

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 131 OF 2019S

STATE
Vs
MAKITI SERU LEDUA

Counsels : **Ms. S. Swartzika for State**
Ms. P. Mataika for Accused
Hearing : **23 and 24 March, 2020.**
Summing Up : **26 March, 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 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 22 March, 2019, at Vuci Road, Nausori in the Eastern Division, rape the complainant (PW1)?

E. THE OFFENCE AND IT'S 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);
(iii) without her consent; and
(iv) he knew she was not consenting to 9 (i) or 9 (ii) above, at the time.

10. In law, the slightest penetration of the complainant’s vagina with the accused’s finger (count no. 1) or the accused’s penis (count no. 2), is sufficient to satisfy element no. 9 (i) [count no. 1] or 9 (ii) [count no. 2] above. For count no. 2, it is irrelevant whether or not the penis was erected, so long as the penis, penetrated the complainant’s vagina. For count no. 2 also, 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) or 9 (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.

F. THE PROSECUTION'S CASE

14. The prosecution's case were as follows. On 22 March 2019, the female complainant (PW1) was residing at Vuci Road Nausori, with her daughter (PW2) and her husband (the accused). Her daughter and the accused had five children, three girls and two boys. The children were aged between 16 and 7 years old. The complainant's daughter and the accused had been married for 15 years. The complainant was 83 years old at the time. She became part of the accused and PW2's family 4 years prior to the alleged incident.
15. According to the prosecution, the complainant's daughter, PW2, was the bread winner for the family, at the time of the alleged incident. The accused stayed home doing domestic chores and was looking after the children. According to the prosecution, the complainant, a retired nurse, had a dim view of the accused. According to her, a man should go out and work to provide for his family. As a result of this view, the accused and the complainant were not always on good terms. This was further compounded by the fact that her daughter (PW2) was going out daily to work to support the family, while the accused stayed at home.
16. On 22 March 2019, between 7 am and 8 am, the complainant's daughter (PW2) woke up, prepared the children's breakfast and lunch, and took them to school. Only the complainant and the accused were in the family residence. According to the prosecution,

the accused allegedly forced his way into the complainant's bedroom. He allegedly pushed the bedroom door open, went to the complainant, who was lying down on her bed. According to the prosecution, he allegedly pulled the complainant's pajama pants off and allegedly parted her legs. He then allegedly inserted his fingers into the complainant's vagina, and played with the same for 30 minutes [count no. 1].

17. The complainant resisted the accused by shouting, but he allegedly blocked her mouth with a hand. He later allegedly inserted his penis into the complainant's vagina for about 30 seconds [count no. 2]. The complainant later pushed him off her bed. He later went to his room. The complainant said she did not consent to the above and the accused knew she was not consenting to the same, at the time. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged, on both counts. That was the case for the prosecution.

G. THE ACCUSED'S CASE

18. On 23 March 2020, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. 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 remain silent and called one witness (DW1). That was his constitutional right.
19. Nothing negative whatsoever should be imputed to the accused when he chose to exercise his right to remain silent. This is because the burden to prove his guilt beyond reasonable doubt, remains with the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. Remember what I told you in paragraph 4 hereof, and I repeat the same here. There is no burden on the accused to prove his innocence, or prove anything at all. He is presumed innocent until he is proven guilty beyond a reasonable doubt. He is entitled, as he had done here, to fold his arms, sit there in the dock, and demand the prosecution prove his guilt beyond a reasonable doubt. However, he decided to call his

cousin (DW1) as a witness. DW1 did not remember the date of the alleged incident. He was, to put it bluntly, of no use to the defence.

20. So, in this case, you will have to carefully examine the prosecution's case and decide whether or not the accused was guilty as charged. The prosecution's case was based fundamentally on the verbal evidence of the complainant, and you will have to decide whether what she alleged against the accused had made you sure of the accused's guilt. If you are sure of his guilt, you must find him guilty as charged. If otherwise, you will have to find him not guilty as charged. It is a matter entirely for you.
21. Because he pleaded not guilty to the charge, the accused is asking you, as assessors and judges of fact, to find him 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 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 State's Case Against the Accused:**

23. The State's case against the accused rested solely on the verbal evidence of the complainant (PW1), given in court on 23 and 24 March 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.

24. On the first element of the offence of rape as discussed in paragraphs 9 (i) and 9 (ii) hereof, two questions arise: (1) For count no. 1, did the accused's finger penetrate the complainant's vagina on 22 March 2019? (2) For count no. 2, did the accused's penis penetrate the complainant's vagina on 22 March 2019? In her evidence, the complainant said, the accused came into her bedroom on 22 March 2019, and inserted two fingers into her vagina, and played with the same for 30 minutes. She also said, he inserted his penis into her vagina, for about 30 seconds. If you accept this evidence, then the prosecution had proven the first element of rape beyond reasonable doubt. If you reject the complainant's evidence on the above issue, you must find the accused not guilty as charged. It is a matter entirely for you.
25. Assuming you find the accused's finger [count no. 1] and penis [count no. 2] penetrated the complainant's vagina on 22 March 2019; you will then have to answer the third question: Were the above penetrations done with the complainant's consent? In her evidence, the complainant appear to say she did not consent to the above. She said, the accused came and pulled her pajama pants off. She said, she tried to raise the alarm by shouting, but she said he closed her mouth with his hand. She said, she tried to push him off, but she said, he was too strong for her. You must examine the whole of the complainant's evidence. If you find she did not consent to the accused's penetrating her vagina on 22 March 2019 with his fingers [count no. 1], or his penis [count no. 2], then you will have to move on to consider the last element of the offence of rape, that is, did he know that the complainant was not consenting to his fingers [count no. 1] or penis [count no. 2] penetrating her vagina at the time? If, on the other hand, you find that the complainant gave her consent to the accused penetrating her vagina with his finger or his penis at the time, or you are not sure on this issue, you must find the accused not guilty as charged. It is a matter entirely for you.

26. Assuming you find that the complainant did not give her consent to the accused penetrating her vagina with his fingers (count no. 1) or his penis (count no. 2) at the time; the last question becomes: did he know at the time that she was not consenting to her vagina being penetrated by his fingers (count no. 1) or his penis (count no. 2)? The complainant when cross-examined said, she asked the accused what he wanted when he came into her bedroom prior to the incident. She said, the accused said nothing. She said, he inserted two of his fingers into her vagina. She said, she tried to shout. She said, the accused put a hand over her mouth. She said, she tried to push the accused off her bed, but she said, he was too heavy. How you answer the last question is entirely a matter for you.
27. If you accept the complainant's evidence on the allegations 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.

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

28. I had summarized the accused's case to you from paragraphs 18 to 21 hereof. I repeat the same here. If you reject the complainant's evidence, you must find the accused not guilty as charged.

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

29. The prosecution called three witnesses:
- (i) Complainant (PW1);
 - (ii) Complainant's daughter (PW2); and
 - (iii) Doctor Himesh Patel (PW3).
- The prosecution tendered one exhibit:
- (i) Complainant's Medical Report – Prosecution Exhibit No. 1.
- The defence called one witness:
- (i) Mr. Taniela Qalobula (DW1).

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

I. SUMMARY

31. 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.

32. Your possible opinions are as follows:

- | | | | | |
|------|-------------|-------|----------|----------------------|
| (i) | Count No. 1 | Rape: | Accused: | Guilty or Not Guilty |
| (ii) | Count No. 2 | Rape: | Accused: | Guilty or Not Guilty |

33. 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



Solicitor for the State
Solicitor for the Accused

:
:

Office of the Director of Public Prosecution, Suva.
Legal Aid Commission, Suva.

A handwritten signature in blue ink, appearing to read "Salesi Temo".

Salesi Temo
JUDGE