

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 94 of 2017

STATE

V

MIKAELE RADRODRO

Counsel : Ms. Sadaf Shameem for the State
Accused appears in person

Dates of Trial : 5-6 December 2019

Summing Up : 12 December 2019

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "TV".

SUMMING UP

Madam Assessors and Gentleman Assessor,

[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused by himself have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box and any admissions made by the parties by way of agreed facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel or the accused are not evidence either. A thing suggested by the accused during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and the Accused are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, a matter which will be of primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14]** The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15]** According to the evidence you heard in this case, the complainant, TV, was 19 years old at the time of the alleged incidents, and was 22 years old when she testified in Court (She said her date of birth was 24 May 1997).
- [16]** You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well

think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.

- [17] You heard in this case the evidence of Marica Bogiva, an aunt of the complainant. She testified that on 6 March 2017, the complainant had informed her of what the accused had done to her. You should consider whether this could be regarded as a complaint made by the complainant of the alleged incidents. If so, you should also consider whether she made that complaint without delay and whether she sufficiently complained of the offences the accused is charged with.
- [18] The complainant need not specifically disclose all of the ingredients of the offences and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that the complainant made a prompt and a proper complaint, then you may consider that her credibility is strengthened in view of that recent complaint.
- [19] It must be borne in mind that the complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [20] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [21] This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [22] However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies and omissions in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission 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 his or her evidence is inaccurate. In the

alternative, you may accept the reason he or she provided for the inconsistency or omission and consider him or her to be reliable as a witness.

- [23] Madam Assessors and Gentleman Assessor, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [24] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [25] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not guilty of the charges. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [26] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [27] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts or direct evidence.
- [28] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [29] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person

seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary facts and the inferences that could be drawn from them.

- [30] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [31] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. It is not his task to prove his innocence.
- [32] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [33] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [34] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [35] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [36] I must also explain to you as to the reason for permitting a closed court proceedings when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when it is closed court proceedings, the complainant is relieved of any mental pressure or any form of embarrassment she may have to describe the often unpleasant incidents. However, please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

[37] Let us now look at the charges contained in the Information.

[38] There are three charges preferred by the Director of Public Prosecutions (DPP), against the accused:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

MIKAELE RADRODRO, on the 6th day of March 2017, at Raiwai, Suva, in the Central Division, unlawfully and indecently assaulted **TV** by fondling her breasts.

COUNT TWO

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

MIKAELE RADRODRO, on the 6th day of March 2017, at Raiwai, Suva, in the Central Division, unlawfully and indecently assaulted **TV** by sucking the nipples of her breasts.

COUNT THREE

Statement of Offence

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

Particulars of Offence

MIKAELE RADRODRO, on the 6th day of March 2017, at Raiwai, Suva, in the Central Division, penetrated the vagina of **TV** with his finger, without her consent.

[39] As you may observe there are a total of three counts. These include two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act) and one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act.

[40] Let me first explain the elements of the first and second counts together, which are counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act.

[41] Section 210 (1) (a) of the Crimes Act reads as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person;

[42] Therefore, in order for the prosecution to prove the first count of Sexual Assault, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance the 6 March 2017);
- (iii) At Raiwai, Suva, in the Central Division;
- (iv) Unlawfully and indecently assaulted the complainant TV, by fondling her breasts.

[43] Similarly, in order for the prosecution to prove the second count of Sexual Assault, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance the 6 March 2017);
- (iii) At Raiwai, Suva, in the Central Division;
- (iv) Unlawfully and indecently assaulted the complainant TV, by sucking the nipples of her breasts.

[44] Let me now elaborate on these elements together in respect of the said two counts.

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

[46] The second element relates to the specific date 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.

[47] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is

an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of fondling the complainant's breasts and sucking the nipples of the complainant's breasts are indecent acts and thereby amounts to Sexual Assault.

[48] Let me now explain the elements of the Count Three, which is a count of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act.

[49] Section 207(1) of the Crimes Act reads as follows:

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

[50] Section 207(2) (b) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a).....; or

(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;

(c).....

[51] Therefore, when Section 207(1) is read with Section 207(2) (b) it would read as follows:

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

(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.

[52] Therefore, in order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance the 6 March 2017);
- (iii) At Raiwai, Suva, in the Central Division;
- (iv) Penetrated the vagina of the complainant TV with his finger;
- (v) Without the consent of the complainant; and

- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[53] Let me now elaborate on these elements in respect of count three.

[54] 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.

[55] The second element relates to the specific date 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.

[56] The fourth element involves the penetration of the complainant'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 the complainant with his finger to any extent.

[57] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his finger, without her consent.

[58] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[59] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his finger, the prosecution must also prove that, either the accused

knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

- [60]** A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 19 years of age at the time of the alleged incidents, and therefore, she had the mental capacity to consent.
- [61]** It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Sexual Assault and Rape are obviously considered a Sexual Offences. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.
- [62]** If you are satisfied beyond any reasonable doubt that the accused, on 6 March 2017, at Raiwai, Suva, unlawfully and indecently assaulted TV by fondling her breasts, then you must find him guilty of the first count of Sexual Assault.
- [63]** If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the first count of Sexual Assault.
- [64]** If you are satisfied beyond any reasonable doubt that the accused, on 6 March 2017, at Raiwai, Suva, unlawfully and indecently assaulted TV by sucking the nipples of her breasts, then you must find him guilty of the second count of Sexual Assault.
- [65]** If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find the accused not guilty of the second count of Sexual Assault.
- [66]** If you are satisfied beyond any reasonable doubt that the accused, on 6 March 2017, at Raiwai, Suva, penetrated the vagina of TV with his finger, without the consent of the complainant and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the third count of Rape.
- [67]** If you find that the prosecution has failed to establish any of these elements beyond reasonable doubt, then you must find him not guilty of the third count of Rape.
- [68]** These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[69] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as “*Agreed Facts*” without placing necessary evidence to prove them:

1. The complainant is TV, 19 years old at the material time.
2. The accused is Mikaele Joji Radrodro, 58 years old at the material time.
3. The accused is the uncle of the complainant as he is married to the complainant’s father’s sister namely Sera Waqa.
4. At the material time the complainant was residing with the accused and her aunt Sera Waqa at Lot 17 McFarlane Road, Raiwai.
5. At the material time the complainant was a student at Nabua Secondary School, Matua program.
6. On 6th March 2017, the accused had left for work in the morning but returned home to watch a rugby match on the television.
7. On 6th March 2017, the complainant was at home when the accused returned home after leaving for work in the morning.
8. The complainant was medically examined on 8th March 2017 at MSP Clinic by Dr. Shelvin Kapur.

[70] Since the prosecution and the defence have consented to treat the above facts as “*Agreed Facts*” without placing necessary evidence to prove them, you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[71] The prosecution, in support of their case, called the complainant, TV, and her aunt, Marica Bogiva.

[72] Evidence of the complainant TV

- (i) *The complainant is now 22 years old. Her date of birth is on 24 May 1997.*
- (ii) *She said that she is originally from Navaga, Koro, Lomaiviti. Her parents reside in Koro, Lomaiviti. Her parents were not employed.*
- (iii) *It is an agreed fact that on 6 March 2017, the complainant was staying at Lot 17 McFarlane Road, Raiwai, with her uncle Mikaele (The Accused) and his wife Sera Waqa, who is her father’s sister. It is also agreed that at the time the complainant was a student at Nabua Secondary School, Matua Program.*

- (iv) *At McFarlane Road, apart from herself, her uncle and aunty Sera, Mikaele's son, named JJ, and her aunt Ivamere (Mikaele's wife sister), were also staying. Later she said Mikaele's 6 years old daughter was also staying in the house.*
- (v) *She describe the house as a double storey house and that they occupied the top flat. As you enter there is a sitting room and as you go into the passage there is a bathroom and toilet. Opposite the bathroom is the bedroom she occupies. The next room is Mikaele's room, and the third room is occupied by JJ. She said that normally that room is closed most of the time, because JJ is mentally ill. He is a patient at St. Giles.*
- (vi) *She had come to live with her uncle and aunt after cyclone Winston. Her aunt Sera Waqa came to Koro and brought the complainant from Koro to attend a school in Suva – John Wesley College.*
- (vii) *It is an agreed fact that on 6 March 2017, her uncle Mikaele had left for work in the morning but returned home to watch a rugby match on the television. It is also agreed that the complainant was at home when her uncle returned home after leaving for work in the morning.*
- (viii) *The witness explained that once her uncle left for work in the morning, her aunty Sera Waqa also left to her work place. Their 6 year old daughter had also left for school at 7 in the morning. The complainant was at home with her aunt Ivamere. Then after a while, her aunt Ivamere told her that she was going to town. So she was alone at home with JJ. She was not sure as to what JJ was doing in his room as his room was closed.*
- (ix) *Between 10.00 and 11.00 in the morning her uncle had returned home. She had heard the sound of his car. The complainant had been lying down on her bed reading her economics book. At the time the complainant had been wearing a sports mini shorts and a sleeveless vest. Inside she was wearing a bra and a panty.*
- (x) *The witness was still lying down on her bed and reading her economics book. She was surprised when her room door was closed. Mikaele had closed the door. She didn't see him come in but heard the door close.*
- (xi) *The complainant was lying down on her back facing upwards. When she tried to stand she had seen Mikaele sitting on the bed beside her and he had put his arm around her from the front. The witness described as to how the accused had put his arm around her.*
- (xii) *Then he had asked her in the Itaukei language whether she has slept with the boy or not (Iko sa bau moce vata kei na dua na tagane?). The complainant shook her head and did not say anything and she was scared at the same time. She was scared because by the time he had started asking her this he started touching her breast. Mikaele had put his hand*

inside her vest and was touching her breast from inside. At the same time he had asked her whether she had touched a male private part or not.

(xiii) Mikaele had put his hand under the left side of her vest and touched her left breast first and then move to the right breast. He had put his hand underneath her bra and touched her breast. The witness testified that she did not see him touching her breast but felt him squeezing her breasts.

(xiv) When asked as to what part of his hand she felt touched her breasts, the witness showed her palm and her fingers.

(xv) Thereafter Mikaele tried to remove her trousers. While he was trying to remove the trousers she had pulled her trousers hard upwards. Then she had felt Mikaele's hand touching her female private part (yaya vakamarama). When asked as to what she meant by female private part the witness said her vagina.

(xvi) At this time the witness said that she had been crying. When Mikaele saw her crying then he pulled his hand out. Then he had taken her to their bedroom.

(xvii) The complainant was then asked the following questions in evidence in chief:

Q. How was his hand touching your vagina?

A. I felt that he touched my vagina with his hand. I can feel the pain.

Q. What part of the hand was he using?

A. His finger.

Q. What was he doing with his finger?

A. The witness described with her finger as to how Mikaele was using his finger.

Q. How did you feel?

A. I pulled his hand for him not to touch it. I didn't say anything I was just crying.

Q. Did you agree for Mikaele to touch your vagina?

A. No.

Q. Did Mikaele know that you were not agreeing to what he was doing?

A. Yes.

Q. What else did you feel at the time?

A. I was scared.

Q. Did you feel anything else?

- A. No.
- Q. From which part of your trousers did Mikaele put his hand inside?
- A. From the front part. I tried to pull my trousers up and he put his hand from the front part of the trousers from the top. I was pulling my trousers holding the sides of my trousers. Mikaele put his hand from the front part of my trousers
- Q. When he put his hand inside your trousers to touch your vagina what was the position?
- A. I was still lying down by then. Because his arm was over me. When I tried to stand or sit I couldn't.
- Q. When he squeezed you breast was it with the same arm or the other?
- A. The same hand.
- Q. Which hand did he put into your trousers?
- A. His right hand. It was the same hand he had used to squeeze my breasts.
- Q. Did you agree for Mikaele to squeeze your breasts?
- A. I did not agree.
- Q. Did Mikaele know that you are not agreeing to it?
- A. Yes.
- Q. When he used his finger to touch your vagina was it outside or inside your panty?
- A. Inside my panty.
- Q. Was there anyone else in the room (at the time)?
- A. No. JJ was in his room.
- Q. Because of what had happened how did you feel about it?
- A. I was just scared because that was the first thing that has ever happened to me.
- Q. Who was the persons who had done these things to you?
- A. Mikaele Radrodro.
- Q. What part of the vagina did he touch?
- A. The inside part of my vagina.
- Q. You know what the inside part is used for?
- A. No.

- Q. *How many fingers did he used?*
- A. *One of his fingers.*
- Q. *Can you describe the movement when he touched the inside part of your vagina?*
- A. *He put his finger into my vagina and I feel that he touch from inside. The witness demonstrated the movement with her right index finger.*
- Q. *How further inside the vagina was his finger?*
- A. *He put it further inside because I can feel the pain. Then he pulled his hand out.*
- Q. *You know what this part is used for?*
- A. *No.*
- Q. *You said before lunch that Mikaele had seen you crying and thereafter took you to his bedroom?*
- A. *Yes.*
- Q. *How far was this bedroom?*
- A. *His son's bedroom and his were just next to each other. In the passage first bedroom is mine, next Mikaele and wife, next JJ's.*
- Q. *How did he take you?*
- A. *I was sitting on my bed crying and he took my hand, and he took me to his room and he pushed me into the bed. As he pushed me into their bed (Mikaele and his wife's bed), I lay on my back facing upwards and then he pulled my t-shirt up and he started sucking my breast. Mikaele Radrodro did this. He took me with my hand into the room and he pushed me into the bed. After he pushed me into the bed Mikaele was standing right in front of me and he lay on top of me and he pulled my t-shirt up. I am referring to my vest. He pulled my t-shirt together with my bra. Then he started kissing my stomach and going up to my breast.*
- I did not know what to do I was just crying. When he saw me crying he stopped what he was doing. I went back to my room. I went and cried there. Then Mikaele followed inside my room. He told me not to cry but to go and have my shower because if my aunty Ivamere if she came and saw me she might come and ask me. He further told me not to tell anyone about this incident and no one to know about this.*
- Q. *Which part of the breast was he sucking?*

A. *My both breasts. From the side and my nipples.*

Q. *Did you agree for Mikaele to suck the sides and the nipples of your breasts?*

A. *No.*

Q. *Did Mikaele know that you did not agree?*

A. *Yes.*

(xviii) *The witness said that thereafter Mikaele went. She was not sure if he went to his work place or went somewhere else.*

(xix) *After that she had gone and had her shower. She had packed her clothes and her school bag and left home in a taxi straight to the bus stand. As she was sitting at the bus stand she said that Mikaele was calling her mobile phone but she did not answer.*

(xx) *The complainant said that as she was sitting there at the bus stand she was thinking of committing suicide. After a while Mikaele had called her mobile again. She realised that he might come to the bus stand so she stood up and went to the market to one of her friends who was selling coconuts there.*

(xxi) *It was around 3.00 in the afternoon when she came out from the market. She had met one of her school mates and went to school together with her.*

(xxii) *The witness then testified that after school finished around 8.00 pm she had gone to her aunt's place in Kalabu. The name of her aunt is Marica Bogiva. She is her father's first cousin. When she reached her aunt's place it was almost 10.00 in the night.*

(xxiii) *The witness said that she had told her aunt what Mika had done to her and also that her aunt Sera Waqa did not know that she had left home.*

(xxiv) *She had told her aunt Marica that Mikaele had closed the room door and came and sat beside her. She told her aunt that he entered the room, he touched her breasts and he tried to remove her trousers. She then told her aunt that he took her to his room and kissed her stomach going up to her breast.*

(xxv) *Thereafter, her aunt Marica had called Sera and told her that the complainant was with her in Kalabu. Her aunt Marica had told Sera of what the complainant had relayed to her and that she is going to report Mikaele for what he has done.*

(xxvi) *Thereafter the witness said that the matter had been reported to the Police.*

(xxvii) *It is an agreed fact that the complainant had been medically examined on 8 March 2017, at MSP Clinic by Dr. Shelvin Kapur.*

(xxviii) *The witness testified that after this incident she has been staying with her aunt Marica at Kalabu.*

(xxix) *The witness identified Mikaele as the accused in Court.*

[73] Evidence of Marica Volata Bogiva

(i) *She is the aunt of the complainant. The complainant's father is a cousin brother. Most of the time when they come to Suva they come and visit her at her house.*

(ii) *She is residing at Qaranivalu Road, Kalabu, with her two nieces and nephew.*

(iii) *She testified as to how the complainant had come to her house around 10.00 in the night on 6 March 2017.*

(iv) *The witness said that the complainant had told her thus: "She then said that she was in one of the rooms lying down there when Mika entered the room. When Mika entered the room he closed the room door and he went straight to her and lay on her. And also she said when he lay on her he started to kiss her and touching her breasts. And he tried to remove her trousers. That is what she told me. Then she kept on crying".*

[74] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[75] In this case, the accused opted to remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

Analysis

[76] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, TV, and her aunt, Marica Bogiva, to prove its case.

[77] As I have informed you earlier, the burden of proving each ingredient of the charges of Sexual Assault and Rape rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

- [78]** In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [79]** In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved.
- [80]** Based on the said agreed facts, the fact that the accused is Mikaele Joji Radrodro has been agreed. It is also agreed that on 6 March 2017, the accused had left for work in the morning, but returned home (at Lot 17 McFarlane Road, Raiwai) to watch a rugby match on the television. It is also agreed that at the time the complainant was at home when the accused returned home after leaving for work in the morning. Therefore, it can be said that the date of offence and place of offence has also been agreed.
- [81]** However, the prosecution must prove beyond reasonable doubt the remaining elements of the three charges. Namely that the accused unlawfully and indecently assaulted the complainant TV, by fondling her breasts (In relation to Count One); that the accused unlawfully and indecently assaulted the complainant TV, by sucking the nipples of her breasts (In relation to Count Two); and that the accused penetrated the vagina of TV with his finger, without the consent of the complainant and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting (In relation to Count Three).
- [82]** The accused's position is that the complainant is not a credible witness and cannot be believed. His position is that although the complainant alleges that he had forced himself on her, there is no evidence to establish this fact. There were no torn clothes, no scratch marks or bruises on the complainant, or no bleeding so as to prove or establish the complainant's story.
- [83]** It is for you as judges of fact to consider the totality of the evidence and come to a finding on all of the above matters.
- [84]** You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its two witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the counts of Sexual Assault and Rape, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offences of Sexual Assault and Rape, beyond any reasonable doubt.
- [85]** You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the other counts as well.
- [86]** In summary, and before I conclude my summing up let me repeat some important points in following form:

- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charges of Sexual Assault and Rape;*
- ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of Sexual Assault and Rape has been established beyond any reasonable doubt. If so you must find the accused guilty of those charges. If not you must find the accused not guilty of those charges.*

[87] Any re directions the parties may request?

[88] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the two counts of Sexual Assault and one count of Rape separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[89] Your possible opinions should be as follows:

First Count

Sexual Assault- Guilty or Not Guilty

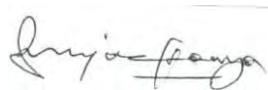
Second Count

Sexual Assault- Guilty or Not Guilty

Third Count

Rape- Guilty or Not Guilty

[90] I thank you for your patient hearing.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT SUVA

Dated this 12th Day of December 2019

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Accused appears in Person.