

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO.HAC 129 of 2018

BETWEEN : **STATE**

AND : **TEVITA LEWAI**

Counsel : Ms. S. Serukai and Dr. A. Jack for the State
Ms. S. Nasedra for the Accused

Hearing on : 03rd of December - 11th of December 2018
Summing up on : 12th December 2018

SUMMING UP

Lady and gentlemen assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the Judges of facts.
2. The names of the complainant juvenile is suppressed and she will be referred to as either by her initials LGJ or the witness number, PW3.
3. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of law. To wit;
 - i) If a person has committed an offence, he should be meted out with an adequate punishment.
In other words, if you are sure that the accused has committed the alleged offences, then it is your duty to find him guilty. I must remind you that it is the duty of the prosecution to prove all the elements of the alleged offences beyond reasonable doubt. The accused is not required to prove anything as his innocence is presumed by the law.

- ii) An innocent person should never be convicted.
There is a saying that it is better to let 100 offenders go free than to convict one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty, let us proceed.

4. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
5. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution or for the defense are not evidence. A suggestion made by a lawyer during the examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.
6. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
7. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, a part or none of any witness' evidence.
8. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.

9. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
10. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question of reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
11. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
12. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you, how you assess the evidence and what weight you give to a witness' testimony.
13. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there are two or more reasonable inferences to draw, one or more against the accused, as well as one or more in his favour, based on the same set of proved facts, then you should not draw the adverse inference. For example, a witnesses' silence when affronted with a vital question could draw many inferences, some in favour and some against the interests of the accused. Therefore, in such situation you should be careful enough to not to draw any adverse inference on it against the accused.
14. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means

that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. That is, you must be sure of the accused person's guilt.

15. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty.
16. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against the accused.
17. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not mandatory.
18. Let us look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (b) and(3) of the Crimes Act of 2009.

Particulars of Offence

TevitaLewai, between the 1st day of May, 2016 and 31st day of May, 2016 at Namulomulo village, Tailevu in the Eastern Division, penetrated the vagina of a child under the age of 13 years, with his finger.

19. Now I will deal with the essential elements of the offence.

Section 207(1) of the Crimes Act reads as;

207. — (1) Any person who rapes another person commits an indictable offence.

Section 207(2) (b) of the Crimes Act reads as;

(2) A person rapes another person if —

[b] the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent;

Section 207 (3) reads as;

(3) For this section, a child under the age of 13 years is incapable of giving consent.

Accordingly, in this case, to prove the offence of Rape the prosecution must prove the following elements beyond a reasonable doubt.

- (i) The accused;
- (ii) On the specified period (in this case between the 1st of May 2016 and 31st of May 2016);
- (iii) At the specified place (in this case at Namulomulo village, Tailevu in the Eastern Division);
- (iv) Penetrated the vagina of LGJ with his finger.

The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

The fourth element involves the penetration of the LGJ's vagina; with the accused's finger. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of LGJ with his finger to any extent.

Summary of the evidence

20. The 1st witness for the prosecution or the PW1 is Tokasa Tuinakelo, the mother of LGJ and also the wife of Tevita, the accused. Her evidence is that;
- i) She is married to the accused and has two children out of the said marriage.
 - ii) Her eldest child LGJ was born on 15/08/2014 and second child Rachel was born on 17/03/2016.
 - iii) She was living with Tevita, her husband and the two children in a house of their own, which was at a distance of about 50-60 feet away from her family house.
 - iv) On the 19th day of some month which she has forgotten now, in 2016, she has been at home with the children, while her husband has gone to work. Later she admitted the exact date to be the 05th of May 2016. On that day she has gone to the family house to take a call and when she returned home at about 2.00pm, she has seen the LGJ's diapers heavy and changed them. While removing she has noted some blood on the diaper. However, there were no blood stains when she changed LGJ's diapers in the morning at about 7.00am, after Tevita left for work.
 - v) The witness has taken the child for a bath and changed her clothes. She has observed some injuries on the child's vaginal area, but has not asked her how that did happen as she has felt shy to ask. Further she says that by the time of that incident, the child was only 1 year 9 months and when the child

is 3 years, and could speak better, recalled the incident and told that her daddy covered her face and played with her vagina. However the witness contradicts herself when she said that she asked the child on the day she saw blood, as to what happened. She further contradicts when she said that after few days from seeing blood, the child told her what happened.

21. Answering the cross examination, PW1 says that;
- i) Tevita, the accused is from Lau and her family was not happy about her relationship with him.
 - ii) After their marriage, Tevita worked at Nasouri and used to travel daily from home. By about 6-6.30am, he leaves for work and returned after 6 O'clock in the evening. His working hours are from 7.30am to 5.00pm from Monday to Saturday and some days he had to stay for the overtime.
 - iii) The witness further states that on the day she saw blood on LGJ, Tevita has gone to work and was not at home. Afterwards Tevita was removed from her village and Tevita went to live in Kilikali settlement in Nepani. Then the witness had an argument with her brother Apeti and having chased from home, together with the children came and joined the accused.
 - iv) Thereafter in September 2016, the witness and her family (together with the accused) had moved to Vatuwaqa, when her sister Naomi and her grandmother came and informed that her father has asked them to come back and live in Namulomulo. Accordingly, by the end of September 2016, they have come back to their house in Namulomulo.
 - v) On Friday the 4th of November 2016, the parents of Tevita had come to visit them from Lau. When the accused brought them home, the witness was at her family house. Later the witness has come and informed that her parents do not like Tevita's parents being there in Namulomulo. Tevita invited her and the children to go with him and the witness having refused, Tevita with his parents went away on the following morning from their home and never returned.
 - vi) The witness admitted to have made a second statement to the Nausori Police Station on the 14th of November 2016. When shown she admitted it. Though it is stated there that Tevita was there with them on 8th of November, and that she confronted him, in fact he was not there with them at home by that date. Her explanation was that she did not complain of her own accord, but on the insistence of her aunts.
 - vii) She further contradicts herself, when initially she stated that the child managed to speak well and explain the alleged incidents when only she became 3 years old and later stated that she was told of the incidents in late 2016. The witness fails to answer couple of questions on the correctness of her second complaint to the police. She finally concedes that this is a fabrication against the accused by her family.
22. In re-examination the witness said;
- i) She complained to the police because LGJ told her that "daddy usually touches her vagina". It should be noted that she has not mentioned such to

the police, in any of her statements. She further affirms that LGJ never gave a statement to the police.

- ii) She concedes that whatever that happened to LGJ has happened after the accused has left to work on that day.

23. The PW2 was Dr. Joseph Tiqarea. His evidence was that;

- i) He is a MBBS qualified medical practitioner with 7 years of working experience. He was attached to the department of pediatrics in the CWM hospital. On the 6th of May 2016, he has examined the child LGJ and prepared the report PE2. At the time of the examination, two maternal grand aunties of the child were present with the child, in addition to Cpl. Susana.
- ii) When he examined the child, her hymen could not be visualized. It may be due to the hymen being torn or due to not being prominent enough to see. Given the injuries, it may be possible to not to visualize the hymen due to blunt trauma.
- iii) In answering to a question by the Court the witness states that if injuries occurred before 7.00am there cannot be any possibility of bleeding starting at around 2.00pm.
- iv) Further, it is revealed that the child had an infection in the vaginal area which causes a bad odor. The witnesses' opinion was that it could happen due to many reasons. Yet it was never suggested by either party whether such infection could have made the vaginal area scratchy/itchy. It leaves out a doubt whether the child scratched her vaginal area by self and such caused the injuries. Anyway, it is up to you to decide whether it creates a reasonable doubt or not.

24. The next witness was the child aged 4 years. The alleged incident has happened when she was 1 year and 9 months old. She spoke very little of an incident. Whether she referred to the alleged incident is in fact questionable. If understood properly, what she said was that "daddy did my pipi". When queried where he did at, the answer was "home". Therefore, it is apparent whatever the incident she referred to has happened at home. It is indeed doubtful whether she is referring to the alleged incident or not. In any event, it should be noted that the witness is only 4 years of age and is not in a position to understand the duty or the responsibility of telling the truth. Further, assuming that what she says as the truth, the widest interpretation that could be given to the child's evidence is that according to her the accused has touched her vaginal area at some day at home. One of the questions would be, whether he penetrated it. Another would be is the child referring to the alleged incident. It is indeed up to the prosecution to prove all the ingredients of the offence. It is up to you to decide whether there is a reasonable doubt of it left in your minds. If there happens to be any reasonable doubt, the benefit of it should go to the accused.

25. PW4 was Losalini. She is the sister-in-law of Tokasa and the wife of Apeti. She states that;

- i) She lives in the family house of Apeti, her husband together with her children and brother-in Law, Freddy.
 - ii) At around 3.00pm on the 5th of May 2016, she was at the veranda outside and was watching people passing by as there was a funeral in at an adjacent house. As far as she remembers, she has seen LGJ, the child coming down the steps from her home and playing on the driveway.
 - iii) She has noticed that the LGJ's diaper looked heavy as it has not been changed for a long time. The diaper looked yellowish, soaked with urine. She did not observe any blood or bleeding at that time.
 - iv) However, after about an hour, LGJ having changed her clothes, come there and asked her for water. While giving water the witness has noted LGJ bleeding and her pants stained with blood. She has called Tokasa, and informed her, Tokasa has told that she noted blood stains when she changed the diaper.
 - v) The witness further confirms that Tevita was at not home that day and may have gone for work. It is her assertion that Tevita must have left home before 7.00am as she got up at 7.00am and she did not see Tevita.

26. PW5 was Theresa, an aunt of Tokasa, who is a retired nurse with 34 years of experience in the service. She stated that;
 - i) At around 7.00pm on the 05th of May 2016, her nephew Apete came and asked her to come to their house to see LGJ. When she went there, the child was lying on the bed and looked calm. Losalini has told her that the child has bled earlier that day. She asked Tokasa to remove the panty of the child and having done so, she inspected the vulva of the child without touching. When she saw she knew that something has happened.
 - ii) She has asked them to take the child to the hospital and inform the matter to the police. When she asked the child "anyone touched your pipi", the child has answered "pipi, pipi", repeating the word, she asked.
 - iii) Thereafter on the request of Apete, she and her husband has accompanied them. She has gone with them to the hospital, while her husband has lodged a complaint at the police.
 - iv) A female doctor having examined the child asked them to take the child to the CWM hospital on the following morning. She has accompanied the child to the CWM hospital too, on the request of Apeti.

27. The next witness for the prosecution was D/Cpl. 2997, Susana, the PW6. She states;
 - i) She joined the police service in 2003, and is working in the Nausori Police station since 2009, being attached to the sexual offences unit. She was on duty on the 05th of May 2016. Upon receiving a report, that evening, she has proceeded to the Nausori hospital to go and see the alleged victim. At the hospital she has seen the little girl LGJ sitting in with her aunt, Losalini and grandmother Theresa. Though she tried to record a statement, she could not do so as the child was only 1 year and 9 months old.
 - ii) As directed by the doctor, she has accompanied the child to the CWM hospital on the following morning. At the CWM hospital the child was

medically examined by doctor Joseph, and directed the child to be admitted. Having admitted the child, she has gone back to the Namulomulo village to inform of the admission of the child. Further, she has recorded two statements from the aunts of Tokasa, namely Venina and Filomina.

- ii) subsequently she has recorded a statement from the child after about 1 year from the incident. Before that, on the 14th of November 2016, Tokasa has called her and informed that child has said something and accordingly she has gone to the Namulomulo village to record the statement.
 - iii) In recording the statement from the child, when asked “where did daddy go to”, the child came out with the answer, “he injured here (touching the vagina)”. At that time she has felt that it was a prepared answer, as the answer is not relevant to the question.
 - iv) when queried whether they had any material to suspect Tevita, when they recorded his statement on 06th of May, the witness has remained silent. Further she has conceded as the investigating officer, that they had no material by then to suspect Tevita and breached an official duty by doing so.
 - v) In cross examination, she admitted that on the information received from Tevita, they brought in another person, yet did not record a statement from him.
28. With the leading of the above evidence prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence covering the elements of the offence, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Decree, explaining the rights of the accused.
29. The accused elected to give evidence on his behalf. His evidence is that;
- i) He is married to Tokasa and they have two children from that marriage. The eldest is LGJ and she was born on the 18th of August 2014. He was from Lau and has met Tokasa when he came to Namulomulo to assist his cousin in 2013.
 - ii) As for the accused, there had been many hardships in them getting together as the Tokasa’s family did not like him. He further states that he was beaten up by her family 6 times previously. Out of that 5 times by Tokasa’s brother Apeti and once when he was at the playground.
 - iii) when LGJ was two months old, Tokasa’s brother Apeti chased them from the family house. The accused managed to find a job at Pioneer Concrete and look them after. In the meantime, his cousin Lavinia and Tokasa’s mother Ana Marama, assisted them. Thereafter they were invited to come back to Namulomulo and they have gone.
 - iv) By May 2016, the accused was working at Pioneer Concrete, Nausori, and his working shift has been from 7.30 am to 5.00 pm, from Monday to Saturday. On the 5th of May, when he returned from work, he has seen a note by Tokasa, stating that they are taking LGJ to the hospital. After a while, Tokasa has come with another and taken him to the family house. There had been many people as there was a funeral in a close by house. Afterwards Apeti,

Losalini and Theresa has come with LGJ and told that the child has to be taken to the CWM on the following day and the police will come and take her. He has stayed home on that day and was clearing the footpath, when police came and took him to the station.

- v) At the Nausori police station he was interviewed by two police officers namely Elizabeth and Emosi (Q-1 to Q-75) and subsequently by Susana (Q-76 to Q-105). According to him he has revealed the names of two suspects, namely Bati and Freddy.
 - vi) Bati is the son of Venina and Freddy is a brother of Tokasa. It is apparent that Freddy has been there in the family house of Tokasa during the alleged incident.
 - vii) Thereafter he has been chased from the village by the relations of Tokasa. The accused was living in Vatuwaga when Tokasa came there with the children, and settled with him.
 - viii) Again on the request of the parents of Tokasa, they have moved back to their home in Namulomulo, in September/October 2016.
 - ix) While in Namulomulo, on Friday the 4th of November 2016, his parents have come to visit them. Tokasa's family having disapproved it he has left Namulomulo with his parents on the 5th of November 2016, and since then never returned home.
 - x) In cross examination, the accused admits that Tokasa's family treated him well by giving him a land and allowing him to stay. However, he states that not all the members of Tokasa's family treated him bad.
30. That is a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
31. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence have been proven beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements
32. The Accused has indicated his stance through his cross-examination done from the PW1 and the other witnesses; it is that he did not commit the alleged act.

With the submission of the accused's stance, one of the three situations given below would arise;

- (i) You may accept his stance and, if so your opinion must be that the accused is 'not guilty'.

- (ii) Without necessarily accepting his stance you may think, 'well what he suggests might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. The situation would then be that you should still consider whether the prosecution has proved all the elements beyond reasonable doubt.
33. Any re-directions?
34. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. You have copies of the document tendered as the exhibit "PE 1". When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.
35. Your opinion should be whether the accused is guilty or not guilty.


Chamath S. Morais
JUDGE



Solicitors for the State : **Office of the Director of Public Prosecutions, Suva**
Solicitors for the Accused : **Legal Aid Commission, Suva**