

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO. HAC 420 OF 2018S**

**STATE**

**vs**

**ROBERT MON WAQALEVU**

**Counsels : Ms. U. Tamanikaiyaroi and Mr. J. Nasa for State**

**Ms. P. Mataika and Ms. M. Cobona for Accused**

**Hearings : 12, 13, 14 and 17 August, 2020.**

**Summing Up: 18 August, 2020.**

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**SUMMING UP**

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**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 victims. 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, on 27 October 2018, at Suva in the Central Division, rape the first complainant (PW3)?
- (ii) On Count no. 2, did the accused, on 27 October 2018, at Suva in the Central Division, rape the second complainant (PW1)?

**E. THE OFFENCE AND IT'S ELEMENTS**

9. The accused was charged with two counts of “rape”, contrary to section 207 (1), (2) (a) and (2) (b) of the Crimes Act 2009. On count no. 1, it was alleged that the accused, on 27 October 2018, at Suva in the Central Division, penetrated the first complainant’s (PW3) vulva with his finger, without her consent. On count no. 2, it was alleged that the accused, on 27 October 2018, at the same place, penetrated the second complainant’s (PW1) vagina with his penis, without her consent. Complainant no. 1 (PW3) was 21 years old, at the time; whereas complainant no. 2 (PW1) was 19 years old, at the time. The accused was 27 years old at the time.

10. 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 vulva (count no. 1); or
- (ii) the accused’s penis penetrated the complainant’s vagina (count no. 2); and

- (iii) without the complainants' consent; and
  - (iv) the accused knew the complainants were not consenting to 10 (i) or 10 (ii) above, at the time.
11. The slightest penetration of the complainant's vulva by the accused's finger (count no. 1) or the slightest penetration of the complainant's vagina by the accused's penis (count no. 2), is sufficient to satisfy element 10 (i) or 10 (ii) above.
  12. Consent is to "agree freely and voluntarily and out of her own free will", and she must have the necessary mental capacity to give her consent. If consent was obtained by force, threat, intimidation or fear of bodily harm 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.
  13. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainants were not consenting to 10 (i) or 10 (ii) above, at the time. You will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue.
  14. If you find the elements of the offence of rape satisfied by the prosecution beyond reasonable doubt, you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is matter entirely for you.

**F. THE PROSECUTION'S CASE**

15. The prosecution's case were as follows. On 27 October 2018, a Saturday, the accused (DW1) was 27 years old. The first complainant (PW3) in count no. 1 was

21 years old, while the second complainant (PW1) in count no. 2 was 19 years old. PW1, at the time, was residing in the same house as the accused in Anand Street, off Robertson Road, Suva. PW3 resided at Wainitarawau Road, Cunningham Stage 1, Nasinu.

16. According to the prosecution, PW1 went out with PW3, on 26 October 2018, a Friday evening. They went night clubbing with friends. At about 9 pm, PW1 and PW3 started off at the Ritz Nightclub. With their friends, the two began consuming alcohol. Later, the two complainants with their friends went to the Sand Dunes Nightclub. They bought a carton of beer, consisting of 12 bottles of longneck beer, and drank the same in the “taki” style. At the Sand Dunes Nightclub, PW1 met the accused, who advised PW1 to go home early. However, PW1, PW3 and their friends continued drinking.
17. Later, according to the prosecution, the two complainants went to the Signals Nightclub. They consumed more alcohol there until the clubs closed at 5 am on 27 October, 2018, now a Saturday. The two complainants and two bouncers from the nightclub, then went up to PW1’s house at Robertson Road to drink more alcohol. They did so until 8 am, when the party ended. PW1 then went to sleep. According to the prosecution, she was drunk and very tired. PW3 was already asleep in an adjacent bedroom. According to the prosecution, while PW3 was fast asleep, the accused allegedly came to her, pulled down her pants and poked her vagina with his finger, without her consent (count no. 1).
18. According to the prosecution, the accused then went into another bedroom, in which PW1 was fast asleep. According to the prosecution, while PW1 was fast asleep, the accused allegedly took off her pants and penetrated her vagina with his penis, without her consent (count no. 2). PW1 suddenly awoke as a result of Una’s

screaming. It was the prosecution's case that, at the material time, the accused knew that the two complainants were not consenting to the abovementioned sexual acts, because they were asleep. 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**

19. On 12 August 2020, the first day of the trial, the information was put to the accused, in the presence of his counsels. 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 his younger brother (DW2) as his only witness. That was his constitutional right.
20. The accused's case was very simple. As far as count no. 1 was concerned, in paragraph 6 of the Agreed Facts, dated 11 October 2019, he agreed that he inserted his finger into the vagina of the first complainant (PW3), on 27 October 2018. Also, on count no. 2, in paragraph 7 of the same Agreed Facts, he admitted, he inserted his penis into the second complainant's (PW1) vagina, on 27 October 2018. He confirmed the above admissions in his sworn evidence. However, he said, he was doing the above with the consent of both complainants, at the time. If you accept the accused's version of events, you must find him not guilty as charged on both counts.
21. If you reject the accused's version of events, you must still assess the strength of the prosecution's case, and decide accordingly. In any event, because he pleaded not guilty to both allegations of rape in the information, the accused is 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:**

22. In analysing 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 analysing 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:**

23. The parties submitted an "Agreed Facts", dated 11 October 2019. 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. The significance of the "Agreed Facts" were that the parties identities were not disputed. Also, the first element of rape in count no. 1, that is, the accused's finger penetrating the complainant's vulva (vagina) was not disputed (Paragraph 6). Again, the first element of rape in count no. 2, that is, the accused's penis penetrating the complainant's vagina was not disputed (Paragraph 7). So, the case will turn on whether or not the complainants gave their consent to the above sexual acts?

24. Also, consider the defence's sketch plan of the crime scene, which was tendered by consent of the parties, as Prosecution Exhibit No. 1.

(c) **The State's Case Against the Accused:**

25. The State's case against the accused was based fundamentally on the verbal evidence of the two complainants (PW1 and PW3), given in court on 12, 13 and 14 August 2020. You had watched them, while they were giving evidence in court. You obviously had assessed their demeanors, and how they reacted to the questions thrown at them by the prosecution and the defence. You have heard their evidence on how they were night clubbing from 9 pm on 26 October 2018 (Friday) to 5 am on 27 October 2018 (Saturday). They did not sleep. When they went to PW1's residence at Anand Street, off Robertson Road, they continued consuming alcohol until 8 am. The first complainant (PW3) went first to sleep. Then the second complainant (PW1) followed later. They said, as soon as they lay on their bed, they fell asleep. I will not bore you with the details of their evidence, because I am sure the same are still fresh in your minds. I will not touch the first element of rape, as discussed in paragraphs 10(i), 10(ii) and 11 hereof, because the parties agree that those elements had been proven by the prosecution beyond reasonable doubt, as a result of paragraphs 6 and 7 of the "Agreed Facts", dated 11 October 2019.
26. I will move on to discuss the second element of rape as discussed in paragraphs 10(iii) and 12 hereof. The questions become: (1) Did PW3 (first complainant) consent to the accused inserting his finger into her vulva/vagina, at the material time? (2) Did PW1 (second complainant) consent to the accused inserting his penis into her vagina, at the material time? Both complainants, in their sworn evidence said, they were asleep, at the material time. If you accept their evidence, as a matter of logic, a sleeping person cannot be taken to have consented to



something being done to her. When a person is sleeping, his or her mind is resting, and is not consciously thinking. So, as a matter of logic, a sleeping mind is not a thinking mind, and thus it cannot be taken logically that the complainants consented to the accused performing the sexual acts mentioned in paragraphs 6 and 7 of the “Agreed Facts”. If you accept the complainants’ evidence that they did not consent to the accused’s sexual acts, as mentioned above, then the prosecution would have proven the second element of rape against the accused beyond a reasonable doubt. This entitles you to move on and consider the third element of rape, as discussed in paragraphs 10(iv) and 13 hereof. However, if you reject the complainants’ evidence on the consent issue, then you must find the accused not guilty as charged on both counts. It is a matter entirely for you

27. Assuming you find that the complainants did not consent to the accused’s sexual acts as discussed above, the final question becomes: Did the accused know that the complainants were not consenting to the sexual acts he did to them, at the time? Here, you will have to take on board the direction I gave you at paragraph 13 hereof. If the accused was inserting his finger into PW3’s vagina, while she was asleep, at the material time, would he know she was not consenting to that act, at the time? If the accused was inserting his penis into PW1’s vagina, while she was asleep, at the material time, would he know she was not consenting to that sexual act, at the time? How you answer the above is entirely a matter for you.
28. If you accept the two complainants’ evidence as 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:**

29. I had summarized the accused's case to you from paragraphs 19 to 21 hereof. I repeat the same here. If you accept the accused's version of events, you must find him not guilty as charged on both counts. If otherwise, you must still assess the strength of the prosecution's case, and decide accordingly. It is a matter entirely for you.

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

30. The prosecution called three witnesses in this case. The defence called two witnesses. Altogether, you have five witnesses, on whose evidence, you will have to make a decision. The prosecution and defence, by consent, submitted Prosecution Exhibit No. 1 (Sketch Plan of Crime Scene). You must consider the above evidence together. You must compare 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



**Salesi Temo**  
**JUDGE**

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