

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 371 OF 2016S

STATE

vs

1. APOROSA ROBAIGAU
2. MARIA ROBAIGAU

Counsels : Ms. K. Semisi for State
Mr. A. Qetaki for Accused No. 1
Mr. S. Valenitabua for Accused No. 2

Hearing : 14, 15 and 16 May, 2018

Summing Up : 18 May, 2018

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentleman 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 accuseds. There is no obligation on the accuseds to prove their 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 accuseds' guilt, before you can express an opinion that they are guilty. If you have any reasonable doubt so that you are not sure about their guilt, then you must express an opinion, that they are 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 accuseds 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:

///) *On count no.1 did Accused No 1, between 1 to 31 August 2016, at Nasiru in the Central Division, rape the complainant (PW1)?*

- (ii) *On count no. 2, did Accused No. 2, between 1 to 31 August 2016, at Nasinu in the Central Division, aid and abet Accused No. 1, rape the complainant (PW1) as alleged in count no. 1?*
- (iii) *On count no. 3, did Accused No.1, between 1 to 31 August 2016, at Nasinu in the Central Division, rape the complainant (PW1) by inserting his fingers into her vagina, without her consent?*
- (iv) *On count no. 4, did Accused No.1, between 1 to 31 August 2016, at Nasinu in the Central Division, sexually assault the complainant (PW1), by kissing her mouth?*
- (v) *On count no. 5, did Accused No. 1 between 1 and 31 August 2016, at Nasinu in the Central Division, indecently annoy the complainant (PW1) by showing her his penis?*

E. THE OFFENCES AND THEIR ELEMENTS

9. In counts no. 1 and 3, Accused No. 1 was charged with "rape", contrary to sections 207(1), (2)(a) and (2)(b) of the Crimes Act 2009. Because this offence is more serious than the others, we will discuss it first. For Accused No.1 to be found guilty, 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 fingers penetrated the complainant's vagina (count no. 3); and**
 - (iii) **without her consent; and**
 - (iv) **the accused knew, she was not consenting to (i) or (ii) above, at the time.**
10. In law, the slightest penetration of the complainant's vagina by the accused's penis (count no. 1), or by the accused's fingers (count no. 3), is sufficient to satisfy element no. 9(i) or 9(ii), as described in paragraphs 9(i) and 9(ii) above.
11. Consent is "to agree freely and voluntarily" and the person must have the necessary mental capacity to give the consent, and the submission without physical resistance shall not alone constitute consent. If consent was obtained by force, threat, intimidation, fear of bodily harm, by exercise of authority or by trickery, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent given was conditional on the performance of an act after the sex, and that condition was not satisfied, the original consent is deemed to be no consent. Full consent to the act must be given by the complainant.

12. The prosecution must also make you sure that the Accused knew the complainant was not consenting to her vagina been penetrated by his penis (count no. 1) or by his fingers (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:
13. Count no. 2 involved Accused no. 2. She is charged with "aiding and abetting" Accused No. 1 rape the complainant (PW1), as alleged in count no.1, contrary to section 45, 207 (1) and (2)(a) of the Crime Act 2009. For Accused No. 2 to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) **Accused No. 2 aided and abetted Accused No. 1;**
 - (ii) **to rape the complainant; and**
 - (iii) **she intended (i) and (ii) above.**
14. In the **Oxford Advance Learner's Dictionary**, 6th edition, Oxford University Press, 2002, the word "aid" means "to help somebody to do something, especially by making it easier" and "aid and abet" means "to help somebody to do something illegal or wrong". In the same dictionary, the word "abet" means "to help or encourage somebody to do something wrong". So, the prosecution must make you sure that Accused No. 2 helped Accused No. 1 rape the complainant at the material time, and she intended the same. The meaning of "rape" is as defined in paragraphs 9, 10, 11 and 12 hereof.
15. In count no. 4, Accused No. 1 was charged with sexually assaulting the complainant, contrary to section 210 (1) of the Crimes Act 2009. For Accused no. 1 to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) **the Accused**
 - (ii) **indecently and**
 - (iii) **unlawfully**
 - (iv) **assaulted**
 - (v) **the female complainant**
16. 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.

17. 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, an older man kissing a 14 year old girl, without her consent, would be indecent.

18. In count no. 5, Accused No. 1 was charged with "indecently annoying the complainant (PW1)", by showing his penis to her, with an intent to insult her, contrary to section 213 (1)(a) of the Crimes Act 2009. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements

- (i) **the accused**
- (ii) **with intent to insult the modesty of the complainant**
- (iii) **exhibits his penis to her**
- (iv) **intending her to see it**

The offence is basically self-explanatory.

19. We had discussed the counts both Accuseds were charged with in the information. With reference to count no. 1 (rape), if you find accused no. 1 not guilty as charged, you may have to consider the lesser offence of "defilement of a young person between 13 and 16 years", contrary to section 215 (1) of the Crimes Act 2009. In law, a person may be convicted of a lesser offence, although he was not formally charged with the same. For accused no. 1 to be found guilty of defilement, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) **the accused's penis penetrates the complainant's vagina; and**
- (ii) **the complainant was above 13 but under 16 years old, at the time; and**
- (iii) **he intended (i) and (ii) above.**

"Penetration" has the same meaning as described in paragraph 10 hereof. Under the offence of defilement, "consent" by the complainant is no defence, and thus irrelevant. The only defence available was that the accused had reasonable cause to believe, and did in fact believe that the complainant was 16 years old or above, at the time. The prosecution must also make you sure that the accused intended to defile the complainant.

20. If you find Accused no. 1 guilty of the offence of defilement, you will have to consider accused no. 2's case. If Accused no. 1 was not guilty of rape, as alleged in count no. 1 but guilty of

defilement: then Accused no. 2 would not be guilty of aiding and abetting accused no. 1 commit rape, as alleged in count no. 1. As previously stated, a person could be convicted of a lesser offence, although she was not formally charged with the same. Would she be guilty of aiding and abetting accused no.1 defile the complainant? To answer this question you will have to ask yourselves the following questions. Did she help accused no.1 defile the complainant, at the material time? Did she intend to do the same? If your answer is yes, she will be guilty of aiding and abetting accused no. 1 defile the complainant. If your answer is no, she will not be guilty of aiding and abetting accused no. 1 defile the complainant. It is a matter entirely for you.

21. There are 5 counts in the information. You must consider them separately in the light of the total evidence given at the trial, and you must come to a considered separate decision on each of them.

F. THE PROSECUTION'S CASE

22. The prosecution's case were as follows. In August 2016, Accused no. 1 was 66 years old. He was married to Accused No. 2, who was 60 years old. The couple resided at Tuirara in the Nasinu area. They have 6 children. At the time of the alleged incident, the couple were living with a daughter and her young son. The complainant (PW1) was 14 years old in August 2016. She was a Form 3 student at Ratu Sukuna Memorial School, at the time. She resided at Tuirara with her father, two young sisters, her uncle and aunty. PW1's father was unemployed and receives Social Welfare assistance and support from the uncle. PW1's family and the accused couple had been neighbours for more than 10 years. They knew each other and the houses were 10 footsteps apart.
23. According to the prosecution, accused no. 2 visited PW1's family house sometime in August 2016. She allegedly asked PW1's father for PW1 to come and clean their house in exchange for some pocket money. According to the prosecution, her father agreed. PW1 then went to the couple's house and cleaned the same. While cleaning the house, Accused no. 1 allegedly came into the same and sat in a settee. Accused no. 2 then allegedly told accused no. 1 to wink at PW1. He allegedly did the same. Later, accused no. 2 allegedly closed the front door, and pulled down the house's curtains. Accused no. 2 then allegedly told accused no. 1 to show PW1 his penis. He allegedly did the same and PW1 saw his penis (count no. 5).

24. According to the prosecution, accused no. 1 then allegedly took PW1 to a bed. Accused no. 1 allegedly made PW1 lie on the bed. According to the prosecution, accused no. 2 also lay next to PW1 on the bed. Accused no. 1 allegedly took off his clothes. Accused no. 1 then allegedly asked PW1 for sex in exchange for some money. PW1 allegedly agreed. Accused no. 1 then allegedly kissed PW1 on the mouth (count no. 4). Accused no. 1 then took off PW1's tights. He then allegedly inserted his fingers into PW1's vagina (count no. 3). He then allegedly inserted his penis into PW1's vagina (count no. 1). PW1 said, it was painful,, PW1 told accused no. 1 to stop, but Accused no. 2 allegedly told her to relax as the sex was about to finish. Accused no. 2 allegedly told accused no. 1 to move up and down on PW1 (count no. 2). After the sex, they all dressed up. Accused no. 2 allegedly gave PW1 \$10 for cleaning the house. Accused no. 1 never gave PW1 any money after the alleged sex. Two weeks later, accused no. 1 gave PW1 \$20 for her not to tell anyone about the incident. For the following six weeks, accused non 1 allegedly gave PW1 a further \$60.

25. The matter was reported to police. An investigation was carried out. Both accuseds were caution interviewed by police. Accused no. 1 was taken to Nasiru Magistrate Court on 3 October 2016 charged with raping the complainant. Accused no. 2 followed accused no. 1 on 5 October 2016, charged with aiding and abetting accused no.1 rape the complainant. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find both Accuseds guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

26. On 14 May 2018, the information was put to the Accuseds, in the presence of their counsels. Both Accuseds pleaded not guilty to the charges. In Accused no. 1's case, he pleaded not guilty to count no. 1, 3, 4 and 5. Accused no. 2 pleaded not guilty to count no. 2. They denied the allegations against them. When a prima facie case was found against each of them, at the end of the prosecution's case, wherein they were called upon to make their defence, they choose to give sworn evidence, in their defence. Accused no. 1 called no witness, while accused no. 2 called his daughter (DW3), as her only witness. The above were the Accuseds' rights.

27. The Accuseds' cases were simple. Accused no.1, on oath, denied the complainant's allegations against him. He said, he heard her evidence in court, but they were all untrue. He said he did not rape her as alleged in count no.1 and 3, he did not sexually assault her as

alleged in count no. 4, and did not indecently annoy her as alleged in count no. 5. He admitted to giving money to the complainant to buy food for her family, as they were poor. He said, he had known the complainant and her family for more than 10 years. He said, the complainant came to his house in August 2016 and left again. He said, he does not know why the complainant was making these allegations against him. He said, he knew she was 14 years old and was a form 3 student at Ratu Sukuna Memorial School.

28. Accused No. 2, on oath, also denied the complainant's allegation against her. She said, from the 1 to 31 August 2016, she was not at their house in Tuirara, but was staying with her daughter (DW3) at Vatuwaqa. She said, she was babysitting DW3's five children. She said, PW1 never clean their house in August 2016. She said, she never give her \$10 in August 2016. She said, she knew PW1 was 14 years old and schooling at Ratu Sukuna Memorial School. She said, PW1's family and her family had known each other for 10 years, and they were neighbours. She said, she knew PW1's father, and knew they were in financial difficulties and relied on Social Welfare for support.
29. Accused no. 2 called her daughter (DW3) as her witness. She confirmed Accused no. 2 was staying with her at Vatuwaqa in August 2016. DW3 confirmed her mother (Accused no. 2) was babysitting her children. However, when cross-examined, she said Accused no. 2 was at her home from Tuesday to Saturday afternoon, and was at Tuirara on Sunday and Monday.
30. Because of the above, the accuseds are asking you, as assessors and judges of facts, to find them not guilty as charged. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

31. 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:

32. For Accused No. 1, there was no "Agreed Facts" between the parties. For Accused no. 2, there was an "Agreed Facts" between the parties, dated 6 April 2018. There are four paragraphs of "Agreed Facts". Because the parties are not disputing the same, you may take it that the prosecution had proven those facts beyond a reasonable doubt, and you may treat the same as established facts.

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

33. The State's case against both accuseds rest fundamentally on the sworn evidence of the complainant (PW1). A crime can be proven on the sworn evidence of a single witness, if the trier of fact, in this case you the assessors, accept the same. You have heard the evidence of the complainant (PW1) in the courtroom on 14 May 2018 and I am sure her evidence is still fresh in your minds. You have observed her demeanour in the courtroom, and you have watched the way she had answered counsels' questions. I will not bore you with the details of her evidence, but I will summarize to you the salient points regarding her allegations against both accuseds.
34. As far as the allegations of rape against accused no. 1 in count no. 1 and 3, and the elements of the offence as discussed in paragraphs 9, 10, 11 and 12 hereof, the complainant admitted accused no. 1's penis penetrated her vagina, at the material time (count no.1); and that the accused's fingers penetrated her vagina also, at the material time (count no.3). So, it would appear that, on the complainant's own sworn evidence, if you accept the same, the first element of rape as discussed in paragraph 9(i) and 9(ii) appeared satisfied.
35. On the second element of rape, as discussed in paragraph 9(iii) hereof, the complainant said, she consented to the penis and fingers penetration to her vagina at the time because accused no. 1 promised to pay her money afterwards. She said, she was not paid any money by Accused no. 1 after the sex that day. However she said, she was given \$20 two weeks later by Accused no. 1 and a total of \$60 six weeks thereafter. On the issue of whether the money is to be paid immediately after the sex or sometimes later, and the amount involved, was not clear cut from the complainant's evidence. On Accused No.1's sworn evidence, he admitted giving the complainant money every now and then to assist her buy food for her family. You will have to decide, after considering all the evidence, what was the actual terms of the agreement between the two, that is, money to be paid immediately after the sex, or sometimes later. You

will note the complainant's evidence that the \$20 given two weeks later after the alleged incident, was given to keep her silent. In any event, if you decide that the complainant consented to the sex acts in count no. 1 and 3, then accused no. 1 would not be guilty of count no. 1 and 3. It could also mean that accused no. 1 would not be guilty of count no. 4 and 5, which were preliminary acts (that is, showing penis and kissing on the mouth) prior to the sex acts in count no. 1 and 3. Consent by the complainant is a complete defence to the offences in count no. 1, 3, 4 and 5.

36. If you find that the complainant consented to the sex acts in count no. 1, 3, 4 and 5, then accused no. 2 would not be guilty of aiding and abetting accused no. 1 rape the complainant as alleged in count no. 1, because consensual sex between a 14 year old girl and a 66 year old man is not rape.
37. Assuming that you find the complainant did not consent to the sex acts alleged in count no. 1 and 3, then you will have to consider the third element of rape, as discussed in paragraphs 9(iv) and 12 hereof. You will have to ask yourselves the following question. Did the accused know the complainant was not consenting to the sex acts alleged in count no. 1 and 3? You will have to consider the whole evidence when answering the above question. If he knew she was not consenting to the sex acts alleged in count no. 1 and 3, then accused no. 1 would be guilty of count no. 1 and 3; if it's otherwise, he would not be guilty as charged. It is a matter entirely for you.
38. If accused no. 1 is found guilty as charged on count no. 1 and 3, then accused no. 2 could be found guilty of count no. 2, if she aided and abetted accused no. 1 rape the complainant as alleged in count no. 1. You will have to consider the whole evidence and decide whether or not accused no. 2 aided and abetted Accused no. 1 rape the complainant in count no. 1. If she did, she would be guilty as charge in count no. 2. If otherwise, she would not be guilty as charged. It is a matter entirely for you.
39. If you find that the complainant did not consent to accused no. 1 kissing her on the mouth, or exposing his penis to her, then accused no. 1 could be found guilty of count no. 4 and 5. If you find she consented to the alleged acts in count no. 4 and 5, then accused no. 1 could not be found guilty of count no. 4 and 5. Consent is a defence to the allegations in count no. 4 and 5. In any event, it is a matter entirely for you.

(d) The Accused's Cases:

40. I have summarized the accuseds' cases to you from paragraphs 26 to 30 hereof. I repeat the same hereof. The accuseds basically denied the allegations against them on oath. You have watched and heard their sworn evidence in court. You observed their demeanour in the courtroom. If you accept their sworn evidence, then you will have to find them not guilty as charged on all counts. If otherwise, you will have to assess the strength of the prosecution's case and make a decision accordingly. It is a matter entirely for you.

(e) The Need To Consider All the Evidence:

41. Three witnesses gave evidence for the prosecution:
- (i) The complainant (PW1);
 - (ii) Doctor Elvira Ongbit (PW2); and
 - (iv) WDC 2571 Sereima Radrodra (PW3)
42. Three witnesses gave evidence for the defence:
- (i) Accused No. 1 (DW1);
 - (ii) Accused No. 2 (DW2); and
 - (iii) Ms. Laisa Cowin (DW3).
43. The prosecution tendered one exhibit:
- (i) Complainant's Medical Report – Prosecution Exhibit No. 1
44. Altogether, there are 6 witnesses on whose evidence you will have to make a decision. You will have to compare and analyse all the above evidence. If I haven't mention a piece of evidence you consider important, 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/her evidence, in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his/her evidence, in your deliberation. You are the judges of facts.

I. SUMMARY

45. Remember, the burden to prove the accuseds' guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accuseds, at any stage of the trial. The accuseds are not required to prove their innocence, or prove anything at all. In fact, they

are 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 accuseds' guilt, you must find them 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 accuseds' guilt, you must find them not guilty as charged.

46. Your possible opinion are as follows:

(i)	Count No. 1:	Rape	:	Guilty or Not Guilty
	Alternative	If not guilty of rape; Lesser offence of Defilement	:	Guilty or Not Guilty
(ii)	Count No. 2:	Aiding and Abetting Rape	:	Guilty or Not Guilty
	Alternative	If not guilty of aiding and Abetting rape; lesser Offence of Aiding and Abetting defilement	:	Guilty or Not Guilty
(iii)	Count No. 3	Rape	:	Guilty or Not Guilty
(iv)	Count No. 4	Sexual Assault	:	Guilty or Not Guilty
(v)	Count No. 5	Indecently Annoying a Person	:	Guilty or Not Guilty

44. 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 State :
Solicitor for Accused No. 1 :
Solicitor for Accused No. 2 :

Office of the Director of Public Prosecution, Suva.
Legal Aid Commission, Suva
Mr. S. Valenitabua, Barrister and Solicitor, Suva