

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 53 of 2018

[CRIMINAL JURISDICTION]

STATE

V

PAULA TAMANISAUTU

Counsel : Ms. S. Swastika for the State
Ms. L. Ratidara with Ms. O. Grace for the Accused

Hearing on : 29 – 31 July 2019

Summing up on : 01 August 2019

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are the judges of facts.
2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or

otherwise come to know anything about this case outside this court room, you must disregard that information.

3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibit tendered. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
6. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts.

Sometimes we honestly forget things or make mistakes when recalling past events.

7. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, 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.
8. However, if there is no acceptable explanation for the inconsistency 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 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.
9. Therefore, if there is an inconsistency 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 the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
10. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with

other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

11. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
12. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
13. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
14. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges against the accused have been proved.
15. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.

16. Let us now look at the Information. The Director of Public Prosecutions has charged the accused with the following offences;

COUNT ONE

(Representative Count)

Statement of Offence

Rape: contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009.

Particulars of Offence

PAULA TAMANISAUTU between the 1st day of January 2016 and the 31st day of December 2016 at Waimalua Settlement, Tailevu in the Eastern Division, had carnal knowledge of **MAKELESI ROKOSORO**, without her consent.

COUNT TWO

(Representative Count)

Statement of Offence

Rape: contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence

PAULA TAMANISAUTU between the 1st day of January 2016 and the 31st day of December 2016 at Waimalua Settlement, Tailevu in the Eastern Division, on an occasion different from Count 1, had carnal knowledge of **MAKELESI ROKOSORO**, without her consent.

COUNT THREE

Statement of Offence

Rape: contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009.

Particulars of Offence

PAULA TAMANISAUTU on the 19th day of January 2018 at Waimalua Settlement, Tailevu in the Eastern Division, had carnal knowledge of **MAKELESI ROKOSORO**, without her consent.

17. You would notice that the first and the second counts in the Information are representative counts. A representative count is a count where the prosecution alleges that the accused had committed the offence he is charged with on more than one occasion during the period specified in that count but the prosecution has opted to frame only one charge mainly because they are unable to ascertain exact dates the offences were allegedly committed. When it comes to a representative count, the law says that it shall be sufficient for the prosecution to prove that between the dates specified in the charge at least one offence was committed.

18. You would also note that the accused is charged with three counts. Please remember that you should consider each count separately. That is, you must not assume that the accused is guilty of the other counts just because you find him guilty of one count.
19. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of that offence beyond reasonable doubt.
20. The accused is charged with the offence of rape on all three counts. To prove the offence of rape in this case, the prosecution should prove the following elements beyond reasonable doubt.
 - I. the accused;
 - II. penetrated the vagina of the complainant with his penis;
 - III. without the consent of the complainant; and
 - IV. the accused either;
 - (i) knew or believed that the complaint was not consenting; or
 - (ii) was reckless as to whether or not she was consenting.
21. In this case, the accused admits that he had sexual intercourse with the complainant in relation to all three counts. Therefore, first and the second elements above in relation to all three counts are not disputed. You should consider that the first two elements in relation to each count have been proven beyond reasonable doubt.
22. Accordingly, in this case the prosecution is only required to prove the two elements involving consent, the third and the fourth elements, beyond reasonable doubt in relation to each count. When you consider each count, if you have a reasonable doubt in respect of any one of those two elements, as to whether the prosecution has proved that element, then you must find the accused not guilty of that count. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason.

23. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent.
24. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not 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.
25. Apart from proving that the complainant did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
26. It is not difficult to understand what is meant by "the accused knew or believed that the complainant was not consenting". But you may wonder as to how you could determine whether the accused was reckless as to whether or not the complainant was consenting. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
27. You should also remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not

possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.

28. The prosecution led the evidence of three witnesses. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence on oath.
29. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
30. Firstly, let us look at the admitted facts. The following facts are admitted in this case and you should consider that these facts have been proven beyond reasonable doubt;
 1. **THAT** Paula Tamanisautu is the accused in this case.
 2. **THAT** the accused was 38 years old at time of the alleged offence.
 3. **THAT** Makelesi Rokosoro is the complainant in this matter.
 4. **THAT** the complainant was 18 years old at the time of the offence.
 5. **THAT** the complainant knows the identity of the accused.
 6. **THAT** the complainant was medically examined at Korovou Hospital on the 23rd of January, 2018 by Dr. Illisapeci Lasaro.
 7. **THAT** the accused was Caution Interviewed at Korovou Police Station on the 23rd of January, 2018.
 8. **THAT** the accused penetrated the complainant's vagina on more than one occasion in 2016.
 9. **THAT** the accused penetrated the complainant's vagina on the 19th of January 2018.
31. The complainant (PW1) said in her evidence that she is 21 years old. In 2016, she lived with her mother and the accused who is her stepfather, at Waimalua Settlement. Her mother was a market vendor and she used to leave the house on

Fridays to go to the market and come back on Saturdays. She had been with the accused since class 8 and she used to call him 'Ta' which means 'Dad'.

32. She recalled that on one Friday when her mother was away, around 2.00am while she was lying on the mattress the accused came and lay down beside her. The accused then touched her and removed her clothes. He touched her breasts and the private part. The accused told her not to move, stay still and not to shout. She said, she was scared because the accused threatened her and told her not to move. She said that the accused touched her after she was threatened. Then he kissed her mouth and started to undress her. Thereafter the accused held her tight from her waist and came on top of her. Then he inserted his penis inside her vagina. His penis was inside her vagina for about 15 minutes and she said she felt pain. After that the accused sat beside her and had a conversation with her. The accused told her that he wants to marry her and wants to make her pregnant. She just kept quiet because she was scared as a result of the threats. She said that the accused told her that he will threaten her using a knife. After her mother came back on the next day, the accused was staring at her when she was standing beside her mother so that she cannot inform her mother.

33. She said that, during the 2nd term in 2016, the accused again came to her between 2.00am and 3.00am. She was wearing trousers and a top and the accused removed her trousers and touched her vagina. She said that she tried to move away from him but he hugged her tightly and got hold of her waist. Then he inserted his penis in her vagina. She felt pain in her stomach and her vagina and she was also scared. The accused had his penis inside her vagina for 15 to 20 minutes and thereafter he sat beside her. He told her not to move, to stay still and not to go outside. The accused also told her that he wants to make her pregnant. She said that the accused told him not to tell her mother what he had done and she felt scared. When the mother came home the next day, the accused started to 'observe her reactions' and she felt scared.

34. On 19/01/18 her mother left for the market and she was at home with the accused. While she was lying on the mattress, the accused came to her, he touched her and then came on top of her. He started removing her trousers. She tried to move but the accused hugged her tightly. The accused then started touching her upper body and her vagina. Thereafter he inserted his penis inside her vagina. After that the accused told her that he wants to make her pregnant and told her not to tell anyone including the mother. On the next day, again the accused was observing her and was staring at her when she was near her mother. She said that she felt scared and angry when the accused told her not to tell anyone. Angry because the accused told her that she should not inform anyone what he did.
35. She again said that on the next day when her mother returned home the accused went to drink grog. She was scared and angry, and then she informed her mother about what the accused always does to her and that the accused wants to make her pregnant and marry her. She said she told the mother that the accused removed her clothes and tried to put his penis inside her vagina in 2016. She also told her that the accused threatened her with a knife and that he threatened to kill her. She said that the accused told her this only on one occasion. She said that she did not tell her mother this in 2016 because the accused threatened her with a knife that he will kill her. After she told this to her mother, the mother told her to pack her stuff and they went to the police station to report the matter.
36. During cross-examination she agreed that in 2016 she used to travel to school daily and that the accused's father's house was the nearest house but she did not tell anyone about the incidents. She said that she wanted to go with her mother on Fridays, but the accused told her not to go and told her mother that she should not go.
37. The defence says that the complainant is not a credible witness. It was highlighted during cross-examination that the complainant went to school daily and that the accused's father's house was nearby but she did not inform anyone

about the allegations. The defence says that the complainant had an affair with the accused.

Delay in making the complaint

38. According to the evidence, the first and the second incidents takes place in 2016 and the third which is the last incident on 19/01/18. The matter was reported to police after the complainant informed PW2 something in relation to the accused. As far as the first two counts are concerned, there was a delay of about 02 years to make a complaint regarding the said allegations. In relation to the third count, the delay is 2 days.

39. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, when there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. So, when there is a delay in making a complaint, you should look whether there is a reasonable explanation for that delay. Did the complainant explain to you the reason for her not complaint for about 02 years and then what prompted her to complain in 2018? Always remember that your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

40. The second prosecution witness was was the complainant's mother (PW2). She said that on 21/01/18 the complainant told her that the accused usually touches the complainant when she goes (out of the house). According to her the complainant also told her that the accused had threatened to kill the complainant if the complainant informs anyone. She said that she thought the accused will care for the complainant but did not anticipate that the accused would want to marry the complainant. She said that she came to know that the accused wanted to marry the complainant after the complainant told her that if she goes to

Taveuni for work, the accused will make the complainant pregnant and then marry the complainant. She said that the house they lived in 2016 to 2018 belonged to the accused. After the complainant told her this, she left the house with the complainant.

41. During cross-examination she said that the accused was a farmer when she was living with him and she used to sell the produce from the farm during weekends. She said that she wanted to take the complainant with her to the market but the accused wanted the complainant to stay with him. She agreed that the complainant was able to travel to her village alone. She denied having a fight with the accused over the accused's clothes on 21/01/18. She confirmed that the complainant only told her that the accused touched her.
42. When she was asked whether she came to know that the accused and the complainant have had sexual intercourse, she said that the complainant told her that the accused tried to do something to the complainant. She agreed that she had suspicions about the accused and the complainant having an affair. She said that she once asked the accused but he did not give her a correct answer. She then asked the complainant when she returned from school and then the accused threatened the complainant with a knife that he will kill the complainant if the complainant tells anyone including her. Thereafter she agreed that she did not see the accused threaten the complainant with a knife and that was what the complainant told her.
43. The prosecution is relying on PW2 as a recent complaint witness. In this regard, if you believe the evidence of PW2, you should consider whether the complaint made to her by the complainant was a prompt complaint regarding the incidents and whether the complainant sufficiently complained of the offences the accused is charged with. In this case the first complaint was made around 02 years after the first incident.

44. You should bear in mind that a recent complaint need not specifically disclose all the ingredients of the offence and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. However, please remember that this evidence of recent complaint is not evidence as to what actually happened between the complainant and the accused. PW2 cannot confirm whether what the complainant told her is true because she was not there at the place of offence at the material time to witness what actually happened. PW2's evidence in relation to the alleged incident is based on what she understood from the story relayed to her by the complainant and what she could remember about that conversation. Therefore remember that, recent complaint evidence may only assist you to decide whether the complainant is consistent and whether or not the complainant has told you the truth. In the end you are deciding whether the complainant has given a truthful account of her encounter with the accused.
45. In this case, according to PW2, the complainant only told her that the accused used to touch her when she is away. She also said that the complainant told her that the accused tried to do something to the complainant. According to PW2, the complainant did not tell her that the accused raped her. You also heard PW2 saying that she was told by the complainant that if she (PW2) goes to Taveuni for work then the accused will make the complainant pregnant and marry the complainant. This evidence of the first complaint made by the complainant is also relevant in deciding the issue of consent which is the only issue to be decided in this case and according to PW2 the complainant did not tell her that the accused had sexual intercourse with the complainant without her consent. Moreover, she (PW2) admitted that she suspected that the complainant and the accused were having an affair.
46. You may ask your selves whether PW2 had told you the entire story. According to her evidence the complainant told her on 21/01/18 that the accused was touching her and that was it. This was a Sunday. As stated above, she also admitted during cross-examination that she had suspicions about the accused and the complainant, that they were having an affair. She questions the

complainant about this after the complainant returns from school. This evidence suggests that she had her suspicions before 21/01/18 about the complainant having an affair with the accused. That means, the complainant had the opportunity to tell her about what happened or what was happening to her to PW2 on a previous occasion, but she did not make any complaint.

47. Initially PW2 said that the accused threatened the complainant when she questioned the complainant which gave the impression that this threatening was done in front of her. But later on she changed her version and said that it was the complainant who told her that. If you accept that answer, that is, the complainant told her about the accused threatening her, then it appears that the complainant had told her something about the complainant and the accused that day. But she does not leave the house or go to the police after that conversation. Even on 21/01/18 the complainant does not tell PW2 that the accused raped her. She was only told that the accused was touching the complainant and she did not mention about the complainant telling her that anything was done by the accused to the complainant without the complainant's consent.
48. On the other hand, if PW2 suspected that the complainant was having an affair with the accused before 21/01/18, and given the fact that the complainant only told PW2 on 21/01/18 that the accused was touching her, what made PW2 leave the house with the complainant on 21/01/18 and then to take the complainant to the police to make a complaint? Neither the complainant nor PW2 does not provide an explanation.
49. The defence on the other hand says that there was an argument on that day where the accused slapped PW2 and that is why the complainant and PW2 left the house.
50. The third prosecution witness was the doctor who medically examined the complainant (PW3). She said that she examined the complainant on 23/01/18 and she tendered the medical report as PE1. She said she did not find any injuries

during the vaginal examination, but she noted that the hymen was absent. In her opinion, the fact that the hymen was absent meant that sexual intercourse had already taken place.

51. During cross-examination she was questioned about the possibility of injuries being visible after four days if there were any injuries due to forceful penetration. She said that depending on the nature of the injuries it is possible. However, the complainant did not say in her evidence that there was forceful penetration on 19/01/18.
52. The third prosecution witness' opinion was that the complainant had had sexual intercourse before the date she examined the complainant. The accused does not dispute him having sexual intercourse with the complainant. The issue in this case is consent and PW3's evidence including PE1 is not relevant when it comes to the issue of consent.
53. When you consider PE 1, you should also remember that what is written in A(4) and D(10) are not admissible in considering whether the facts stated therein are true because those parts are filled based on the information received. The individuals who filled those parts in the form did not actually see what took place between the complainant and the accused. For this reason, the contents of A(4) and D(10) are blotted out. A portion of D(14) is also blotted out for the same reason as that portion includes facts that were merely told to PW3.
54. The accused said in his evidence that the complainant usually removes her trousers and shows him her private part. He said that the first time he had sexual intercourse with the complainant, the complainant came to him and told him to touch her breasts and to hug her. He said that while he was touching her breast, the complainant took his hand and told him to use his hand placing his hand on her female private part. Thereafter the complainant removed her trousers, told him to lay on top of her and told him to put his private part into her private part.

Then the accused asked the complainant what will happen if they get caught and the complainant told him that she won't tell anyone.

55. He said that he did not force her when they had sexual intercourse during the 2nd term, this was regarding the second occasion the complainant mentioned in her evidence. He denied threatening the complainant with a knife. He said that even at times he does not want to have sexual intercourse, the complainant would want him to do it. He said that the complainant told him that if they keep on having sexual intercourse and the complainant gets pregnant, they can get married.
56. He said that on the third occasion, that is on 19/01/18, after the complainant returned from school she had a bath and then she came and sat on him. He said that when he had sexual intercourse with the complainant, from her facial expressions, he could tell that the complainant wanted to have sexual intercourse. He said he did not force the complainant to have sexual intercourse. He said that sometimes when he talks to some of his Tavale's, the complainant used to tell him off and had told him not to talk with other women. He said that they (complainant and PW2) left on 21/01/18 because he got angry and slapped PW2 over an issue regarding his 'Sunday clothes'.
57. During cross-examination he agreed that the house belonged to him and that he was the 'financial head' of the house. He agreed that he had authority over the complainant and PW2. The last question was "You used your authority to get what you wanted, isn't it?" and he replied "yes". During re-examination he said that he said 'yes' to that question because the complainant said 'yes' to their sexual intercourse.
58. The accused admitted that he had authority over the complainant and PW2. The issue is whether he used that authority to obtain the complainant's consent for sexual intercourse. The complainant did not say that she gave her consent because of the authority the accused had on her. What she said was that the accused

threatened to kill her and that is why she did not complain to anyone including her mother.


59. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
60. You should also bear in mind that the accused is tried for the offence of rape under the law. Therefore, what you should decide in this case is whether or not the disputed elements have been proven beyond reasonable doubt and not whether the accused is right or wrong according to moral standards. Accordingly, you should decide in respect of each count, whether the evidence presented in this case establishes beyond reasonable doubt that the complainant did not consent for the accused to penetrate her vagina and if you find that she did not consent, then, whether the accused knew or believed that she was not consenting or whether the accused was reckless as to whether or not she was consenting.
61. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
62. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in relation to each count;
 - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.

(iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

63. Any re-directions?
64. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
65. Your opinion should be whether the accused is guilty or not guilty on each count.




Vinsent S. Perera
JUDGE

Solicitors;

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