

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 058 OF 2016LAB

STATE

V

ETUWINI KAMEKAME

Counsels : Mr. R. Kumar for State
Ms. C. Choy for Accused

Hearings : 22 and 23 November, 2017

Summing Up : 23 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 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 victims. 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. 2, did the accused, on 9 November 2016, at Savusavu in the Northern Division, rape complainant no. 1 (PW1)?
 - (ii) On count no. 3, did the accused, on 9 November 2016, at Savusavu in the Northern Division, rape complainant no. 1 (PW1)?
 - (iii) On count no. 4, did the accused, on 9 November 2016, at Savusavu in the Northern Division, assault complainant no. 2 (PW3), causing her actual bodily harm?
 - (iv) On count no. 5, did the accused, on 9 November 2016, at Savusavu in the Northern Division, assault complainant no. 3 (PW2), causing her actual bodily harm?
 - (v) On count no. 6, did the accused, on 9 November 2016, at Savusavu in the Northern Division, sexually assault complainant no. 3 (PW2)?

E. THE OFFENCES AND THEIR ELEMENTS

9. The accused was charged with "rape", contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009 (counts no. 2 and 3); "sexual assault," contrary to section 210 (1) (a) of the Crimes Act 2009 (count no. 6); and "assault causing actual bodily harm," contrary to section 275 of the Crimes Act 2009 (counts no. 4 and 5). It was alleged that, on 9 November 2016, in the early morning, the accused unlawfully inserted his finger into PW1's vagina and anus, then sexually assaulted PW2 and then repeatedly assaulted PW2 and PW3. We will discuss the offences in terms of seriousness, beginning first with "rape", then "sexual assault", and lastly, "assault causing actual bodily harm".
10. For the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused's finger penetrated the complainant's vagina (count no. 2); or
 - (ii) the accused's finger penetrated the complainant's anus (count no. 3); and
 - (iii) without her consent; and
 - (iv) the accused knew she was not consenting to 10 (i) or 10 (ii) above, at the time.

11. In law, the slightest penetration of the complainant's vagina (count no. 2) or anus (count no. 3) by the accused's finger, is sufficient to satisfy element no. 10 (i) or 10 (ii), as described in paragraphs 10 (i) and 10 (ii) hereof.
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 her vagina been penetrated by his finger (count no. 2) or her anus been penetrated by his finger (count no. 3), at the time. You will have to look at the parties' conduct, at the time, and the surrounding circumstances, to decide this issue.
14. Count no. 6 involved "sexual assault". "Sexual Assault" is basically an aggravated form of "indecent assault". For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) indecently and
 - (iii) unlawfully
 - (iv) assaulted
 - (v) the female complainant.
15. An "assault" is basically the unlawful application of force to the person of another. For example, if someone punches you or hits you with a stick, without your consent, that's an "unlawful application of force to your person". It is the least touching of another in anger which amounts to an assault. The assault is unlawful because you did not consent to it.
16. The assault must not only be unlawful, it must also be "indecent". An action is indecent if right-thinking members of society regard it as indecent. For example, a 23 year old man touching a 15 year old female's naked breast while showering without her consent, would be regarded as indecent by right-thinking members of society.

17. Counts no. 4 and 5 involved "assault causing actual bodily harm". For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused
 - (ii) assaults the complainant
 - (iv) causing her actual bodily harm
18. The definition of "assault" is similar to that described in paragraph 15 hereof. The assault must cause actual bodily harm to the complainant. "Bodily harm" here means any type of bodily harm, for example, pain, bruises, cuts or other lacerations.
19. There are five counts to be considered, that is, counts no. 2, 3, 4, 5 and 6. You must consider them separately in the light of the total evidence presented, and come to a separate considered decision on each of them

F. THE PROSECUTION'S CASE

20. The prosecution's case were as follows. On 8 November 2016, complainant no. 1 (PW1), complainant no. 2 (PW3) and complainant no. 3 (PW2) went to Ketei Settlement in Savusavu for a church gathering. Prayer sessions were organized during the church gathering. Approximately 30 men and 10 ladies were in the prayer sessions. The sessions went on from the morning to the evening. Between 6pm to 7pm, the men and women had their dinners.
21. Later in the evening, the group were told to rest and sleep. The ladies were accommodated at the "Vakatawa's" house. The men were accommodated at another house. In the "Vakatawa's" house, the "Vakatawa" and his wife slept in their bedroom, while the complainants, that is, PW1, PW2, PW3 and other ladies slept in the sitting room. PW1's husband, the accused, also slept on a bed in the sitting room. They all went to sleep after 12 midnight.
22. According to the prosecution, PW1, the accused's wife, was suddenly awoken at about 1am on 9 November 2016. PW1 said, she saw the accused's hand on Matelita's hair. PW1 intervened by tapping the accused's hand away. According to the prosecution, the accused approached his wife, PW1, and stepped on her neck. They struggled. According to the prosecution, the accused then touched his wife's vagina with his hand, and later inserted two of his fingers into her vagina. Later,

he inserted a finger into his wife's anus. According to the prosecution, on both occasions, his wife did not consent to the above, and he knew she was not consenting at the time (counts no. 2 and 3).

23. According to the prosecution, the accused then approached the second complainant (PW3). He stepped on her stomach, where she had a previous operation. Thereafter, he hassled her and threw three hard punches on the right side of her head. He later bit her on the shoulder. PW3 said, the assault on her were very painful and she suffered bite marks on her shoulder and pain on her head (count no. 4). The accused then approached complainant no. 3 (PW2). According to the prosecution, the accused threw two punches at PW2's left neck. He later pulled her hair, earrings and ring off her. Thereafter, he pulled PW2 towards him in an attempt to kiss her. PW2 was resisting him. He then touched PW2's thighs and tried to touch her vagina.
24. According to the prosecution, the accused later fondled PW2's left breast and licked her neck (counts no. 5 and 6). PW2 sought PW3's assistance and later all the complainants fled out of the "Vakatawa's" house. They fled to the middle of the village to seek help. The police later arrived. The police investigated the matter. The accused was later charged as per the information. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged on all counts. That was the case for the prosecution.

G. THE ACCUSED'S CASE

25. On 22 November 2017, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charges. In other words, he denied the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make a defence, he choose to remain silent and called no witness. That was his right.
26. Nothing negative whatsoever should be imputed to the accused for choosing to remain silent. As I've said before, the burden of proof is not on him to prove his innocence. The burden of proof is on the prosecution from the start to the end of the trial, and it never shifts to the accused, at any stage of the trial. In fact, he is well within his right, to sit there, fold his arm and demand that the prosecution prove his guilt beyond reasonable doubt. In fact, he is telling you that the prosecution

he inserted a finger into his wife's anus. According to the prosecution, on both occasions, his wife did not consent to the above, and he knew she was not consenting at the time (counts no. 2 and 3).

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had not proven his guilt beyond reasonable doubt, and is asking you, as assessors and judges of fact, to find him not guilty as charged on all counts. That was the case for the accused.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

27. 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 fact, 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 State's case against the accused; then the accused's case and lastly, the need to consider all the evidence.

(b) State's Case Against the Accused:

28. The State's case against the accused was based fundamentally on the sworn evidence of the three female complainants, that is, PW1, PW2 and PW3. On counts no. 2 and 3, the State's case against the accused was based fundamentally on his wife's (PW1) sworn evidence. They had been married for eleven years and knew each other very well. PW1 said, at the material time, they were sleeping at the "Vakatawa's" sitting room. PW1 said she awoke at 1am on 9 November 2016 to see the accused standing in the sitting room. PW1 said, the accused stepped on her neck and the two struggled. In the course of the struggle the accused touched her vagina and inserted his finger into the same without her consent. PW1 said, he also touched her anus, and later inserted his finger into the same without her consent. PW1 said, he well knew she was not consenting to the same, because she was resisting him at the time (counts no. 2 and 3).
29. As for complainant no. 2 (PW3), she said she awoke early morning on 9 November 2016 to find the accused walking around in the "Vakatawa's" sitting room. PW3 said, he suddenly approached her and stepped on her stomach. PW3 said, it was painful, as she just had an operation on her stomach. PW3 said, the accused later bit her shoulder with his teeth, and she was injured with bite marks. PW3 said, he later threw three hard punches to the right side of her head. She said, she felt extreme pain on the same (count no. 4).

30. As for complainant no. 3 (PW2), she said she woke up at about 2.30am on 9 November 2016 in the "Vakatawa's" sitting room. PW2 said, after assaulting PW3, the accused moved towards her. PW2 said, the accused threw two hard punches at her left neck. PW2 said, he later pulled her hair, her earrings and her ring. PW2 said, he later pulled her towards him to kiss her. PW2 said, she resisted. PW2 said, he later touched her thighs and attempted to touch her vagina. PW2 said, he later licked her neck and fondled her breast. PW2 said, she later fled from him (counts no. 5 and 6).

31. If you accept the complainant's (PW1, PW2 and PW3) verbal evidence and find them credible, you must find the accused guilty as charged on all counts. If otherwise, you must find the accused not guilty as charged on all counts. It is a matter entirely for you.

(c) The Accused's Case:

32. He pleaded not guilty to all the counts, that is, counts no. 2, 3, 4, 5 and 6. Thus he denied all the allegations against him. He choose to remain silent and call no witness. That was his right. Nothing negative must be imputed to him for choosing to remain silent. That was his constitutional right.

(d) The Need To consider All the Evidence:

33. The prosecution called three witnesses, that is, complainant no. 1 (PW1), complainant no. 2 (PW3) and complainant no. 3 (PW2). The defence called no witness. Thus, there are a total of three witnesses, on whose evidence, you will have to make a decision. Consider all their evidence together, compare and analyse them together. If you find a witness's evidence credible, you are entitled to accept the whole or some of it, in your deliberation. If you find a witness's evidence not credible, you are entitled to reject the whole or some of it, in your deliberation. You are the judges of fact.

I. SUMMARY

34. 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.

35. Your possible opinions are as follow:

- | | | | | | |
|-------|-------------|---|---------------------------------------|---|----------------------|
| (i) | Count No. 2 | : | Rape | : | Guilty or Not Guilty |
| (ii) | Count No. 3 | : | Rape | : | Guilty or Not Guilty |
| (iii) | Count No. 4 | : | Assault Causing Actual
Bodily Harm | : | Guilty or Not Guilty |
| (v) | Count No. 5 | : | Assault Causing Actual
Bodily Harm | : | Guilty or Not Guilty |
| (vi) | Count No. 6 | : | Sexual Assault | : | Guilty or Not Guilty |

36. 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**