

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 271 OF 2016S

STATE

Vs

SAINIANA MARAMA DROSE

**Counsels : Ms. S. Tivao and Ms. S. Lodhia for State
Ms. N. Mishra and Mr. S. Ali for Accused**

Hearings : 8 and 9 November, 2017

Summing Up : 10 November, 2017

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 her innocence. Under our system of criminal justice, an accused person is presumed to be innocent until she 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 she is guilty. If you have any reasonable doubt so that you are not sure about her guilt, then you must express an opinion, that she 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) Did the accused, between 1 January and 5 July 2016, at Nasinu in the Central Division, rape the complainant?
 - (ii) Did the accused, between 1 January and 5 July 2016, at Nasinu in the Central Division, sexually assault the complainant?

E. THE OFFENCE AND THEIR ELEMENTS

9. The accused was charged with two counts, first, "rape", contrary to section 207 (1) and (2)(b) of the Crimes Act 2009 (count no. 1), and second, "sexual assault", contrary to section 210 (1)(a) and 3(b) of the Crimes Act 2009 (count no. 2). In count no. 1, it was alleged that the accused penetrated the complainant's vagina with her tongue, without her consent, at Nasinu, between 1 January and 5 July 2016. In count No. 2, during the same period, at Nasinu, it was alleged that the accused sexually assaulted the complainant by fondling her breasts and poking her vagina.
10. For the accused to be found guilty of the offence of "rape" in count no. 1, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused penetrated the complainant's vagina with her tongue;
 - (ii) without the complainant's consent; and
 - (iii) the accused knew she was not consenting to 10 (i) above, at the time.
11. The slightest penetration of the complainant's vagina by the accused's tongue, is sufficient to satisfy element 10(i) above.
12. "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.

13. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to 10 (i) above, at the time. You will have to look at the parties' conduct, at the time, and the surrounding circumstances, to decide this issue.
14. In count no. 2, for the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) unlawfully and indecently
 - (iv) assaulted
 - (v) the complainant
15. To describe the offence, we will start with the verb "assault". To "assault" someone means to apply unlawful force to the person of another, for example, to punch someone in the face without any justification, is to apply unlawful force to the person of another. Likewise, in the context of this case, to fondle a complainant's breasts, or to poke her vagina with a finger, without any lawful justification, is to apply unlawful force to the person of another.
16. The "assault" must not only be "unlawful", it must also be "indecent". An "indecent assault" is one committed in circumstances of indecency. A circumstance of indecency is what right minded people would consider indecent, for example, a mother fondling her 14 year old daughter's breasts or poking her vagina, for no adequate reasons. It is therefore essential for the prosecution to make you sure that the assault was not only unlawful, it was also indecent, that is, right-minded people would consider the assault to be indecent.
17. Count no. 1 and 2 are "representative counts". This meant the prosecution was charging the accused for alleged rapes and sexual assaults committed between 1 January and 5 July 2016. The prosecution was unable to identify each separate occasions of the alleged rapes and sexual assaults because the complainant couldn't identify the exact date of the offence or couldn't recall them. If you are sure that the accused committed one rape or sexual assault within the period identified in the counts, that would be sufficient to find the count proved. The prosecution does not need to prove all the alleged rapes and/or sexual assaults within that period.

18. There are two counts under consideration in this trial, that is, count no. 1 and 2. You must carefully consider each count separately in the light of the total evidence given, and you must come to a separate considered decision on each count.

F. THE PROSECUTION'S CASE

19. The prosecution's case were as follows. The accused (DW1) is 45 years old. She is a single mother, and had three sons and a daughter. Her sons were aged 24, 21 and 8. Her daughter was 14 years old and is the complainant (PW1) in this case. At the time of the alleged offendings, the accused and her children were living at Wainibuku Hart as a family. PW1 is now a form 3 student at a school in Suva. At the time of the alleged offences, she was schooling at a primary school in Wainibuku.
20. According to the prosecution, when the accused and the complainant were at home alone, the accused used to force PW1 to take off her clothes. Thereafter, she used to tell PW1 to lie down. Then she fondled her breasts. According to the prosecution, PW1 was often lying down naked, and the accused used to forcefully part her legs, and licked her "mimi", the term PW1 used to describe her vagina. According to the prosecution, when the accused was licking PW1's vagina, her tongue often penetrated her vagina for about 2 minutes.
21. According to the prosecution, the accused did the above to PW1 approximately 20 times when her other siblings were not at home. She also used to fondle her breasts for about 20 times. PW1 said the accused also poked her vagina 3 times. Because of the above, the prosecution is asking you, as assessors and judges of facts, to find the accused guilty as charged on both counts. That was the case for the prosecution.

G. THE ACCUSED'S CASE

22. On 8 November 2017, the information was put to the accused, in the presence of her counsels. She pleaded not guilty to the charge. In other words, she denied the allegations against her. At the end of the prosecution's case, she was acquitted on count no. 3. However, a prima facie case

was found against her on count no. 1 and 2. She was called upon to make her defence. She choose to give sworn evidence and called no witness. That was her right.

23. The accused's case was very simple. On oath, she denied the allegations against her. She said, she loved her daughter a lot and all she wanted for her was to focus on her education and to succeed in life. Because of the above, the defence is asking you, as assessors and judges of facts, to find the accused not guilty as charged. That was the case for the defence.

H ANALYSIS OF THE EVIDENCE

(a) Introduction:

24. In analyzing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of facts, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the "Agreed Facts" and its significance; then we will discuss the state's case against the Accused; then the Accused's case, and finally, the need to consider all the evidence.

(b) The Agreed Facts:

25. The parties had submitted an "Agreed Facts". A copy of the same is with you. Please, read them carefully. There are five paragraphs of Agreed Facts. Because these "Agreed Facts" are not disputed by the parties, you may treat the same as established facts, and that the prosecution had proven these facts beyond reasonable doubt. The "Agreed Facts" sets the scene for the allegations. It was obviously a dispute between a single mother and her 14 year old daughter. They all resided in the same house with 3 other male siblings,

(c) The State's case Against the Accused:

26. The state's case against the accused was based fundamentally on her daughter's (PW1) verbal evidence in court. I will quote her evidence from the record for you, "...**She used to come to the room, that is, my mother. She used to tell me to take off my clothes. She used to tell me to lie down. I said no. She then forced me to lie down. She than touched my body. That is my breast and "mimi". I was naked, she then poked my "mimi". She was using her hand to**

touch me. She then licked my "mimi". My mother licks my "mimi". She uses her tongue to lick my "mimi" for about 2 minutes. "Mimi" is my private part. My private part is below me.

When she was licking my "mimi", I can feel it. I can feel the wetness of her tongue inside my "mimi". I was scared. I use the "mimi" to urinate with. [PW1 point to where her vagina is, to demonstrate where her "mimi" is]. I can feel her tongue inside my "mimi". Her tongue were inside my "mimi", from the front. She licked my "mimi" for 2 minutes. She parted my legs and licked my "mimi". She licked the front of my "mimi". She force me to part my legs, so that she could licked me. I was crying. What she was doing to me was painful. When she was licking my "mimi", it was painful. After that she told me to get dressed. She told me not to tell anyone else about the incident. I was scared of my mother. She had a short temper.

When mum touched my breast and licked my "mimi", she did it in a room in our home. It was the house our family stays in. My brothers were not in the house and were somewhere else. Only myself and mum were in the house at the time. Between 1 January to 5 July 2016, she did the above most of the time, that is, she did it about 20 times. She touched my breast for about 20 times during the above period.

I used to cry on my way to school. I then told my form teacher about the above. Then we went to the Nakasi Police Station (NPS). At Nakasi Police Station, I gave my statements. I was later taken to the HOME.

I can't recall 5 July 2016. The last time mum licked my "mimi" was on 5 July 2016. Before she licked my "mimi", she touched both my breasts. At the time, I was living with mum. I was attending Wainibuku HART Primary School. She also poked my mimi 3 times. She also told me to poke her "mimi" some times.

My relationship with my mum was not good because she did not care for me. When I asked her to do something, she often refuses. When by brothers assaulted me, she does not care about it. Taniela often assaults me. Only he assaults me..."

(d) **The Accused's Case:**

27. The accused's case was summarized by her own evidence in court, which I will quote directly to you, "...I heard PW1's evidence. I never tell her to take off her clothes. I never touch her breasts and/or her "mimi". I never poke her "mimi" with my hand. I did not part her legs. I never licked her "mimi" for 2 minutes. I did not tell her not to tell anyone about the alleged incident. I had never force myself on her "mimi". I never licked her vagina for 20 times between 1 January to 5 July 2016. I have never touched her breasts 20 times between the above period. I never licked her "mimi" on 5th July 2016. I never poked her "mimi" 3 times. I have only one daughter. I love her a lot over my three sons. I counsel her to become a good person. I told her to concentrate on her education first, before anything else. She doesn't like the way I used to talk to her. I don't want her to follow other negative people, she used to take money from my purse and I talk to her..."

(e) **The Need to Consider All the Evidence:**

28. The prosecution called only one witness in this case, that is, the complainant (PW1). The defence called only one witness, that is, the accused (DW1), in their defence. Altogether, there are two witnesses, on whose evidence, you will have to make a decision. You have heard and watch both witnesses give evidence in the courtroom. I will not bore you with the details of their evidence, because the same are still fresh in your minds.
29. You will need to consider and compare both parties' evidence. Analyze them. Who do you think, from your point of view, was telling the truth? Who did you think was the credible witness? If you find a witness credible, you may accept the whole or part of her evidence, in your deliberation. If you find a witness not credible, you may reject the whole or part of her evidence, in your deliberation. You are the judges of fact.

I. **SUMMARY**

30. 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 her innocence, or prove anything at all. In fact, she 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 her 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 her not guilty as charged.

31. Your possible opinions are as follows:

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

32: 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 your decisions.




Salesi Temo
JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused : **Legal Aid Commission, Suva.**