

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 322 OF 2018S

STATE
vs
JOSAIA TADULALA

Counsels : **Ms. K. Semisi for State**
Mr. E. Radio for Accused
Hearings : **13, 14 and 15 July, 2020.**
Summing Up : **16 July, 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 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, and 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, between 16 January and 21 April 2017, at Vanuabalavu in the Eastern Division, rape the complainant (PW1)?
 - (ii) On count no. 2, did the accused, between 16 January and 21 April 2017, at Vanuabalavu in the Eastern Division, sexually assault the complainant (PW1)?

E. THE OFFENCES AND THEIR ELEMENTS

9. On the first count of “rape”, contrary to section 207 (1), (2)(b) and (3) of the Crimes Act 2009, it was alleged that the accused, between 16 January and 21 April 2017, at Vanuabalavu in the Eastern Division, penetrated the child complainant’s vagina with his tongue. On the second count of “sexual assault”, contrary to section 210 (1) (a) of the Crimes Act 2009, it was alleged that the accused, at the same time period and the same place, sexually assaulted the child complainant by sucking her breast and touching her vagina.
10. For the accused to be found guilty of rape, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused;
 - (ii) penetrated the complainant’s vagina with his tongue;
 - (iii) without her consent; and
 - (iv) he knew she was not consenting to 10 (ii) above, at the time.
11. Crucial to the above offence is the meaning of the verb “penetrate”. In the **Oxford Advanced Learner’s Dictionary**, 6th edition, Oxford University Press, 2002, the word “penetrate” means “to go into or through something”. The slightest penetration of the complainant’s vagina by the accused’s tongue, is sufficient to satisfy element 10 (ii) above.

12. “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. In this case however, we are dealing with a female complainant, who was under 13 years old at the time. In law, a person under 13 years old is incapable of giving her consent to her vagina being penetrated by a tongue. So, for a child under 13 years old, the prosecution does not need to prove non-consent by the child complainant. It is already a presumption in law.
13. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting, at the time. You will have to look at the parties’ conduct at the time, and the surrounding circumstances, to decide this issue. However, for a child complainant who was under 13 years old at the time, an adult accused is presumed to know in law that she is incapable of giving her consent to her vagina being penetrated by the accused’s tongue. This policy was put there to protect children.
14. If you find the above elements of rape proven 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.
15. For the accused to be found guilty of “sexual assault” (count no. 2), the prosecution need to prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) unlawfully and indecently
 - (iii) assaults
 - (iv) the female complainant.
16. Sexual assault is an aggravated form of indecent assault. The prosecution must prove the above elements against the accused beyond reasonable doubt. “Assault” is really to apply unlawful force to the person of another without his or her consent. The “assault” must be considered “indecent” by right thinking members of society. If you find the above elements

proven by the prosecution beyond reasonable doubt against the accused, you may find him guilty of sexual assault or indecent assault. If otherwise, you must find him not guilty of the same. It is a matter entirely for you.

17. Count no. 1 and 2 are alleged to have occurred between 16 January and 21 April 2017, a period of 3 months. It is normal for the prosecution to draft the charge in such a way if the child complainant does not remember the exact date and time of the alleged incident. However, if you find and accept that an alleged incident occurred within such time period, that would be enough to support the charge.
18. There are two counts in the information. You must consider them separately and come to a considered decision on each of them separately, in the light of the whole evidence presented at the trial.

F. THE PROSECUTION'S CASE

19. The prosecution's case were as follows. The female complainant (PW1) was 10 years 10 months old at the time of the alleged incident. She was residing with her parents and 7 siblings in a village in Vanuabalavu, Lau. She was at that time, a class 5 student in the village school. The accused was at the time 57 years old. He and his wife separated on or about 2011. He was living in a tent in the village at the time, and was a farmer and construction worker. He was living alone in his tent. The complainant and the accused are related, and the accused was one of her grandfathers.
20. According to the prosecution, between the 16th January and 21 April 2017, on three separate occasions, the accused allegedly invited the complainant into his tent. While the two were alone in the tent, the prosecution alleged that accused made the complainant lie on his bed, removed her clothes and touched her vagina by rubbing the same with his right hand (count no. 2). On another occasion, the prosecution alleged that the accused stopped her in the bush, took off her clothes and rubbed her on the vagina (count no. 2). The prosecution also alleged that on one occasion in the tent, the accused allegedly

removed her clothes, squeezed her right breast and allegedly sucked the same (count no. 2).

21. According to the prosecution, the accused after allegedly sucking the complainant's right breast, went down on her and allegedly licked her vagina. According to the prosecution, the accused, when allegedly licking her vagina, his tongue went as far as where she urinates from. The prosecution also alleged that his tongue penetrated the complainant's labia majora and then the labia minora and right to where the hymen was (count no. 1). The matter was later reported to the police. An investigation was carried out. The accused was later brought before the Suva Magistrate Court on 21 August 2017. He was later charged with raping and sexually assaulting the complainant, as alleged in the information.
22. 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

23. On 13 July 2020, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charges. In other words, he denied the 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 supporting witness. That was his right.
24. The accused's case was very simple. On oath, he denied the complainant's allegations against him. He said, he did not do any of the alleged offences that the complainant was alleging against him. He said the complainant was mistaken and was lying. Because of the above, the defence was asking you, as assessors and judges of fact, to find him not guilty as charged on both counts. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

25. 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:**

26. The parties had submitted an "Agreed Facts", dated 6 July 2020. A copy of the same is with you. Please, read it carefully. There are 3 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:**

27. The State's case against the accused was based fundamentally on the verbal evidence of the child female complainant (PW1), given in court before you on 13 and 14 July 2020. You had watched her give evidence in court, and had assessed her demeanor while she was responding to the questions thrown at her by the prosecutor and defence counsel. At the time of the alleged offences, she was approximately 10 years 10 months old. She is now 14 years old. She was trying to recall what allegedly occurred 3 years ago. I am sure her evidence are still fresh in your minds, and I do not wish to bore you with the details. However, in our discussion, I will concentrate on the salient points in the evidence, and the issue of whether or not the prosecution had proven all the elements of the offences alleged beyond reasonable doubt.

28. We will begin with the rape allegation in count no. 1. On this matter, please take on board the directions I gave you in paragraphs 10, 11, 12, 13 and 14 hereof. In her evidence, the child complainant (PW1) said, she recalled the time period of 16 January to 21 April 2017. She said, the accused came to her house and asked her to go with him in return for a payment of \$10. She said, they ended up in his tent. She said, he took her to his bed in the tent, made her lay on the same and he later took off her clothes. She said, the accused later rubbed her vagina with his right hand, then later squeezed her right breast and also sucked the same. She said, the accused later went down on her and licked her vagina with his tongue. She said, when licking her vagina, his tongue went as far as where she urinates from. According to Doctor Malakai Ranuve (PW5), who medically examined PW1 on 28 July 2017 at Lomaloma Hospital, when the tongue reaches the place where the complainant urinates from, then the tongue penetrated the outer lip of the vagina, then the inner lip of the vagina, before it reaches the hymen. According to PW5, the above amounts to the penetration of the complainant's vagina by the accused's tongue. If you accept the complainant's evidence as mentioned above, the same is enough to support the complainant's allegations in count no. 1 and 2.
29. Furthermore, in addition to the above, the complainant said, the accused touched her vagina on four other occasions. Three of the above incidents allegedly occurred in his village tent and one was in the bush, while she was returning from the sea shore. According to the complainant, the accused would first promise her something (for example, biscuits, noodles or money), then he would take off her clothes and then rubbed her vagina with his right hand. In analyzing the above, please take on board my directives in paragraphs 15, 16 and 17 hereof. If you accept the complainant's evidence as mentioned above, they are enough to support the allegations of sexual assault in count no. 2.
30. If you accept the complainant's evidence described above, and you find the same to be credible, you must find the accused guilty as charged, on both counts. If otherwise, you must find the accused not guilty as charged, on both counts. It is a matter entirely for you.

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

31. I had summarized the accused's case to you from paragraphs 23 and 24 hereof. I repeat the same here. If you accept the accused's sworn denials against the allegations against him, then you must find the accused not guilty as charged on both counts. However, if you reject his sworn denials, you must still assess the strength of the prosecution's case in general, and decide accordingly. It is a matter entirely for you.

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

32. Five witnesses gave evidence for the prosecution:

- (i) Child complainant (PW1);
- (ii) Complainant's mother (PW2);
- (iii) Ms. Ana Maramanigauna (PW3);
- (iv) Ms. Milika Vuamuri Rogo (PW4); and
- (v) Doctor Malakai Ranuve (PW5).

Prosecution submitted the following exhibits:

- (i) Prosecution Exhibit No. 1: PW1's Birth Certificate
- (ii) Prosecution Exhibit No. 2: Complainant's Medical Report

Defence called only one witness:

- (i) Accused (DW1).

33. You must consider the above evidence together. Compare and analyze them together. If I hadn'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**

34. 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.
35. Your possible opinions are as follows:
- (i) Count No. 1 - Rape : Accused: Guilty or Not Guilty
 - (ii) Count No. 2 – Sexual Assault: Accused: Guilty or Not Guilty
36. 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.**