

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 302 OF 2018S

STATE
Vs
USAIA MALO

Counsels : Ms. U. Tamanikaiyaroi for State
Mr. E. Radio for Accused
Hearing : 24, 25 and 26 February, 2020.
Summing Up : 27 February, 2020.

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 their 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. I will now read the same to you:

“... [read from the information]....”

D. THE MAIN ISSUES

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:
- (i) On Count No. 1, did the accused, on 30 June 2018, at Lau in the Southern Division, rape the complainant (PW1)?
 - (ii) On Count No. 2, did the accused, on 30 June 2018, at Lau in the Southern Division, rape the complainant (PW1)?

E. THE OFFENCES AND THEIR ELEMENTS

9. For the accused to be found guilty of “rape”, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused’s finger penetrated the complainant’s vagina (count no. 1); or
 - (ii) the accused’s penis penetrated the complainant’s vagina (count no. 2); and
 - (iii) without her consent; and
 - (iv) he knew she was not consenting to 9 (i) and (ii) above, at the time.
10. The slightest penetration of the complainant’s vagina with the accused’s finger or penis; is sufficient to satisfy element no. 9 (i) and (ii) above. It is irrelevant whether or not the accused ejaculated.
11. “Consent” is to agree freely and voluntarily and out of her own freewill. 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. If the consent was induced by fear, it is no consent at all.
12. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to 9 (i) and (ii) above, at the time. You will have

to examine the parties' conduct at the time, and the surrounding circumstances, to decide this issue.

13. If you find the elements of rape, as described in paragraph 9 hereof, satisfied by the prosecution beyond reasonable doubt, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.

14. If you find the accused not guilty of rape, as alleged in count no. 2, you are entitled in law to consider the lesser offence of "defilement of a young person between 13 and 16 years", contrary to section 215(1) of the Crimes Act 2009. The above is permissible, although he was not formally charged with the same. For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) unlawfully
 - (iii) inserts his penis
 - (iv) into the complainant's vagina,
 - (v) and the complainant was aged between 13 and 16 years.

15. In defilement, consent by the complainant, is not a defence. The only defence available was that the accused, prior to sexual intercourse, had reasonable cause to believe and did in fact believe that the complainant was of or above the age of 16 years. In deciding the above issues, you have to look at both parties actions and the surrounding circumstances, and decide accordingly.

F. THE PROSECUTION'S CASE

16. The prosecution's case were as follows. On 30 June 2018, the date of the alleged incident, the complainant (PW1) was 14 years old. At the time, she was in Nasau Village, Moce Island, in the Lau group. She was attending Moce Secondary School as a Form 3 student. The accused (DW1), at the date of the alleged incident, was also residing at Nasau Village,

Moce. He was 34 years old. He was a subsistence farmer, married with 4 young children aged between 3 to 14 years old. The complainant and the accused were related. The complainant was the accused's grandniece.

17. According to the prosecution, the people of Nasau Village were installing their chief on 30 June 2018, a Saturday. Ceremonies and celebration went on until 8 pm in the night. According to the prosecution, the complainant was with friends and other children in a shed near the village green. They were playing and singing songs. According to the prosecution, the accused came to them, and allegedly took the complainant to a water tank behind the shed. According to the prosecution, the accused allegedly forced himself on the complainant and inserted his finger into her vagina, without her consent.
18. Later, according to the prosecution, the accused then allegedly forced her down on the ground, forcefully parted her legs and allegedly inserted his penis into her vagina, without her consent. According to the prosecution, on the above occasions, the accused allegedly knew the complainant was not consenting to what he did, at the time. The matter was later reported to police. An investigation was carried out. The accused was later charged for raping the complainant twice on 30 June 2018.
19. 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

20. On 24 February 2020, in the presence of his counsel, the information was put to the accused. He pleaded not guilty to the charges. In other words, he denied the two rape allegations 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 no witness. That was his constitutional right.

21. The accused's case was very simple. He admitted he was at the alleged crime scene, at the material time. He admitted, he was related to the complainant. He admitted, he took her to the water tank behind the shed, at the material time. He admitted, he asked the complainant for sex, prior to touching her vagina. However, he denied inserting his finger into her vagina, nor inserting his penis into her vagina, at the material time. He said, he later went home, after the alleged incident.
22. Because of the above, the accused denied raping the complainant, as alleged in count no. 1 and 2 of the information. As a result, he is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the Accused.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

23. 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.

(b) **The Agreed Facts:**

24. The parties had submitted an "Agreed Facts", dated 26 November 2019. A copy of the same is with you. Please, read it carefully. There are 5 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:

25. The State's case against the accused rested solely on the verbal evidence of the complainant (PW1), given in court on 24, 25 and 26 February 2020. You had watched her give evidence, you had observed her demeanor and you had observed her reactions to the questions thrown at her by the prosecution and defence counsels. I am sure that the details of her evidence are still fresh in your minds. However, in this case, I will not bore you with the details of her evidence, but will concentrate on the salient points on the evidence, and whether or not the elements of the charges had been proven by the prosecution beyond a reasonable doubt.
26. On the first element of the offence of rape as discussed in paragraphs 9(i) [count no. 1] and 9(ii) [count no. 2], the questions becomes; firstly, did the accused's finger penetrate the complainant's vagina on 30 June 2018? [Count no. 1]; secondly, did the accused's penis penetrate the complainant's vagina on 30 June 2018? [Count no. 2]. In her evidence, the complainant said, while she and the accused were behind the water tank, at the material time, the accused inserted his fingers into her vagina, and later inserted his penis into her vagina, when they were lying on the ground. If you accept the complainant's evidence on the above matter, then the prosecution had proven the first element of rape on both counts beyond a reasonable doubt. If you reject the complainant's evidence on the above matter, then you must find the accused not guilty as charged on both counts. It is a matter entirely for you.
27. Assuming you find the accused's finger (count no. 1) and penis (count no. 2) penetrated the complainant's vagina on 30 June 2018, the next question becomes: were they done with her consent? In her evidence in court, the complainant said, she struggled and resisted the accused's attempt to insert his finger and penis into her vagina on 30 June 2018, but it was to no avail. She said, the accused was too strong for her to resist him. She said, she pushed him off, called Litia three times, struggled with him, but it was all to no avail. She

told the accused, not to do what he was doing to her, because they would be caught by others. Remember, there were children playing around near to the alleged crime scene.

28. After the alleged incident, the matter came to the notice of the Nasau Village “Turaga ni Koro” (Village Headman), and he reported the matter to Lakeba Police Station. There was no police station in Moce. The complainant said, she did not report the matter to the Village Headman and only partly told her grandmother. When cross examined, she said she did not report the matter to police. She said, she only told the police about the alleged incident when they investigated and questioned her on the matter. When considering whether or not the complainant consented to her vagina been allegedly penetrated by the accused’s finger and penis, you must consider the whole of her evidence before, during and after the alleged incident. Look at what she said and did, and the surrounding circumstances to decide whether or not she consented to her vagina been allegedly penetrated by the accused’s finger and penis, on 30 June 2018. If you find that she did not consent, this entitles you to move on to consider the third element of the offence of rape, as outlined in paragraph 9 (iv) hereof. If you find she consented to her vagina been allegedly penetrated by the accused’s finger and penis on 30 June 2018, or you are not sure of the same, you must find the accused not guilty as charged. It is a matter entirely for you.
29. Assuming you find the complainant did not give her consent to the accused allegedly penetrating her vagina with his finger and penis, then the last question becomes: did he know at the time, that she was not consenting to her vagina been allegedly penetrated by the accused’s finger and penis? On this issue, you have to carefully analyze what the complainant said in her evidence and the surrounding circumstances at the time. According to the complainant, she resisted the accused by pushing him back with her hands, calling Litia three times, saying no to the accused and telling him to stop because they will be caught. Note there were children playing around in the area. The complainant said the accused was too strong for her, and as a result, her resistance was to no avail. How you answer the above question is entirely a matter for you.

30. If you accept the complainant's evidence on the allegation as credible, you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you. If you find the accused not guilty as charged, you must consider the lesser offence of "defilement of a girl aged between 13 and 16 years," as outlined to you in paragraphs 14 and 15 hereof, as an alternative to count no. 2. How you answer the above is entirely a matter for you.

(d) **The Accused's Case:**

31. I had summarized the accused's case to you from paragraphs 20 to 22 hereof. I repeat the same here. You had heard the accused gave sworn evidence yesterday. You had observed his demeanor and the way he reacted to the questions thrown at him by prosecution and defence counsels. In a nutshell, the accused denied inserting his finger and penis into the complainant's vagina, at the material time. If you accept the accused's sworn denials, you must find him not guilty as charged on both counts. Alternatively, if after listening to the accused's sworn evidence, you are thrown into a reasonable doubt, about the prosecution's case, or you are not sure about his guilt, you must find him not guilty as charged. It is a matter entirely for you.

(e) **The Need To Consider All The Evidence:**

32. The State called only one witness, the complainant herself. The defence also called one witness, that is, the accused himself. Altogether, you have two witnesses, on whose evidence, you will have to make a decision. If you accept the complainant's evidence, you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.

I. **SUMMARY**

33. 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.

34. Your possible opinions are as follows:

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|-------|--|----------|----------------------|
| (i) | Count no. 1: Rape | Accused: | Guilty or Not Guilty |
| (ii) | Count no. 2: Rape | Accused: | Guilty or Not Guilty |
| (iii) | Alternative of Defilement of girl
between 13 and 16 years, if not
guilty of count no. 2: | Accused | Guilty or Not Guilty |

35. 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 : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused : **Legal Aid Commission, Suva.**