

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No: HAC 72 of 2017

BETWEEN : THE STATE

AND : APENAI KALOUSESE KINILOVO

Counsel: Ms D Kumar for the State
Mr J Korotini and Ms K Boseiwaqa for the Accused

Date of Hearing: 20 - 21 August 2018

Date of Summing Up: 22 August 2018

SUMMING UP

- [1] Madam Assessors and Gentleman Assessor, it is now my duty to sum up the case to you. We have differing roles in this trial. I have to give you directions on the law and you must accept those directions. You are to decide the facts applying those directions and to give me your opinions as to the Accused's guilt or innocence.
- [2] In going through the evidence I may express an opinion. If you do not agree with that opinion, you are free to ignore it and to form another view of that piece of evidence. I may omit some evidence which you think significant. Nonetheless you may give that evidence such weight as you consider appropriate. You are free to form your own opinions.

- [3] At the end of this summing up, and after you have given your individual opinions, the final decision on the facts rests with me. I am not bound to conform to your opinions. However in arriving at my judgment I shall place much reliance upon your opinions.
- [4] The burden of proof rests throughout the trial upon the prosecution. In our system of justice there is a presumption of innocence in favour of an Accused. The prosecution brings the charge against the Accused. Therefore it is for the prosecution to prove the charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.
- [5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty. If you entertain a reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of the charge.
- [6] The Accused elected to give evidence. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
- [7] You must decide this case upon the evidence presented to you. If a witness was not called you must not speculate the reasons why the witness was not called. You must only consider evidence which were led in the trial. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [8] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state his or her individual opinions orally on the charge against the Accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.
- [9] However it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions.

- [10] Those opinions must be based solely upon the evidence. Evidence consists of sworn testimony of the witnesses, what each witness has told the court in the witness box, as well as the exhibits tendered in court.
- [11] Neither speculation nor theories of one's own constitute evidence. Media coverage, idle talk, or gossip, are similarly not evidence. Put out of your mind when considering your opinions, anything you may have read in the newspapers about this case. Focus solely on the evidence which you have seen, heard, or examined in this court.
- [12] This summing up is not evidence either, nor are counsel's opening or closing addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [13] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness's answer is evidence. If he or she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [14] In arriving at your opinions, use the common sense you bring to bear in your daily lives, at home and at work. Observe and assess the witnesses' evidence and demeanour together with all of the evidence in the case. You can accept part of a witness's testimony and reject other parts. A witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and be wide of the mark about another.
- [15] If you have formed a moral opinion on the conduct alleged in this case, put that to one side. Consistent with your oath, you should put away both prejudice and sympathy. Approach your assessment of the evidence dispassionately. Bring a cool detachment to your task of examining whether the case against the Accused has been proved before you, proved with evidence led by the prosecution.
- [16] I turn now to deal with what the prosecution must prove. The Accused is charged with one count of defilement of a young person between 13 and 16 years of age. To prove defilement, the prosecution must prove beyond reasonable doubt that the Accused had sexual intercourse with the complainant, that is, he penetrated the vagina of the

complainant with his penis and that at the time of sexual intercourse the complainant was between 13 years and 16 years of age. It is not in dispute that on 17 October 2017 the Accused had sexual intercourse with the complainant. At the time of the sexual intercourse, the complainant was 15 years old. She was born on 12 October 2002. Her birth certificate is in evidence and marked as PE1.

[17] If you feel sure that the Accused had sexual intercourse with the complainant on 17 October 2017 (which is not in dispute) and that the complainant was between 13 and 16 years of age at the time of the sexual intercourse, then you must consider whether the Accused had reasonable cause to believe and did in fact believe that the complainant was of or above the age of 16 years when he had sexual intercourse with her on 17 October 2017. The law is that that is a matter for him to prove on all the evidence; but whenever the law requires the Accused to prove something, he does not have to make you sure of it. He has to show that it is probable, which means more likely than not, that he had a reasonable cause to believe and did in fact believe that the complainant was more than 16 years old . If you decide that probably he did had a reasonable cause to believe and did in fact believe that the complainant was more than 16 years old, you must find him not guilty. If you decide that he did not, then you must find him guilty.

[18] The issues for you to consider are:

1. Did the Accused have a reasonable cause to believe that the complainant was more than 16 years of age when he had sexual intercourse with her on 17 October 2017?
2. Did the Accused did in fact believe that the complainant was more than 16 years of age when he had sexual intercourse with her on 17 October 2017?

[19] The complainant in her evidence said that on the night in question she was not expecting to meet the Accused. She met him coincidentally when she went outside her dormitory to meet another boy she had known from the church. The Accused introduced himself as Pena and showed interest in her. He showed her his photos on his mobile phone. They had a conversation but they did not talk about her age. He did not ask her about her age. After having a conversation he suggested to her that they

move to the toilet to avoid being noticed due to the lights that were coming from his mobile phone. They went inside the toilet where he showed her more photos and both kissed. She said that the Accused asked her to lie down on the floor but she was reluctant. They then moved to a dormitory and had sexual intercourse.

[20] The Accused in his evidence said he was not expecting to meet the complainant when he went to the girls' dormitory on the night of 17 October 2017. He was 22 years old at the time. He said that the complainant was introduced to him by another girl. At first he was reluctant to meet the complainant but eventually agreed to have a conversation with her. They spoke and he showed his photos on his mobile phone. He said that she told him she was 18 years old and in Form 5. He said he believed she was 18 years old by looking at her physical appearance and by the way she was conducting herself. They tried to have sexual intercourse in the toilet but she was reluctant as the toilet was dirty. He said that she led him to a vacant dormitory where they had sexual intercourse. After having sexual intercourse she went to wash herself and then he went back to his village. He said he told the police in his caution interview that the complainant had told him she was 18 years old and that he did not know she was 15 years old when he had sexual intercourse with her. He said that he told the police the allegation was true because he was afraid as this was the first time he had encountered police over an allegation.

[21] What weight you want to attach to the Accused's evidence is a matter for you. If you believe his evidence that the complainant led him to reasonably believe that she was more than 16 years of age by lying about her actual age and by her physical appearance and by the way she conducted herself on the night in question and that the Accused did in fact believe that the complainant was over the age of 16 years, then you must find him not guilty.

[22] But if you reject his evidence and believe the evidence of the complainant that she did not have a conversation about her age with the Accused and from her physical appearance and behaviour before the sexual intercourse it was not probable that the Accused reasonably believed and did in fact believe that the complainant was of or over the age of 16 years, then the proper opinion is guilty.

[23] Your opinions would be either guilty or not guilty. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them. Please now retire to deliberate on your opinions.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Accused