

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

**CRIMINAL CASE NO. HAC 303 OF 2019**

**BETWEEN** : STATE

**AND** : VILIKESA RALAGI

**Counsel** : Ms S Swastika with Mr S Koroibaba for the State  
Ms S Daunivesi with Ms O Grace for the Accused

**Date of Hearing** : 29 June – 30 June 2020

**Date of Summing Up:** 30 June 2020

**SUMMING UP**

- [1] Madam 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 the charge.
- [6] 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 were led in the trial. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [7] In this case the complainant gave evidence behind a screen. The giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness give. The fact that the evidence had been so given must not in any way be considered by you as prejudicial to the Accused.
- [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 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.
- [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 heard about this case outside the courtroom. 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 opening or closing 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 one count of rape. To prove the charge, the prosecution must prove the following elements beyond reasonable doubt.

[17] First, it must be proved beyond reasonable doubt that the Accused had sexual intercourse with the complainant, that is, he penetrated her vagina with his penis. The slightest degree of penetration is enough, and it is not necessary to prove that ejaculation took place.

[18] Second, the prosecution must prove beyond reasonable doubt that when the Accused penetrated the vagina of the complainant with his penis, he did so without her consent. The term consent means consent freely and voluntarily given by the complainant to engage in the physical act of sexual intercourse. Consent can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated in other ways. Consent obtained after persuasion is still consent. However, the law specifically provides that a person who does not offer actual physical resistance to sexual acts is not, by reason only of that fact, to be regarded as consenting to the sexual acts. A person who submits to sexual acts with another person as a result of threats or violence is, by law, not to be regarded as consenting to the sexual acts.

[19] Third, it must be proved that the Accused knew that the complainant did not consent. This is a subjective, and not an objective test. You might ask how, in the absence of an admission by the accused, the prosecution can prove that the accused was aware that the complainant did not consent. The prosecution asks you to infer from other facts which it has set out to prove, that the Accused must have known and that he did indeed know.

[20] All three elements of rape are in dispute. The questions for you are:

- Whether the Accused penetrated the complainant's vagina with his penis?
- Whether the sexual intercourse was without the consent of the complainant?
- Whether the Accused knew that the complainant did not consent to the sexual intercourse?

[21] I turn now to summarize the evidence. In doing this it would be tedious and impractical for me to go through the evidence in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention 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.

[22] Both sides have agreed to certain facts. The Agreed Facts are to be taken as true when you consider the evidence and the charge. The complainant is a young girl. She was 14 years of age at the time of the alleged incident. Her relationship with the Accused is not in dispute. He is her father's uncle and lived close to her home at Namata village, Tailevu.

[23] In relating to the incident, the complainant said she was alone at home one Saturday afternoon in November 2018 when the Accused entered the bedroom where she was lying down on a bed after bathing. Her father and her brother had gone to the farm at that time. She said the Accused came and lay on top of her and when she tried to flee he covered her face with a pillow. She said the Accused threatened to strike her with a cane knife if she reported the incident. She said he held both her hands down and covered her mouth with a pillow. She said the Accused penetrated her vagina with his penis for five minutes until she felt something wet on her thighs. She said she could not move or flee because he held her down. She said she felt pain. She could not talk or shout because her mouth was covered with the pillow. After she felt something wet on her thighs he stood up and threatened her that he would kill her if she reported the incident to anyone, before walking away.

[24] The complainant said after the Accused had left her house, she sat on the bed and cried. After that she took a shower and went to her friend, Viniana's house and reported the incident to her. She told Viniana that the Accused came to her home and had sexual intercourse with her. The complainant also told the court that her grandmother reported the incident to police when she revealed the incident to her in a prayer session in August 2019.

[25] The next two witnesses were Viniana Divere and Amelia Koroikaisuni. They confirmed to the Court that the complainant told them that the Accused had done something to her. Viniana said the complainant told her that the Accused entered the house, undressed her

and laid on top of her. You will recall the complaint to the grandmother was made after 8 months and was prodded out of the complainant by the grandmother.

[26] There is a further direction that I wish to give you regarding the complaint evidence. In a case of sexual offence, recent complaint evidence is led to show consistency on the part of the complainant, which may help you to decide whether or not the complainant has told you the truth. It is for you to decide whether the evidence of this compliant given to the friend and grandmother helps you to reach a decision, but it is important that you should understand that the complaint is not independent evidence of what happened between the complainant and the Accused, and it therefore cannot itself prove that the complaint is true. You must consider these matters if you decide to rely upon the complaint evidence to assess whether the complainant's evidence is consistent and therefore believable.

[27] You will recall that the complainant and Viniana were cross examined on inconsistencies or omissions in their police statements. I must give you a further direction regarding this. Evidence is what the witnesses told us in court on oath. Police statement is not evidence. So what use you can make of a police statement? You may take into account the inconsistencies or omissions in a police statement when you consider whether the witness is believable. In examining the inconsistencies or omissions, you will wish to decide, first, whether there is in fact an inconsistency or omission and if you decide there is one whether it is a material and relevant inconsistency or omission. If there is an inconsistency or omission, it might lead to conclude that the witness is generally not to be relied upon, or that a part of her evidence is inaccurate or you may accept the reason the witness has provided for the inconsistency or omission and consider her to be a reliable witness. That is a matter for you to consider.

[28] I turn now to the medical evidence. The complainant was medically examined on 20 August 2019 by Dr Ongbit. The specific medical finding was an old healed hymenal laceration (tear) at 3 o'clock and 6 o'clock. Since Dr Ongbit was unavailable to give evidence, Dr Bakani was called to give his medical opinion on what could have caused the injury. Dr Bakani said the hymenal tear could have been a result of penetration to the vagina by a blunt object. What weight you put to the medical evidence is a matter for you

bearing in mind the medical evidence alone does not prove that the Accused committed the alleged sexual act.

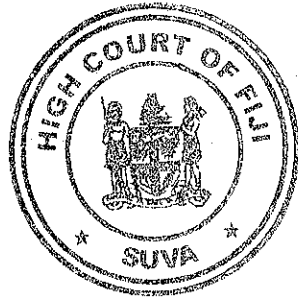
[29] That was the prosecution case.

[30] 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 the 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.

[31] The defence case is that the allegation of rape made against the Accused by the complainant is not true but a fabrication when the Accused refused to allow her to use his boat. Counsel for the Accused says that the delay by the complainant in reporting the alleged incident to her close family members is inconsistent with the conduct of a truthful person who had been sexually assaulted. The defence says that you should, therefore, regard the complainant's evidence that the Accused raped her as false. This is necessarily a matter which you should consider, but I must warn you that the delay or lack of a complaint does not necessarily indicate that the evidence of the complainant is false. It may indicate fabrication on the part of the complainant, but does not necessarily do so. There may be good reasons why a person who has been sexually assaulted hesitates in reporting to her close family members. In this case, the complainant was a child and a female and the Accused was an adult male relative living close to her home. She said she was scared of his threat not to report the incident to anyone. Do you accept the complainant's reasons that she was scared to raise alarm or to complain to be reasonable in the circumstances of this case. That is a matter for you to consider.

[32] The prosecution's case wholly rests on the complainant's evidence. If you believe the complainant is telling you the truth that the Accused had sexual intercourse with her without her consent and knowing she had not consented, then you may express an opinion that the Accused is guilty of the charge. But if you do not believe the account of the complainant or if you have a reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty of the charge. Remember the Accused does not have to prove anything. The prosecution must prove his guilt beyond reasonable doubt.

[33] 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. Please now retire to deliberate on your opinions.



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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

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