilty or Not Guilty.
27. 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, Labasa
Solicitor for the Accused : Office of the Legal Aid Commission, Labasa