

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 021 OF 2019S

STATE
Vs
SALACIELI RATUMAIDRAVUWALU

Counsels : **Ms. K. Semisi for State**
Mr. J. Korotini for Accused
Hearings : **2, 3, 4 and 5 June, 2020.**
Summing Up : **8 June, 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. There were 6 counts in the information. At the close of the prosecution's case, after listening to the parties' submissions, I found the accused not guilty as charged on counts no. 2, 4, 5 and 6, and acquitted him accordingly on those counts. You are therefore required to disregard those counts in this summing up. You are only to consider counts no. 1 and 3, and I will now read the same to you:

"... [read count no. 1 and 3 in 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, between 1 and 31 October 2018, at Lami in the Central Division, rape the complainant (PW1)?
 - (ii) On count no. 3, did the accused, on 4 November 2018, at Lami in the Central 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 penis penetrated the complainant's vagina;
 - (ii) without her consent; and
 - (iii) he knew she was not consenting to 9 (i) above, at the time.
10. The slightest penetration of the complainant's vagina with the accused's penis; is sufficient to satisfy element no. 9 (i) 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) 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. The accused was a 62 year old carpenter, residing in a settlement in Lami. The complainant (PW1) was his 15 year old biological daughter. When PW1 was born in 2003, she was adopted by the accused's first cousin and his wife (PW2). PW2 and her husband brought up the complainant to this very day. Their house was 7 footsteps away from the accused's house in the Lami settlement.
15. According to the prosecution, sometimes between 1 and 31 October 2018, the accused allegedly called the complainant to his house. This was before lunch at midday. When PW1 arrived at his house, the accused allegedly told her to go into his bedroom. He allegedly told her to lie on a mattress on the floor in his bedroom. He then allegedly took off her clothes and his clothes. According to the prosecution, PW1 allegedly told the accused not to do the above. Nevertheless, according to the prosecution, the accused allegedly inserted his penis into her vagina without her consent. According to the prosecution, the accused allegedly knew she was not consenting to sex with him at the time, because she pleaded with him to stop. That was the allegation in count no. 1.

16. According to the prosecution, the accused allegedly repeated the above episode to her on 4 November 2018. The complainant and her mother, PW2, allegedly argued with each other in the early evening. PW2 then told PW1 to find a place to sleep in that night. According to the prosecution, the complainant and a friend went into the accused's house. They ate some food and slept on a mattress in the accused's bedroom. While sleeping, PW1 felt someone touching her.
17. PW1 then allegedly saw the accused touching her. According to the prosecution, the accused allegedly took off PW1's clothes and inserted his penis into her vagina without her consent. According to the prosecution, the accused allegedly knew she was not consenting to sex with him at the time, because she pleaded with him to stop. However, he allegedly ignored her protest. That was the allegation in count no. 3.
18. The matter was reported to police. An investigation was carried out. The accused was brought to the Suva Magistrate Court on 14 December 2018 charged with raping the complainant as alleged. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged on counts no 1 and 3. That was the case for the prosecution.

G. THE ACCUSED'S CASE

19. On 2 June 2020, count no 1 and 3 in the information were put to the accused, in the presence of his counsel. He pleaded not guilty to the same. In other words, he denied the 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 no witness. That was his constitutional right.
20. 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.

21. 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.
22. 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 on counts no. 1 and 3. That was the case for the defence.

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 20 March 2020. A copy of the same is with you. Please, read it carefully. There are 8 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. A crime can be proven solely on the basis of the sworn evidence of a witness, if the same was accepted by the trier of fact, in this case, you as assessors and judges of fact. The State’s case against the accused was based solely on the verbal evidence of the complainant (PW1), given in court on 2, 3 and 4 June 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, and I will not bore you with the details of the same. I will however, concentrate on the salient points in the evidence, and the central issue of whether or not the prosecution had proven beyond reasonable doubt the elements of the charges of rape in counts no. 1 and 3.
26. On the first element of rape as discussed in paragraphs 9 (i) and 10 hereof, the first question for count no. 1 and 3 becomes: (i) on count no. 1, did the accused’s penis penetrate the complainant’s vagina, between 1 and 31 October 2018? (ii) On count no. 3, did the accused’s penis penetrate the complainant’s vagina on 4 November 2018? In her evidence on counts no. 1 and 3, the complainant said the accused’s penis penetrated her vagina, at the material times, for approximately 5 minutes. If you accept her evidence on the same, then the prosecution would have proven the first element of rape beyond a reasonable doubt, and this entitles you to move on to consider the second element of rape, as discussed in paragraphs 9 (ii) and 11 hereof. However, if you reject the complainant’s above evidence on penile penetration of the complainant’s vagina, at the material times, then the prosecution would have failed to prove the first element of rape beyond a

reasonable doubt, and you must then find the accused not guilty as charged on counts no. 1 and 3.

27. Assuming that you had decided for the State on the first element of rape, the second question becomes: (i) On count no. 1, did the complainant consented to the accused penetrating her vagina with his penis, between 1 and 31 October 2018? (ii) On count no. 3, did the complainant consented to the accused penetrating her vagina with his penis on 4 November 2018? In answering these questions, you must read and understand the concept of “consent” as discussed in paragraph 11 hereof. In her evidence on both counts, the complainant said she did not consent to the accused penetrating her vagina with his penis, at the material times. She said, she pleaded with him to stop, but he didn’t. If you accept the complainant’s evidence on this issue, then the prosecution would have proven the second element of rape beyond a reasonable doubt, and this entitles you to move on and consider the final element of rape, as discussed in paragraphs 9 (iii) and 12 hereof. If you reject the complainant’s evidence as mentioned above, then the prosecution had failed to prove the second element of rape beyond a reasonable doubt, and thus you must find the accused not guilty as charged on count no. 1 and 3.
28. Assuming that you had decided for the State on the second element of rape, the third and final questions become: (i) On count no. 1, did the accused know that the complainant was not consenting to sex with him, between 1 and 31 October 2018? (ii) On count no. 3, did the accused know that the complainant was not consenting to sex with him on 4 November 2018? In answering these questions, you must consider what was mentioned in paragraph 12 hereof. In her evidence, on both counts, the complainant said, she asked the accused not to take her clothes off and not to insert his penis into her vagina. She said, she told him to stop, as he was her biological father. She said, the accused said he was her “boss” and the “boss of her body”, given that he was her biological father. She said, he ignored her pleas, and continued to have sex with her for approximately 5 minutes, on each counts. The above evidence, if accepted, showed that the accused knew she was not consenting to

sex with him, as alleged in counts no. 1 and 3. If you accept the complainant's evidence on the above issue, then the prosecution would have proven beyond reasonable doubt, the third and final element of the offence of rape. If you reject the complainant's evidence on the above issue, then you must find the accused not guilty as charged, on counts no. 1 and 3. How you answer the above issues, is entirely a matter for you.

29. 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.

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

30. I had summarized the accused's case to you from paragraphs 19 to 22 hereof. I repeat the same here. If you reject the complainant's evidence, you must find the accused not guilty as charged.

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

31. The State called 3 witnesses:
- (i) Complainant (PW1);
 - (ii) Complainant's Mother (PW2); and
 - (iii) Doctor Alanieta Waqanicagica (PW3).

The prosecution submitted one exhibit:

- (i) Prosecution Exhibit No. 1 – PW1's medical report.

The accused chose to remain silent and called no witness.

32. 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 her evidence in your deliberation. If you find a witness not credible, you

are entitled to reject the whole or some of her evidence in your deliberation. You are the judges of fact.

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:

- | | | | | |
|------|--------------|-------|----------|----------------------|
| (i) | Count No. 1: | Rape: | Accused: | Guilty or Not Guilty |
| (ii) | Count No. 3: | Rape: | 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



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 be "Salesi Temo".

Salesi Temo
JUDGE