

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 037 OF 2019LAB

STATE

V

SAMUELA VOSADRUGU

**Counsels : Ms. D. Rao for State
Ms. S. Devi and Ms. M. Besetimoala for Accused**

Hearings : 18, 19, 20 December, 2019

Summing Up : 21 December, 2019

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen 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 accused. There is no obligation on the accused to prove his 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 accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is 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 accused 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, and I will now read the same to you:
“... [read from the information]...”

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, on 24 May 2019, at Labasa in the Northern Division, penetrate the vagina of FB, child under the age of 13 years with his penis?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was charged with "rape", contrary to section 207(1), (2) and (3) of the Crimes Act 2009. It was alleged that, on 24 May 2019, at Labasa in the Northern Division, the accused penetrated the complainant's vagina with his penis. The complainant (PW2) was under the age of 13 years, at the time.
10. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused;
 - (ii) penetrate the complainant's vagina with his penis;
 - (iii) without her consent; and
 - (iv) he knew she was not consenting to 10 (ii) above, at the time.
11. Crucial to the above offence is the meaning of the verb "penetrate". In the **Oxford Advanced Learner's Dictionary**, 6th edition, Oxford University Press, 2002, the word "penetrate" means "to go into or through something". The slightest penetration of the complainant's vagina by the accused's penis, is sufficient to satisfy element 10 (ii) above. There does not need to be full penetration, nor there is a need for the accused to ejaculate.
12. "Consent" is to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. In this case however, we are dealing with a female complainant, who was under 13 years old at the time. In law, a person under 13 years old is incapable of giving her consent to her vagina being penetrated by a penis. So, for a child under 13 years old, the prosecution does not need to prove non-consent by the child complainant. It is already a presumption in-law.
13. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting, at the time. You will have to look at the parties' conduct at the time, and the surrounding circumstance, to decide this issue. However, for a child

complainant who was under 13 years old at the time, an accused is presumed to know in law that she is incapable of giving her consent to her vagina being penetrated by the accused's penis. This policy was put there to protect children.

14. If you find the above elements of rape proven by the prosecution beyond reasonable doubt, you must find the accused guilty as charged. It is a matter entirely for you.

F. THE PROSECUTION'S CASE

15. The prosecution's case were as follows. At the time of the alleged incident on 24 May 2019, the female child complainant (PW2) was 4 years 5 months 1 day old. She was born on 23 December 2014. She lived with her mother (PW1), father (PW3) and another sibling at a settlement in Bua. Her father was a farmer, and her mother did domestic duties. The accused (DW1) was 23 years old. He was a farmer by profession and resided with his uncle in a farm near to PW1 and PW3's residence. The accused and the child complainant's parents were friends, and the accused often visited them at their residence every now and then.
16. According to the prosecution, on 24 May 2019, the accused was at the complainant's parents' house. Before 6pm or thereabouts, the complainant's father, PW3, asked the accused to fetch water from a nearby church for the family. The family did not have tap water, and often relied on the church's tap for water. According to the prosecution, it takes 12 minutes to fetch water from the church tap, that is, 5 minutes to walk there, 2 minutes to fill the container with water and 5 minutes to walk back. According to the prosecution, the child complainant (PW2) cried to accompany the accused to the church to fetch water. Her mother (PW1) reluctantly agreed and the child and accused went to fetch water.
17. According to the prosecution, while fetching water at the church bathroom, the accused allegedly laid the child complainant on the bathroom floor and slightly penetrated her vagina with his penis. Thereafter, they allegedly returned to the child parent's residence. On 29 May 2019, the child complained to her mother (PW1) that her "pipi" (vagina) was paining. PW1 asked the child "did anyone do anything to you?" According to the prosecution, the child allegedly told PW1 that "Sam laid her on the church bathroom floor and then touched her "pipi". PW1 later reported the matter to the police. An investigation was carried out. The child was medically examined. It was found that her vagina was allegedly injured. On 3 June 2019, the accused appeared in the Labasa Magistrate Court charged with raping the child complainant.

18. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

19. On 18 December 2019, the information was put to the accused, in the presence of his counsels. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he chose to give sworn evidence and called 3 witnesses in his defence. That was his right.

20. The accused's case was very simple. On oath, he denied the allegation against him. He said, on 24 May, 2019, he never went to the church with the child complainant to fetch water for the child's family. He said, at the time of the alleged rape, he was not at the crime scene. He said, he was at the Nabouwalu Jetty unloading and loading some cargo for his uncle (DW3). He said, he was not at the child parent's residence between 3pm to 5pm on 24 May 2019. He admitted, he arrived at the child parent's residence after 6pm on 24 May 2019, talked with PW1 and PW3 for about 10 to 15 minutes, and then left for a birthday celebration. He said, he never offended against the child complainant, as alleged.

21. Because of the above, the defence is asking you, as assessors and judges of fact, to find the accused not guilty as charged. That was the case for the defence.

H ANALYSIS OF THE EVIDENCE

(a) Introduction:

22. In analyzing 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 analyzing 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.

23. (b) The Agreed Facts:

The parties had submitted an "Agreed Facts", dated 18 December 2019. A copy of the same is with you. Please, read it carefully. There are 3 paragraphs of "Agreed Facts". Because the

parties are not disputing the same, you may treat the same as established facts, and that the prosecution had proven those facts beyond a reasonable doubt.

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

24. To prosecute a child complainant's allegation of rape against any person is traditionally a daunting task for the prosecution. This is especially so with child complainants who are below the age of 6 years old. On a case of rape, it is absolutely essential that complainants understand and can describe in court the act of sexual intercourse. This demands a basic understanding of the sexual organs and the sexual act itself. For a child complainant under 6 years old, let alone one who is 4 years old, the above prerequisite is a near impossibility. Herein lies the prosecution's difficulty in this case.

25. The State's case against the accused is based on what is often called "circumstantial evidence". Reference has been made to the type of evidence which you have received in this case. Sometimes assessors are asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw an accused commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the accused himself having admitted it, these would all be good examples of direct evidence against him. On the other hand, it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the accused, which they say when taken together, will lead to the sure conclusion that it was the accused who committed the crime. It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which the assessors can say "we now know everything there is to know about this case". But the evidence must lead you to the sure conclusion that the charge which the accused faces is proved against him. Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution's case. Finally, you should be careful to distinguish between arriving at conclusion based on reliable circumstantial evidence,

and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.

26. Now we will discuss the “evidence of various circumstances relating to the crime and the defendant, which the prosecution say when taken together will lead to the sure conclusion that it was the defendant who committed the crime.

(i) Child Complainant’s Mother’s (PW1) Evidence:

27. You have heard the child complainant’s mother (PW1) give evidence on 18 and 19 December 2019. You had watched her give evidence in the courtroom. You had observed her demeanour. You had watched her reactions to the questions thrown to her by the prosecution and defence counsels. I am sure her sworn evidence is still fresh in your minds and I will not bore you with the detail, but only the salient points. According to PW1, the accused was present in her house and compound between 3pm to 5pm and even before 6pm, before he departed for a birthday party, on 24 May 2019. She said, they had no tap water in the house, and often rely on a nearby church tap water. The sketch plan of the crime scene had been tendered in evidence as Prosecution Exhibit No. 2, and you may rely on the same for assistance. PW1 said that her husband, PW3, asked the accused to fetch some water for the family from the nearby church tap. PW1 said, the accused agreed to do so, and he took four 2.5 liter plastic bottles with him. At that time, PW1 said, the child complained (PW2), her daughter, cried to go with the accused to fetch water. PW1 said she reluctantly agreed, and PW2 went with the accused to fetch water. PW1 said, she saw, with her own eyes, the child going with the accused to fetch water.
28. PW1 said, the process of fetching water often took 12 minutes, 5 minutes to walk there, 2 minutes to fill the water and 5 minutes to walk back. PW1 said, she saw the accused returning after 30 minutes and right behind him was the child complainant. PW1 said, the accused brought the bottles of water to the kitchen, and left as soon as possible. PW1 said, she saw her child’s eyes were red and she was crying. PW1 said, her child told her she wanted to lie down and sleep. PW1 said, the child woke up the next day at 7am. PW1 said, when she took her to the birthday party, she was still asleep. PW1 said, the next day the child wanted to continue sleep. PW1 said, her child, PW2, appeared afraid. She didn’t say anything.

29. PW1 said, on 29 May 2019, 5 days after the alleged incident, her child complaint to her that her “pipi” (vagina) was paining. PW1 said, she laid her down and asked her “Did anybody do anything to you?” PW1 said, her child replied, “Sam (the accused) laid her down and touched her “pipi”. PW1 said, she asked her, “where it happened?”, and she said, “in the church bathroom, when they went to get the water.” The photograph of the bathroom had been tendered in evidence as the “Booklet of photos”, Prosecution Exhibit No. 3, and you may rely on the same for assistance. Photo 1 to 5 shows the church bathroom from various angles. PW1 said, she asked her “what other things Sam (the accused) did to her?” PW1 said, she replied that “Sam closed her mouth, closed the bathroom door, laid her down on the bathroom floor and touched her “pipi”. PW1 said, she also told her that Sam used his “stick” on her, that is, used his penis on her. PW1 said, he later told her husband about the above. PW1 said, her husband (PW3) didn’t believe it, until he asked her twice, and she repeated the same. PW1 said, she later reported the matter to police on 30 May 2019. An investigation was carried out. Her child was taken for medical examination on 30 May 2019 at Medical Services Pacific (MSP), Labasa.
30. Note when considering PW1’s evidence on what her child told her when she questioned her on 29 May 2019 on why her “pipi” was paining, PW1’s evidence on what her child told her, does not prove the truth of what her child was telling her. What her child told her after her complain were merely evidence of the consistency of her conduct after the alleged incident. It does not prove the truth of what is said. In any event, it is evidence for you in considering the total overall circumstances of the case.

(ii) Child’s Father’s (PW3) Evidence:

31. PW3 gave evidence. He said on 24 May 2019, Sam (the accused) and Manu (DW2) visited his residence between 3pm to 5pm. PW3 said the accused was his friend and related to his wife. PW3 said he asked the accused to fetch some water from the church. PW3 said, he agreed. PW3 said, his child (PW2) cried to go with the accused to fetch water. PW3 said, he allowed his child to go. PW3 said, he saw the accused and his child (PW2) go to the nearby church to fetch some water. PW3 said, it took the accused a long time to fetch the water. PW3 said, when he came home, his child (PW2) was asleep. According to PW3, she was always up until 11pm. PW3 said, his wife (PW1) reported to him that “Sam had been touching their child’s “pipi”. PW3 said, he later asked his child 3 or 4 times about the same. PW3 said, she repeated the above to him 4 times. PW3 said, they reported the matter to police. On 30 May 2019, PW3

said his child PW2 was medically examined. Note that what PW2 told PW3 does not prove the truth of what was uttered. It only proved the consistency of her conduct in reporting the same to her father.

(iii) Child Complainant's (PW2) Evidence:

32. We are dealing here with a 4 year old child complainant. Obviously her understanding of sexual matters and body parts are obviously limited. But we must try and “de-code” what she’s telling us, and make some sense out of it. PW2 told us she lives with her parents, PW1 and PW3. PW2 said, her next birthday is this month. PW2 told us her family gets their water from the church, and sometimes she goes there with her parents to fetch the same. She said, the church tap is in the church bathroom. The booklet of photos, Prosecution Exhibit No. 3, was shown to her. She said, she remembered the bathroom in the photos. She said, she saw a stick (kau) in the bathroom. She said Sam had the stick (kau). She said, Sam brought the stick. When asked to point to her “pipi”, she pointed to her vagina. PW2 was asked to identify Sam in the courtroom. On the 3rd attempt, she pointed at the accused in the dock, the first two attempts, he pointed at the wall. PW2 said, Sam was in the bathroom. PW2 said, Sam brought the stick (kau) into the bathroom.
33. You have watched the child complainant give evidence in court, and what you make of her evidence is entirely a matter for you.

(iv) Doctor Bakani's (PW4) Evidence:

34. For the prosecution, perhaps the most important piece of evidence is that of the doctor. Doctor Bakani (PW4) medically examined the child complainant (PW2) on 30 May 2019 at 4.15pm. This was approximately 5 days after the alleged incident. The doctor recorded his finding in a medical report which was tendered in evidence as Prosecution Exhibit No. 1. Please read the medical report carefully, especially D(12)(a) and (b). The doctor noted there was tender reddish rash along right labia minora and there was hymenal laceration located at 6 o'clock position and it was healing. According to the doctor, the tear to the hymen occurred 3 to 6 days before the examination, and the same could be due “to penetration by a blunt force trauma, most likely finger and/or penile and/or other objects”. The doctor said, in his opinion, there was a slight penetration to the child complainant's vagina. The doctor concluded in D(16) of the report by saying, “...4 year female with allegation of fondling of private part, indecent exposure and

rubbing his, Sam (family friend), penis against her :”pipi”. Examination reveal hymenal laceration that is due to penetration by blunt force trauma”.

(v) WPC 3548 Prasad’s (PW5) Evidence:

36. PW5 was the police investigation officer. She compiled the police docket in this case, and took the child with her mother to the Medical Services Pacific, Labasa, for the child to be medically examined. She submitted the Police Sketch of the crime scene as Prosecution Exhibit No. 2, and the Booklet of Photos as Prosecution Exhibit No. 3.
37. You will have to consider all the above witnesses’ evidence together. Compare and analyse them together. Take into account my direction to you on circumstantial evidence in paragraph 25 hereof. What do the above circumstantial evidence tell you? Was the accused guilty as charged or otherwise? How you answer the same is a matter entirely for you.

(d) The Accused’s Case:

38. I had summarized the accused’s case to you from paragraphs 19, 20 and 21 hereof. I repeat the same here. If you accept the accused’s version of events, then you must find him not guilty as charged. If you reject his version of events, you must still consider the strength of the prosecution’s case and decide accordingly. It is a matter entirely for you.

(e) The Need to Consider All the Evidence:

39. The prosecution called 5 witnesses:
- (i) Child’s mother (PW1);
 - (ii) Child complainant (PW2);
 - (iii) Child’s father (PW3);
 - (iv) Doctor N. Bakani (PW4); and
 - (v) WPC 3546 N. Prasad (PW5).

The prosecution submitted the following exhibits:

- (i) Child’s Medical Report - Prosecution Exhibit No. 1.
- (ii) Police sketch Plan - Prosecution Exhibit No. 2
- (iii) Booklet of Photos - Prosecution Exhibit No. 3.

The defence called the following witnesses.

- (i) Accused (DW1);
- (ii) Manueli Tuiravita (DW2);
- (iii) Sitiveni Vesikula (DW3);and
- (iv) Josefa Dravu (DW4).

40. You must consider the above evidence together. Compare and analyze them together. If I hadn't mentioned 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 her/his evidence in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of her/his evidence in your deliberation. You are the judges of fact.

I. SUMMARY

41. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is 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 accused's guilt, you must find him 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 accused's guilt, you must find him not guilty as charged.

42. Your possible opinions are as follows:

- (i) Rape - Guilty or Not Guilty

43. 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 your decisions

Salesi Temo
JUDGE



Solicitor for the State :
Solicitor for the Accused :

Office of the Director of Public Prosecution, Labasa
Office of the Legal Aid commission, Labasa