

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

Criminal Case No: HAC 02 of 2015

STATE

V

TOMANI CERELALA

Counsel: Ms. A. Vavadakua for State
Mr. K. Ratule for Accused

Dates of Hearing : 4, 5, 6 May 2016

Date of Summing Up : 6 May 2016

SUMMING UP

[1] Madam and Gentlemen assessors. It is now my duty to sum up to you. In doing so, I will direct you on matters of law which you must accept and act on. You must apply the law as I direct you in this case.

- [2] As far as the facts of this case are concerned, what evidence to accept, what weight to put on certain evidence, which witnesses are reliable, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts, or if I appear to do so it is entirely a matter for you whether you accept what I say or form your own opinions. In other words you are masters and the judges of facts.
- [3] Counsel for the prosecution and the defence have made submissions to you about how you should find the facts of this case, they have the right to make these comments because it is part of their duties as counsel. However you are not bound by what counsel for either side has told you about the facts of the case. If you think that their comments appeal to your common sense and judgment, you may use them as you think fit. You are the representatives of the community of this trial and it is for you to decide which version of the evidence to accept or reject.
- [4] You will not be asked to give reasons for your opinions, but merely your opinions themselves, and you need not be unanimous although it would be desirable if you could agree on them. Your opinions are not binding on me and I can assure you that I will give them great weight when I come to deliver my judgment.
- [5] On the issue of proof, I must direct you as a matter of law that the onus or burden of proof lies on the prosecution to prove the case against the accused. The burden remains on the prosecution throughout the trial and never shifts. There is no obligation upon 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.

- [6] The standard of proof is one of proof beyond reasonable doubt. This means that before you can find the accused guilty of the offences charged, you must be satisfied so that you are sure of his guilt. If you have a reasonable doubt about the guilt of the accused, then it is your duty to express an opinion that the accused is not guilty. It is only if you are satisfied so that you feel sure of the guilt of the accused that you can express an opinion that he is guilty.
- [7] Your opinions must be based only on the evidence you have heard in the courtroom and upon nothing else.
- [8] The accused has been charged with two counts of rape. Rape in our law and for the purposes of this trial rape is committed when a male penetrates the vagina of a woman with his penis or with his finger without her consent, knowing she is not consenting or being reckless as to whether she is consenting or not. It matters not whether it is a finger or a penis. They are both rape.
- [9] Now on the issue of consent, a child under 13 years of age is unable to consent so the law presumes that any sexual invasion is without consent.
- [10] It is an admitted fact (Exh. P1) that Mere was under the age of 13, and anyway you have seen how young and immature she is.
- [11] So, in order to prove each of the rape counts beyond reasonable doubt the prosecution must prove to you, so that you are sure, the following factors:
- (i) that it was indeed this accused, who

- (ii) penetrated to some extent the vagina of Mere (with his penis in Count 2 and his finger in Count 3)
- [12] You will recall that we are not dealing with Count One because that has been removed from the charge sheet or Information.
- [13] It is a simple question of fact for you: do you believe the young girl Mere when she says she was raped by the accused Tomani once with his penis, and once with his finger.
- [14] I must direct you that unlike previous times you need no longer look for corroboration of Mere's testimony. You either believe her or you don't. It is unnecessary to have evidence that backs up her story although you might think that the evidence of the other two witnesses do support her to some extent.
- [15] That is all I wish to say about the law at this stage.
- [16] I know that the evidence was brief and that you have been reminded of it by Counsel. However it is my judicial duty to summarize the evidence for you so that you can apply it to the law as I have directed you.
- [17] You heard first from the Police Officer who read us the record of interview of the accused. It was an interview under caution which means that he was told he didn't have to say anything, but he did. As Mr. Ratule says he denied the allegations of rape, which is correct but you have seen a copy of the record and you will see that the accused has admitted kissing the child and admitted later that he touched her vagina. All of those answers are for you to consider as evidence in the normal way, and to give the weight you see fit.

- [18] You will not forget the evidence of Mere who eventually after much coaxing told us of the “bad things” that her uncle Tomani did to her.
- [19] She said that Tomani is her uncle. One day he called her in. She went alone and he was in the house. He was in the corner. After she went in he closed the door. He put her up against a wall and told her to lift her legs. He used his hand and inserted a finger into her vagina. She felt pain. She told her Aunty about it.
- [20] On another occasion she went to her friend Bulou’s house which was next door to uncle’s house. Again he called her in. He was lying on the bed wearing a T-shirt. He told her to lie down on the floor. He stood up and pulled down his trousers and lay on top of her. He started to move and she pushed him away because it was painful. He pushed “some of it” inside her.
- [21] She told of a third incident under the mango tree up a hill. I will not repeat that evidence here because it is not relevant to the two charges the accused is facing. However if you think that it is important you will take it into account.
- [22] In cross-examination, Mere admitted that she had not told the Police about the finger episode at the time she made her statement and on being pressed she said that there was more occasions of “bad things” than she told the Police about.
- [23] In this regard Madam and Gentlemen I must give you a legal direction. When a witness says something in Court and it is shown that he or she has said something different on another occasion, be it in writing or orally, what the witness says in Court is the evidence that must be accepted.

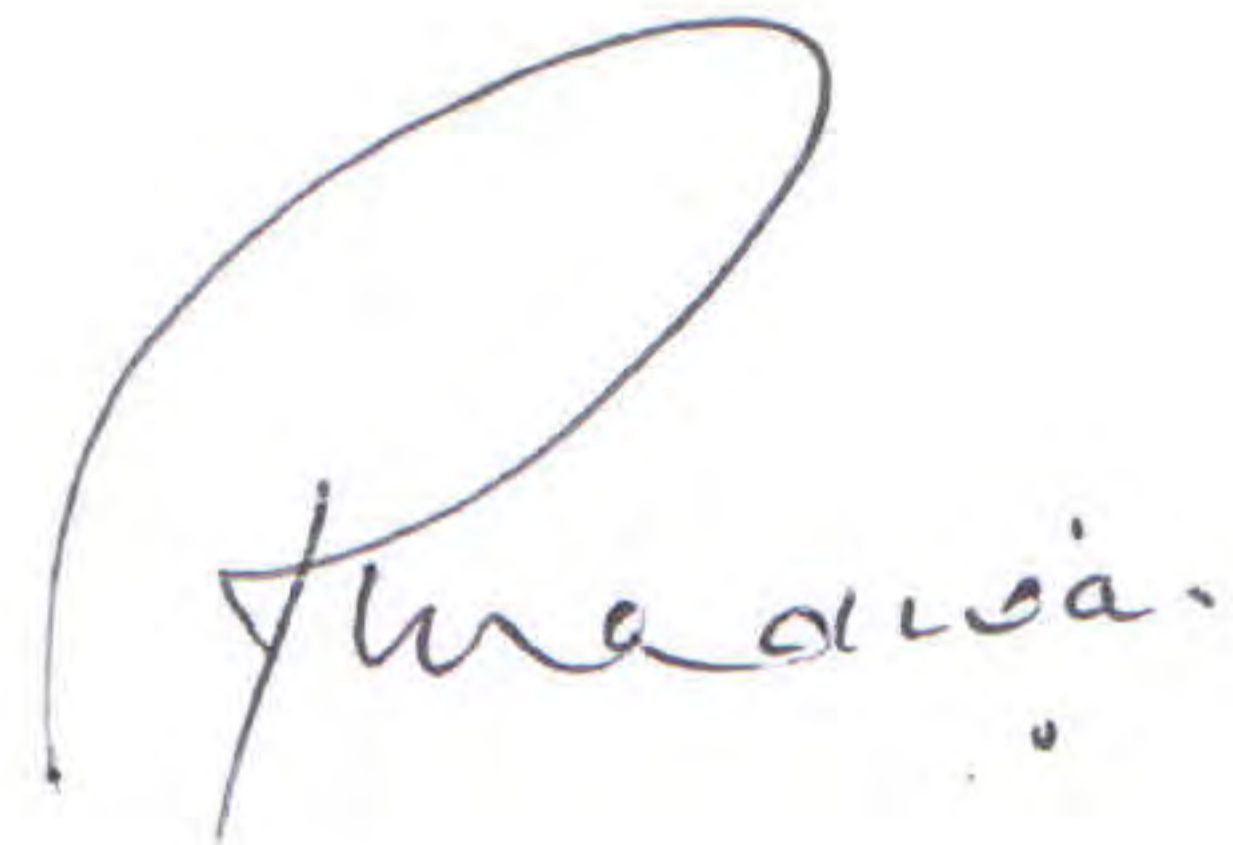
- [24] So in this case what Mere says in her evidence in Court is what you should be looking at. She appears to have sufficiently explained the difference and you will realize that she was only 10 at the time and very frightened. However if you find that her evidence and the Police statement are fundamentally different and that there is no explanation for it, then you might think that she is an unreliable witness. It is a matter for you.
- [25] It transpired from Mr. Ratule's cross-examination of the young girl that she continued to go back to her uncle after being abused because he gave her money. In re-examination it transpired that she was given money every time she went there and after some sexual molestation such as touching breasts.
- [26] The third prosecution witness was Madam Tiko, Mere's aunty. She said that in the middle of December 2014 she saw that Mere had a \$5 note and she said nothing about it on enquiry. She subsequently confided in her aunty that she got the money from the accused, not for doing chores but for kissing in his house. On the 30th December Mere told her aunt that the accused did something to her.
- [27] The fourth and last witness for the prosecution was the Doctor who examined Mere on the 31st December 2014. His professional finding that there were no signs of injury to her genitals but he did note that her hymen was not intact. He opined that that showed that there had been penetration at some time but of course he was not able to make any other finding. You will make what you want of this evidence.
- [28] Well, Madam and Gentlemen assessors, that was the end of the prosecution case. After legal argument I deleted the first count

from the Information and I found that the accused was put to his defence on the other two counts. You heard me explain to him his rights in defence. He could give evidence and most likely be cross-examined, or he could keep silent and say that the state hadn't proved their case. As you know the accused elected to remain silent.

[29] Now I direct you not to think any less of the accused because of that. He is entitled to remain silent and you must not think that he is guilty just because he has not given evidence. The case must be decided on the strength of the prosecution evidence. If Mere and her aunty have made you sure that she was raped, once by finger and again by penis then you will find the accused guilty. If you are not sure you will find him not guilty.

[30] You may retire now to consider your opinions. Please let a member of my staff know when you are ready and I will reconvene the Court.

[31] Any redirections Counsel?



P. K. Madigan
Judge



At Labasa
6 May 2016