

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 048 OF 2016LAB

STATE

VS

VILIAME VALO

Counsels : Ms. A. Vavadakua for State  
Ms. C. Choy and Mr. J. Korotini for Accused

Hearings : 13 and 14 December, 2017

Summing Up : 15 December, 2017

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## SUMMING UP

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### 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. 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. 1, did the accused, between 24 January and 29 April 2011, at Bua in the Northern Division, rape the complainant (PW2)?
  - (ii) On count no. 2, did the accused, between 24 January 2011 and 15 August 2016, at Bua in the Northern Division, sexually assault the complainant (PW2)?
  - (iii) On count no. 3, did the accused, on 15 August 2016, at Bua in the Northern Division, rape the complainant (PW2)?

**E. THE OFFENCES AND THEIR ELEMENTS**

9. The accused was charged with two counts of "rape", contrary to section 207 (1), (2) (a), (2) (b) and (3) of the Crimes Act 2009 (counts no. 1 and 3) and one count of "sexual assault", contrary to section 210 (1) (a) of the Crimes Act 2009 (count no. 2).
10. For the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused's penis penetrated the complainant's vagina (count no. 1); or
  - (ii) the accused's tongue penetrated the complainant's vagina (count no. 3);
  - (iii) without the complainant's consent; and
  - (iv) the accused knew the complainant was not consenting to 10 (i) or 10 (ii) above, at the time.
11. The slightest penetration of the complainant's vagina with the accused's penis (count no. 1); or the slightest penetration of the complainant's vagina with the accused's tongue (count no. 3), is sufficient to satisfy element no. 10 (i) or 10 (ii) above.
12. "Consent" is to "agree freely and voluntarily and out of her own freewill". If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself 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. In this case however, we are dealing with a female complainant, who was under 13 years old at the time. In law, a person under 13 years old is incapable of giving her consent to her vagina being penetrated by a penis (count no. 1) or by a tongue (count no. 3). So, for a child under 13 years old, the prosecution does not need to prove non-consent by the child complainant. It is already a presumption in law.
13. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to 10 (i) or 10 (ii) above, at the time. You will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue. However, for a child complainant who was under 13 years old at the time, an adult accused is presumed to know in law that she is incapable of giving her consent to her vagina being penetrated by his penis or her vagina being penetrated by his tongue. This policy was put there to protect children

14. "Sexual Assault" is an aggravated form of "indecent assault". For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) The accused
  - (ii) Unlawfully and indecently
  - (iii) Assault
  - (iv) 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 touch a young girl's vagina, without any lawful justification, is to apply unlawful force on the child's person. A child also, as a matter of law, cannot consent to an adult touching her vagina, unless it was for a medical purpose.
16. The "assault" must not only be "unlawful", it must also be "indecent". An "indecent assault" is one committed in circumstance of indecency. A circumstance of indecency is what right-minded people would consider indecent, for example, a grandfather touching his granddaughter's 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. There are 3 counts in the information. You must consider them separately and come to a considered decision on each of them in the light of the total evidence presented at the trial.
18. Counts no. 1 and 2 appear as "representative counts". This meant that the prosecutor was charging the accused for alleged sexual acts committed between two separate dates involving months or years. This is not unusual, because in most child sex offence cases, the child complainant cannot recall the exact date of the alleged offences, but recall the incident occurring between two dates, thus the "representative counts". If you find and accept a single sex offence occurring between the two mentioned dates, that will be sufficient to prove the offence on that particular count. The prosecution does not need to prove all the alleged sex offences occurring between the two mentioned dates.

## F. THE PROSECUTION'S CASE

19. The prosecution's case were as follows. The time of the alleged offences were between 24 January 2011 to 15 August 2016, a period of 5 years. In 2011, the accused (DW1) was 60 years old, and on 15 August 2016, he was 65 years old. The female complainant (PW2) was 6 years old in 2011, and 11 years old in 2016. The accused and his wife brought the complainant up ever since she was young. They look after and cared for her. The complainant's mother was the accused's wife's daughter. The complainant (PW2) was the accused's grandchild.
20. According to the prosecution, sometimes in 2011 when PW2 was in class 1, she was sleeping in their house one afternoon with her grandmother and another relative. PW2 said, the accused returned home drunk. PW2 said, her grandmother and the relative fled from their home. PW2 said, the accused then came to her, touched her and took off her panty. He then allegedly inserted his penis into PW2's vagina. According to the prosecution, her vagina allegedly bled and PW2 said, it was painful. PW2 said, the accused allegedly threatened to kill her, if she told anyone about the incident (count no. 1).
21. According to the prosecution, between 24 January 2011 and 15 August 2016, the accused used to come to her while she was sleeping in their house and allegedly touched her vagina. PW2 said, he allegedly poked her vagina when he allegedly touched it. According to PW2, it was often painful and he warned her not to tell anyone, or he will kill her (count no. 2).
22. On 15 August 2016, the accused (DW1), the complainant (PW2), PW2's cousin brother (PW3) and PW2's cousin sister went to the family's plantation. According to the prosecution, the accused told PW2's cousin brother (PW3) and cousin sister to look after the family's cassava patch, while he and PW2 went to get some more cassava. According to the prosecution, the accused took PW2 to a secluded spot, tied her hands, and laid her down on the grass. He then allegedly took off all her clothes and licked the inside of her vagina (count no. 3).
23. The matter was later report to police. An investigation was carried out. The accused was later arrested and charged with the counts in the information. Because of the above, the prosecution is asking you, as assessors and judges of facts, to find the accused guilty as charged on all counts. That was the case for the prosecution.

**G. THE ACCUSED'S CASE**

24. On 13 December 2017, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to all the counts. In other words, he denied all 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 his defence, he choose to give sworn evidence and called no witness. That was his right.

25. The accused's (DW1) case was very simple. On oath, he denied the complainant's (PW2) allegations against him. He denied the allegations in counts no. 1, 2 and 3. According to the defence, the complainant was coached by his mother to make up these allegations. DW1 said PW2's mother and him were not on good terms. Because of the above, the accused asks 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:**

26. In analysing 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 analysing the evidence, we will first discuss the Agreed Facts, then the State's case against the accused. Then, we will discuss the Accused's case. Then we will consider the need to look at all the evidence.

**(b) The Agreed Facts:**

27. The parties had submitted an "Agreed Facts", dated 26 May 2017. A copy of the same is with you. Please, read it carefully. There are 4 paragraphs of "Agreed Facts". Because the parties are not disputing the same, you may treat the same as established facts, and that the prosecution had proven those facts beyond a reasonable doubt. The significance of the "Agreed Facts" was that, it showed that this was a case about an alleged rape and sexual assault of a granddaughter by her grandfather. In other words, it was an in-family dispute. That is the setting of this case.

**(c) The State's Case Against the Accused:**

28. The State's case against the accused was based fundamentally on the complainant's (PW2) verbal evidence given in court on 13 December 2017. You have heard her evidence in court. You have watched her in court. You have observed her demeanour while giving evidence in court. I am sure her evidence is still fresh in your minds and I will not bore you with the details. However, I will

summarize to you the salient points, as far as the elements of the offences, in each of the counts are concerned, to assist you in your deliberation.

**Complainant (PW2): Count No. 1 (Rape)**

29. PW2 said, sometime in 2011, when she was in class 1, she was sleeping in their house with her grandmother and a cousin sister. It was in the afternoon. PW2 said, her grandfather, the accused (DW1), suddenly came home drunk. PW2 said, her grandmother and cousin sister fled from the house, and she was there alone. PW2 said, the accused came to her, and took off her panty. PW2 said, he then inserted his penis into her vagina. PW2 said, her vagina bled and it was painful. PW2 said, they were alone in the house. PW2 said, the accused warned her not to tell anyone about the incident, or he will kill her.

**Complainant (PW2): Count No.2 (Sexual Assault)**

30. PW2 said, sometime between 2011 and 2016, she was sleeping in their house with her cousin sister. PW2 said, the accused (DW1) came and touched her cousin sister's thigh, and later touched her vagina. PW2 said, this occurred in the daytime. PW2 said, when the accused touched her vagina, he did so by poking her vagina. PW2 said, when he poked her vagina, it was painful. PW2 said, the accused threatened to kill her if she told anyone about the incident.

**Complainant (PW2): Count No. 3 (Rape)**

31. PW2 said, on 15 August 2016, the accused, herself, a cousin brother (PW3) and a cousin sister, went to the family farm. At the family farm, PW2 said, the accused told PW3 and her cousin sister to look after the cassava patch. PW2 said, the accused told them that he and PW2 were going to look for some more cassava. PW2 said, the accused took her to a secluded spot. PW2 said, he tied her hands, lay her down on the grass and took off all her clothes. PW2 said, he then licked the inside of her vagina. PW2 said, it was painful.

**Cousin brother's (PW3) Evidence**

32. PW3 gave evidence for the State. You have heard his evidence in court. You have watched and observed his demeanour in court. I'm sure his evidence is still fresh in your mind, and I will not bore you with the details. Suffice to say that he was at the family farm with the accused, PW2 and his cousin sister on 15 August 2016. PW3 said, he went to look for the accused and PW2 when they went away. PW3 said, he saw the accused removing PW2's panty in a cassava patch. PW3 said, he saw the accused kneeling over PW2, and PW2's legs were between the accused's legs when he was

kneeling down. PW3 said he saw PW2's legs, side of her head and side of her stomach. PW3 said, he saw the accused facing PW2, while kneeling down. What you make of PW3's evidence is a matter entirely for you.

**Doctor Inosi Voce's (PW1) Evidence:**

33. Doctor Voce (PW1) gave evidence on 13 December 2017. He medically examined the complainant (PW2) on 25 August 2016 – 10 days after the incident alleged in count no. 3. He recorded his findings in a medical report, which he tendered in evidence as Prosecution Exhibit No. 1. A copy is with you. Please, read it carefully. PW1 took PW2's medical history through a guardian, see D(10) of the report. PW1 also examined PW2's vagina and recorded his findings in D(12) of the report. As is common in child rape cases, the vagina will reveal whether or not it had been penetrated previously with the presence or non-presence of the hymen. PW1 said, PW2's hymen was not intact. PW1 said, the non-presence of the hymen could be caused by a penis, or other blunt objects. PW1 could not specify which. Although it is not necessary as a matter of law for a rape complaint to be corroborated by independent evidence, how you treat Doctor Voce's evidence is entirely a matter for you.
34. If you accept the complainant's (PW2) evidence and version of events, 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.

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

35. The accused, on oath, denied the allegations against him. You have heard his evidence. You have watched and observed his demeanour in the courtroom. I am sure his evidence is still fresh in your mind and I will not bore you with the details. If you accept the accused's sworn denials, you must find him not guilty as charged on all counts. If otherwise, you will have to consider the State's case as a whole, and decide on whether or not the accused was guilty as charged on all counts.

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

36. The prosecution called three witnesses, that is, Doctor Inosi Vutucicila Voce (PW1), the complainant (PW2) and the complainant's cousin brother (PW3). The prosecution tendered PW2's medical report as Prosecution Exhibit No. 1. The accused (DW1) gave sworn evidence. Altogether, there are four witnesses, on whose evidence, you will have to make a decision. Please, read and compare their evidence. Analyze them. If you find a piece of evidence important and I haven't mentioned it, please take it on board in your deliberation. If you find a witness credible, you are entitled to accept the whole



or some of his evidence, in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his evidence, in your deliberation. You are the judges of fact.

**I. SUMMARY**

37. 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.

38. Your possible opinion are as follows:

- |       |             |   |                |   |                      |
|-------|-------------|---|----------------|---|----------------------|
| (i)   | Count No. 1 | : | Rape           | - | Guilty or Not Guilty |
| (ii)  | Count No. 2 | : | Sexual Assault | - | Guilty or Not Guilty |
| (iii) | Count No. 3 | : | Rape           | - | Guilty or Not Guilty |

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