

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

CRIMINAL CASE NO. HAC 425 OF 2018

BETWEEN : **STATE**

AND : **JOSEVATA WERELAGI**

Counsel : **Ms S Tivao with Ms L Bogitini for the State**
Ms S Nasedra with Ms T Kean for the Accused

Date of Hearing : **25 – 29 November 2019, 2 – 4 December 2019**

Date of Summing Up: **5 December 2019**

SUMMING UP

Madam Assessors

- [1] It is now my duty to sum up to you. In summing up the case I will direct you on matters of law which you must accept and act upon. You must apply the law that I direct you on in this case. On the facts however, it is for you to decide what facts to accept and what facts to reject. If, in the course of this summing up, I express my opinion on the facts, or if I appear to do so, it is entirely a matter for you whether you accept what I say or form your own opinions.
- [2] Both Counsel have made submissions to you at the end of the trial, about how you should find the facts of the case. That is their right. But you are not bound by closing submissions. If what they have said appeals to your own sense of judgment, then you may accept them. You are the representatives of the community at this trial and you must decide what really happened in this case.

- [3] You will not be asked to give reasons for your opinions but merely your opinions themselves. Your opinions need not be unanimous although it would be desirable if you could agree on them. Your opinions are not binding on me but they will carry great weight with me when I come to deliver my judgment.
- [4] On the question of proof, I must direct you as a matter of law, that the prosecution bears the burden of proving the accused's guilt. That burden remains throughout the trial upon the prosecution and never shifts. There is no obligation upon the accused person to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proven guilty.
- [5] The standard of proof in a criminal case is one of proof beyond reasonable doubt. This means that you must be satisfied so that you feel sure of the guilt of the accused person before you can express an opinion that he is guilty. If you have any reasonable doubt about the guilt of the accused you must express an opinion that he is not guilty. You may only express an opinion of guilt if you are satisfied so that you are sure that he committed the offences alleged.
- [6] Your deliberations must be based solely and exclusively upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you may have heard or read about the case outside this court. Your duty is to apply the law to the evidence you have heard.
- [7] 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.
- [8] The Accused is charged with five counts, which includes an alternative count. You must consider each count separately and you must not assume guilt on all counts simply because you have assumed guilt on one. The alternative count is to count one. You must

only consider the alternative count if you reach an opinion that the Accused is not guilty on count one.

[9] On count one the Accused is charged with aggravated sexual servitude. The particulars of the charge allege that the Accused between 18 July 2015 and 22 July 2015 by the use of threats or force caused the complainant, a 15-year old child to enter into or remain in sexual servitude with intent to cause that sexual servitude.

[10] A person is guilty of sexual servitude if his or her conduct causes the complainant to enter into or remain in sexual servitude and who intends to cause, or is reckless as to causing that sexual servitude.

[11] The offence is aggravated if it is committed against a person under 18.

[12] Sexual servitude is the condition of a person who provides sexual services and who, because of the use of force or threats is not free to cease providing sexual services or is not free to leave the place or area where the person provides sexual services.

[13] Sexual service means the commercial use or display of the body of the person providing the service for the sexual gratification of others.

[14] Threat means

(a) A threat of force; or

(b) A threat to cause a person's deportation or

(c) A threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person.

[15] In the context of count one, the prosecution must prove the following elements beyond reasonable doubt.

[16] Firstly, it must be proved that the Accused by use of force or a threat of force caused the complainant to enter or remain in a condition to commercially use or display her body for the sexual gratification of others.

- [17] Secondly, it must be proved that the Accused intended to cause the complainant to enter or remain in a condition to commercially use or display her body for the sexual gratification of others. Intention in respect to a conduct is proven if the Accused means to engage in that conduct, that is, cause the complainant to enter or remain in a condition to commercially use or display her body for the sexual gratification of others.
- [18] Thirdly, it must be proved that the complainant was under the age of 18.
- [19] If you are satisfied beyond reasonable doubt that the Accused by use of force or a threat of force caused the complainant to enter or remain in a condition to provide a commercial sexual service and that he intended to cause that sexual servitude then the proper opinion would be guilty. But if have reasonable doubt on the use of force or threats or the intention of the Accused, then you must give an opinion that he is not guilty. If you find the Accused guilty of sexual servitude then you do not have to consider the alternative count. But if you find the Accused not guilty of sexual servitude, then you must consider the alternative count.
- [20] The alternative charge is buying a minor under the age of 18 years for immoral purposes. The charge allege that the Accused between 18 July 2015 and 22 July 2015 obtained possession of the complainant , a 15 year old girl, with the intention to employ or use her for the purpose of prostitution. The offence has three elements that the prosecution must prove beyond reasonable doubt.
- [21] Firstly, the prosecution must prove that the Accused obtained possession of the complainant. The word obtains means to acquire or secure. Possession means power or control over something or a person. The prosecution must make you feel sure that the Accused had acquired and controlled the complainant at the time of the allegation.
- [22] Secondly, the prosecution must prove that the complainant was a minor under age of 18 years at the relevant time. A minor or a child is a person under the age of 18 years.
- [23] Thirdly, the prosecution must prove that when the Accused took control of the complainant he did so with the intention to either employ or use her for prostitution.

Prostitution involves sex in return for a payment of any nature. You must feel sure that when the Accused took control of the complainant he intended to employ or use her for prostitution.

[24] The law is that any common prostitute who obtains possession of a minor under the age of 18 years shall, until the contrary is proved, be deemed to have obtained possession of the minor with the intention to employ or use the minor for prostitution. If you accept the Accused's admission that he is a prostitute as true and if you are sure that he took control of the complainant at the relevant time, then you may presume the Accused did so with the intention to employ or use her for prostitution unless the contrary is proved by the Accused on the balance of probabilities, that is, it is more likely than not that he did not intend to employ or use the complainant for prostitution. That is a matter for you to consider.

[25] On counts two, three and four, the Accused is charged with domestic trafficking in children. The charges allege that on three separate dates, that is, 18th, 20th and 22nd July 2015, the Accused facilitated the transportation of the complainant a 15-year old girl from Nausori to Rewa Street and that he did so with the intention that the complainant will be used to provide sexual services.

[26] To prove domestic trafficking in children, the prosecution must prove three elements beyond reasonable doubt.

[27] Firstly, the prosecution must prove that on the alleged dates the Accused facilitated the transportation of the complainant from one place to another in Fiji. Facilitate means to make a process or action easy or easier. The prosecution alleges that the Accused made it easier for the complainant to be transported from Nausori to Rewa Street by accompanying her in a vehicle arranged by him. If that is what occurred then the element of facilitation has been proven. That is matter for you to determine on each count of domestic trafficking in children.

[28] Secondly, the prosecution must prove that the complainant was under the age of 18 years at the relevant times.

- [29] Thirdly, the prosecution must prove that in facilitating that transportation the Accused intended the complainant will be used to provide sexual services during or following the transportation to that other place. An accused has intention with respect to result if he means to bring it about or is aware that it will occur in the ordinary course of actions. For example, if I intent to cause physical injury to someone by throwing a rock at him I must mean to cause the injury when I throw the rock or I am aware that the injury will occur when I throw the rock. So for the Accused to have the relevant intention you must feel sure that when he facilitated the transportation of the complainant from Nausori to Rewa Street he either intended the complainant will be used to provide sexual services or was aware that the complainant will be used to provide sexual services at Rewa Street.
- [30] In respect to each charge, it is for you to decide the intent or intention by considering what the Accused did or did not do and by what he said or did not say. You should look at his actions before, at the time of and after the alleged offences. All these things may shed light on his intention at the relevant times.
- [31] On the basis of these legal principles that I have explained to you, you must consider the evidence in this case and decide what has been proved. As I said earlier, it is your job to assess the credibility of the witnesses. You decide who is truthful and to be believed. However, there are some comments that I make on a few items of evidence.
- [32] The caution interview of the Accused is in evidence. The Record of Interview is Prosecution Exhibit 3. The statements made by the Accused in his interview are evidence for and against him. The defence says that the incriminating statements were not made by the Accused but were fabricated by the police. The defence says therefore you should not put any weight on the incriminating statements when considering the charges against the Accused. What weight you attach to those statements is entirely a matter for you but before you rely on those statements you must feel sure that the Accused did make the statements as opposed to being fabricated and that the statements are true.
- [33] Finally, there is the evidence of the Accused himself. I must remind you that when an accused gives evidence he assumes no onus of proof. That remains on the prosecution

throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

[34] You will generally find that an accused gives an innocent explanation and one of three situations then arises:

You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offences.

Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is a reasonable doubt in your minds and so again your opinion must be not guilty.

The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offence. The situation would then be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be guilty.

[35] I now remind you of the evidence of the witnesses called at the trial. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

[36] In this case the prosecution and the defence have agreed to certain facts. You have been given copies of the Agreed Facts. The Agreed Facts are part of the evidence and you should accept these Agreed Facts as accurate and the truth.

[37] The prosecution called three witnesses. The first witness was the complainant. Now she is an adult but in 2015 when the allegations arose she was about 15 years of age. She told the court that in July 2015 she was residing with her mother at Vuci Road in Nausori.

[38] The complainant said that she first met the Accused in the evening of 18 July 2015 in Nausori town. This was a Saturday evening. After a conversation she accompanied him to Samabula for a meal. They first went to Manoca in a taxi flagged down by him. From Manoca they returned to Nausori and boarded a minivan near the old bridge. The Accused told her to get on the van. She accompanied the Accused and both got off at BSP, Samabula. She did not pay the fare. The Accused paid the fare.

[39] After getting off the vehicle, they walked down to Gospel bus stop at Rewa Street. She saw other transgender people at the bus stop. While she was at the bus stop, a man approached them and had a conversation with the Accused. She saw the client pass something to the Accused in his hand and then went behind the bus stop. She was handed a packet of condoms by the Accused and told to follow the client to the vacant house behind the bus stop. She complied because she was afraid of the Accused. She said she was afraid of the Accused's appearance, that is, he had a hard face and a hard look.

[40] The complainant said she went to the vacant house and had sexual intercourse with the client. She said she was tired and felt pain and she also had empty stomach. After having sex she returned to the Accused at the bus stop. She said it was the first time for her to be sold on the street. She gave two reasons for not walking away from the situation. She said she wanted money to repay her aunty for raising her and that she was also afraid of the Accused in case he might do something like assault or kill her because he had sold her for money. She returned to the Accused at the bus stop on his instruction. She knew the client had given money to the Accused for having sex with her. She said she received a portion of money from the Accused when she returned to the bus stop after having sex but she cannot recall the exact amount.

[41] From the bus stop she accompanied the Accused to the Samabula Hot Bread Kitchen by foot on his instruction. While they were at the bakery, a taxi driver approached her and after a conversation she boarded the taxi and went to a secluded location where she had

sex with the driver in exchange for money. She said although she was tired she had sex so that she could get money for her and the Accused. She said she hid the money in her bra as she was afraid that the Accused might take all of it. She was dropped off at the bakery where the Accused was waiting. He had told her to come back to him. She said she returned to him because she was afraid of him. She said she followed his instructions because she feared his appearance. He asked her for money she had earned and she gave some of it to him.

[42] From Samabula they flagged down a minivan and went to Waila to his place. She was afraid to go back home because she had been missing from home. She accompanied the Accused to Waila because he had told her that he knew her mother well as they have worked together at a saloon. When they arrived at Waila she slept at his neighbour's house after a shower.

[43] On Sunday (19 July 2015) the complainant spent the day with the Accused's family at his home.

[44] The following evening, 20 July 2015 (Monday), the Accused groomed the complainant by doing her hair and makeup. She wore a mini skirt and a tight top chosen by him. She thinks he groomed her to make her look older. They left home at about 7pm and walked to the main road where they boarded a vehicle and arrived at Rishikul bus stop. She got on the vehicle because the Accused told her that he knew the driver. After getting off at Rishikul bus stop, the Accused flagged down a minivan and told the complainant to board the van. He accompanied her on the van and both got off at Samabula and walked to the Gospel bus stop at Rewa Street.

[45] While they were at the bus stop, a vehicle (Pajero) stopped. She saw the Accused had a conversation with the driver, after which he handed her a condom and told her to get on the vehicle. She accompanied the driver to a motel and had sex in exchange for money. She was dropped off at the same bus stop after sex where the Accused was waiting. The Accused told her to come back to the same spot. She shared some of the money that she got from the client with the Accused while she hid some in her bra for herself as she was afraid that the Accused might take all of it.

- [46] While she was still at Rewa Street, another vehicle stopped. She got on the vehicle and went to secluded location and had sex with the driver in exchange for money. When she returned, she gave a portion of money to the Accused. They then walked to the main road at Samabula and boarded a minivan to Nakasi. They got off at Nakasi and after buying fish and chips, they boarded another vehicle to Dilkusha.
- [47] They got off at Waila Service Station and walked to the Accused's aunt's house. She accompanied the Accused to Waila because she was afraid of him. She was afraid to escape because he had threatened her on the evening of 20 July 2015 when she returned to Rewa Street after sex with the first client (Pajero driver) that evening. She said he threatened her by saying "not to be cunning towards him because he has a lot of transgender friends who can run after her and assault her". She spent the night and the day in Waila with the Accused and his family.
- [48] On the evening of 22 July 2015, the Accused groomed the complainant again in the similar manner as the previous occasion so that they could go back to Rewa Street. They walked to Lelean where they boarded a minivan and got off at Samabula. They returned to the same bus stop at Rewa Street. While they were sitting at the bus stop a twin cab stopped. She heard the driver saying that she looked young but the Accused told him she was not. She heard the Accused telling the driver to take her. She boarded the vehicle and she heard the Accused telling the driver to drop her off at the same spot. The driver of the twin cab took the complainant to a house and had sex with her in exchange for money. After sex he dropped her back at the bus stop where the Accused was waiting. When she got off, the Accused asked her about the money but she lied to him saying the client had given the money to him. She said she was tired of doing the work while he was sitting at the bus stop.
- [49] While they were sitting at the bus stop, a taxi stopped. The Accused passed a condom to her and told her to get on the taxi. She accompanied the driver to a motel and had sex in exchange for money. After sex the driver dropped her off at the same bus stop from where she was picked up. She did not share the money with the Accused.

- [50] When she returned to the bus stop the Accused was waiting. They decided to go to Suva city. They got on a vehicle and came to a nightclub. She was spotted outside a club by a police officer who took her to Totogo Police Station. She said she lied to the police regarding her presence outside the club because she was afraid of the repercussions of going back home after being missing from home.
- [51] In cross examination, the complainant admitted that the Accused did not physically force her to do anything. She said the only threat of assault was made on 20 July 2015 when she returned to the bus stop after having sex with the driver of the Pajero. In re-examination she said she followed the instructions of the Accused because both were looking for money and that she was afraid to go back to her home due to the repercussions for being missing from home.
- [52] The next witness for the prosecution was SC Kelemedi. In the early hours of 23 July 2015, SC Kelemedi spotted the complainant loitering near a club at Caravon Street. The complainant got the officer's attention because she was a small child. He did not see the Accused with the complainant. He took the complainant to Totogo Police Station.
- [53] The third and the final witness for the prosecution was WDC Arieta Buidei. She is the investigating officer in this case. She interviewed the Accused under caution. The Record of Interview is Prosecution Exhibit 3. The interview was conducted in two segments. The first segment was over a period of two days from 11 March 2016 to 12 March 2016. The second segment was conducted on 1 February 2017.
- [54] In the first segment the Accused did not make any incriminating statements. He admitted being involved in prostitution himself but he denied involving the complainant into prostitution. However, in the second segment he admitted some involvement with the complainant but he explained it was done out of care for her after learning of her personal and family circumstances.
- [55] In cross-examination the officer denied fabricating any answers and said she recorded what the Accused told her. She said she overlooked to get the Accused sign the

acknowledgment that he was advised of his rights on two occasions but she said the Accused had put his signature at the bottom of each page.

[56] That is the evidence for the prosecution.

[57] The Accused in his evidence denies the allegations. He said that on the evening of 18 July 2015, he did meet the complainant briefly for the first time in Nausori town when she approached him to inquire about another transgender person. After that inquiry she left him and then he sees her again that same night near a shop at Rewa Street. He said he saw her at the Gospel School bus stop but he did not pay much attention to her as he was with his other transgender friends. He said after a scuffle with an Itaukei man he decided to return home.

[58] The Accused said he was at the Samabula Hot Bread Kitchen when he spotted the complainant getting into a taxi. He saw her next went she returned and got off at a junction near the bakery. He flagged down a minibus and when he was about to board she approached him and suggested they travel together as she was from the same area.

[59] They boarded the minivan and got off at Nabua. From Nabua they boarded another minivan and got off at Nakasi. At Nakasi he bought a serve of fish and chips for her on her request. From Nakasi, they boarded another vehicle. He got off near Lelean and started walking towards Dilkusha when he heard a door slammed.

[60] When the Accused looked back he saw the complainant walking towards him. She appeared unstable to him. She told him that she was going to sleep at her cousin's house in Navuso. They started chatting and that's when he came to know her name. She told him that she was pregnant and that she was having family problems. He told her that he was going to go to his neighbour's house for a drink. She requested to join him to his neighbour's house. He agreed. While drinking at the neighbour's house he did not feel well. He went to vomit outside and when he returned the complainant was nowhere to be seen. He went to his home to sleep just before the sunrise.

- [61] The next time the Accused saw the complainant was in the evening of Sunday when his family woke him up and said there was someone at the door who wanted to see him. He got up and saw it was the complainant. She told him that she slept at the neighbour's house. He introduced her to his family and invited her for dinner that evening.
- [62] She stayed with him until the evening of 20 July 2015 (Monday) when he saw her going through his suitcase and picking an outfit for herself. She told him that she was going home and out of concern for her he accompanied her on a vehicle and dropped her off at a mosque from where she would meet a cousin and go home.
- [63] After dropping her off, he went and did his business and then returned to Nausori. While he was in Nausori, he met the complainant again. He said upon her request he gave her \$3.00 for fare to return home. After that he left for Samabula to do his business.
- [64] The Accused spotted the complainant again in the early hours of 21 July 2015 (Tuesday) at Rewa Street. After a brief conversation both got on a vehicle and returned to his home in Waila. She slept in his house that morning. He spent the day doing at his home doing house chores. The complainant was him. Earlier on Monday night the Accused came to know from his friends that the complainant was Molly's daughter. He knew Molly. They have worked together at a saloon. He confronted the complainant and suggested he was going to take her back to her mother. She was reluctant to go back home. He went to Molly's work to inform her but she was not there. He returned home after advising Molly's work colleague that the complainant was at his home.
- [65] Later that evening the Accused did not see the complainant in his house. He saw the complainant again the next time at the roadside near his home when he was on his way to do his business after 10 pm. She forced herself into a vehicle that he stopped for a ride to Suva. They got off at Rishikul and boarded another vehicle. He got off at Samabula while she continued with her journey. She told him that she was going to see a cousin in Suva.
- [66] After doing his business he returned home in Waila. While he was walking to his home, he spotted the complainant getting off a vehicle at a bowser in Waila. They went home and she slept at his place that day.

- [67] The next day, 22 July 2015 (Wednesday) he woke up at around 1 pm. By that time the complainant had left his home. He said he had given \$3.00 to her earlier that morning when they met at the bowser for her to return home. The next time he saw her was in court when she gave evidence.
- [68] The Accused said he was not aware of her age and that she did tell him of her age. He said he did not read his caution interview because the whole process was overwhelming for him. He said the incriminating answers were not his but were fabricated by the interviewing officer.
- [69] That was the evidence for the defence.
- [70] The prosecution case is substantially depended upon whether you find the complainant to be a truthful witness. Her evidence is that she accompanied the Accused from Nausori to Samabula on his invitation for a meal. When she arrived at Rewa Street she followed his instructions and engaged in sex for money because she wanted money and she was afraid to disobey the Accused's instructions because of his physical appearance. She told the court of the instances she engaged in sex for money while being in the Accused's company between 18 July 2015 and 22 July 2015. Her evidence is that on all instances the Accused facilitated the transportation from Nausori to Rewa Street.
- [71] The defence case is of denial of the charges. The Accused's evidence is that any association with the complainant arose out of care and concern for her when he learnt of her predicament.
- [72] On each charge, you must feel sure that the complainant was a minor under the age of 18 years. The date of birth or age of the complainant is not in dispute. The official birth certificate of the complainant is Prosecution Exhibit 1. The complainant was born on 22 April 2001. She was about 15 years of age when the allegations arose in July 2015. If you accept the date of birth of the complainant as true then she was about 15 years of age and a minor at the relevant time. The Accused in his evidence has said he was not aware of the age of the complainant but he has not suggested that he had a reasonable and honest belief and did in fact believe that she was over 18 years of age at the relevant time. So

you may think the prosecution has proved in respect of each charge the complainant was a minor under the age of 18 years. That is a matter for you to consider.

- [73] If you feel sure that the complainant was a minor under the age of 18 years at the relevant time, then go on to consider the physical and mental elements required for each charge.
- [74] On the charge of sexual servitude (count one), you must feel sure that the Accused by use of force or a threat of force caused the complainant to enter or remain in a condition to commercially use her body for the sexual gratification of others and that he did so with the intention for the complainant to enter or remain in that condition before you express an opinion that he is guilty. If you feel unsure or if you have reasonable doubt on the use of force or a threat of force to enter into a condition of sexual servitude or on the required intention of the Accused, then you must express a not guilty opinion on the charge of sexual servitude.
- [75] In the event you find the Accused not guilty of sexual servitude, then go on to consider the alternative charge of buying a minor under the age of 18 years for immoral purposes. On this charge you must feel sure that the Accused obtained possession, that is, he took control of the complainant with the intention to employ or use her for the purpose of prostitution before you express an opinion that he is guilty. If you feel unsure or if you have reasonable doubt on whether the Accused obtained possession of the complainant to use her for prostitution and with such intention, then you must express an opinion of not guilty.
- [76] On each count of domestic trafficking in children (counts two-four), you must feel sure that the Accused facilitated the transportation of the complainant from one place to another with the intention that the complainant will provide sexual services before you express an opinion that he is guilty. If you feel unsure or if you have reasonable doubt on whether the Accused facilitated the transportation with the intention that the complainant will provide sexual services, then you must express an opinion that he is not guilty.

[77] Remember to consider each count separately. Your opinions on each count are either guilty or not guilty. You may retire now. Once you have reached your opinions, please advise the court clerk, and the court will re-convene to receive your opinions.



.....
Hon. Mr Justice Daniel Goundar

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