

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

Criminal Case No. HAC 260 of 2018

BETWEEN : STATE

AND : RATU SELA DRADRA MATIA

Counsel : Ms K Semisi for the State
Ms S Nasendra & Ms S Daunivesi for the Accused

Dates of Hearing : 11 - 13 March 2019

Date of Summing Up: 13 March 2019

SUMMING UP

- [1] Ladies and Gentleman Assessors, it is now my duty to sum up the case to you. We have differing roles in this trial. I have to give you directions on the law and you must accept those directions. You are to decide the facts applying those directions and to give me your opinions as to the Accused's guilt or innocence.
- [2] In going through the evidence I may express an opinion. If you do not agree with that opinion, you are free to ignore it and to form another view of that piece of evidence. I may omit some evidence which you think significant. Nonetheless you may give that evidence such weight as you consider appropriate. You are free to form your own opinions.
- [3] At the end of this summing up, and after you have given your individual opinions, the final decision on the facts rests with me. I am not bound to conform to your opinions. However in arriving at my judgment I shall place much reliance upon your opinions.

- [4] The burden of proof rests throughout the trial upon the prosecution. In our system of justice there is a presumption of innocence in favour of an Accused. The prosecution brings the charge against the Accused. Therefore it is for the prosecution to prove the charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.
- [5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty. If you entertain a reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of that charge.
- [6] The Accused elected not to give evidence. That is perfectly his right. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing, one way or the other. You will have to decide whether, on the prosecution's evidence, you are sure of his guilt.
- [7] You must decide this case upon the evidence presented to you. If a witness was not called you must not speculate the reasons why the witness was not called. You must only consider evidence which was led in the trial. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [8] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state his or her individual opinions orally on the charge against the Accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.
- [9] However it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions.

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

depending on the view you took on each count and the evidence available on each count.

- [17] On both counts the Accused is charged with rape of the same complainant. To prove rape, the prosecution must prove three elements.
- [18] First, it must be proved beyond reasonable doubt that the Accused had unlawful carnal knowledge, that is, unlawful sexual intercourse with the complainant. The physical act of intercourse must be proved, that is that the Accused's penis penetrated the complainant's vagina. The slightest penetration is sufficient. It is not necessary to prove ejaculation.
- [19] Second, it must be proved that when the Accused had unlawful sexual intercourse with the complainant he did so without her consent. The term consent means consent freely and voluntarily given by the complainant with the necessary mental capacity to give consent.
- [20] Third, it must be proved that the Accused either knew that the complainant did not consent or was reckless as to whether she consented. The Accused was reckless as to whether the complainant consented to sexual intercourse if you are sure that he realized there was a risk that she was not consenting and carried on anyway when in the circumstances known to him it was unreasonable to do so.
- [21] All three elements are in dispute. The prosecution case is that the Accused had unlawful sexual intercourse with the complainant on two separate occasions while she was asleep. If that is what occurred then she was not capable of giving consent to sexual intercourse and the Accused knew that she had not consented or was reckless as to whether she consented. That of course is a matter for you to consider. The issues for you to consider in respect of each count of rape are:
- Whether the Accused had unlawful sexual intercourse with the complainant?
 - Whether the sexual intercourse was without the consent of the complainant?

- Whether the Accused knew that the complainant had not consented or was reckless as whether she consented?

[22] I turn now to summarize the evidence. 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.

[23] The first prosecution witness was the complainant. She is the mother of the Accused and is from Kabariki village in Kadavu where the allegations of rape arose. Her relationship with the Accused is not in dispute. She was called by the prosecution, but gave evidence which did not support the prosecution's case. The prosecution was therefore allowed to treat her as a hostile witness – a witness who had in effect changed sides and to cross examine her to show that she had earlier made statements to the police, which are inconsistent with the evidence she has now given in court. Her police statement is PE1. The contents of her police statement (PE1) are not evidence. PE1 was put before you by the prosecution to throw doubt about the reliability of her evidence in court. You have to decide whether you can accept any part of the evidence which she has given in court and, if so, what part of it. If you find her to be a truthful witness and if you accept her evidence that the Accused did not rape her as true, then the proper opinions would be not guilty. If you decide that there is a serious conflict between the evidence she gave and the statements previously made by her to police, you may think that you should reject her evidence altogether and not to rely upon anything she has said in the witness box. If you decide not to rely on anything that she has said in her evidence, then you must consider other evidence to determine whether the charges of rape have been proved beyond a reasonable doubt.

[24] The other evidence that implicates the Accused to the alleged incidents of rape is his admissions to police. The admissions were reduced in writing and are in evidence as

PE2A & 2B. PE2A is the original iTaukei version and PE2B is the English translation. In his interview, the accused admitted having sexual intercourse on two separate occasions with the complainant while she was asleep in their house, although he cannot recall the dates of the incidents. You will recall that the defence suggested to the interviewing officer, D/Cpl Lewabeci and the witnessing officer WSC Selai that the answers in the caution interview were fabricated by them because the interview was conducted in Bauan dialect while the Accused spoke and understood Kadavu dialect. The evidence of the two police officers is that they did not fabricate the answers in the caution interview and that they wrote the answers using the Bauan dialect after WSC Selai translated the questions to the Accused using Kadavu dialect. In cross examination WSC Selai admitted that she did not record in the interview that she translated the questions in Kadavu dialect for the Accused to answer.

- [25] There is a further issue regarding the admissions that I must direct you to consider. Any person suspected of a criminal offence is entitled to say nothing when asked questions about it. That right is given in the Constitution. That right must be given in unqualified terms that the accused need not to speak. In Q 10 of the record of interview the Accused was advised that he had a constitutional right to remain silent but "if you won't answer, we won't be able to know your story, but on the other hand, you can be charge (sic) on the allegation". I must direct you the qualifications that were placed on the right to remain silent were inappropriate and objectionable and you may consider whether the manner in which the Accused's right to remain silent was administered to him in deciding whether you can safely rely upon the admissions to convict him.
- [26] In deciding whether you can safely rely upon the admissions, you must decide two issues:
1. Did the accused in fact make the admissions. The defence case is that the admissions were fabricated by police and were not in fact made by the Accused. If you are not sure that he did, you must ignore them and not rely upon them. If however you are sure that the Accused did in

fact make the admissions, then go on to consider the second issue, that is,

2. Are you sure that the admissions are true? In addressing this issue consider the circumstances under which the interview was conducted, how the rights of the Accused were administered to him, how did the police officers who interviewed the Accused conduct themselves or whether they breached any of the rights of the Accused and whether the admissions are consistent with other evidence led at the trial by the prosecution. If you feel sure that the admissions were or may have been fabricated by the police, then you must disregard the admissions. If you feel sure that the admissions were not fabricated or obtained using unfair tactics such as putting qualifications on the right to remain silent to induce the Accused to incriminate himself, then you may rely upon the admissions.

[27] The final piece of evidence came from the cousin brother of the Accused, Nacani Turaganivalu. This witness spoke about an incident that he had witnessed when he was staying at Kabariki village between 2017 and 2018. The witness had returned home from the village hall shortly after midnight when he noticed the Accused entering into the kitchen of his home in a suspicious manner. He went and peeped into the kitchen from a window and saw his cousin, the Accused kneeling down to where his aunt, the complainant was lying sleeping. The witness said that he saw the Accused pulled the complainant's skirt up and then tried to tear the pants that the complainant was wearing with a knife he picked up from the basin beside him. He left the scene to call his wife. He did not return to the scene and waited at his house for the Accused. He saw the Accused come out of the kitchen and visit the bathroom. The witness said that he confronted the Accused with the allegation regarding his conduct towards the complainant when he was going back to his house after coming out of the bathroom. Initially the Accused denied the allegation but when confronted with the allegation together with the witness's spouse, the Accused admitted the allegation and apologized. If you accept the evidence of this witness as true then I must direct you that this piece of evidence alone does not prove that the Accused had sexual intercourse with the complainant without her consent. The evidence may

indicate the Accused had some sort of sexual inclination towards his mother but it does not prove that he raped her.

- [28] The prosecution's case wholly rests on the admissions of the Accused to police. You must approach with care to solely rely upon his admissions to convict him for the reasons I have directed you earlier in my summing up. If you decide not to rely upon the admissions, then the charges are not proven, and the proper opinions would be not guilty. However, if you are sure that the Accused did in fact make the admissions and that the admissions are true and reliable and that you feel sure that the Accused had sexual intercourse with the complainant without her consent and knowing that she had not consented on two separate occasions, then the proper opinions would be guilty.
- [29] On each count, your opinions would be either guilty or not guilty. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them.
- [30] Please now retire to deliberate on your opinions.



A handwritten signature in blue ink, appearing to be "D. Goundar", written over a dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

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