

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 37 OF 2019

BETWEEN : **STATE**

AND : **SAIMONI PITA KORO**

Counsel : *Mr. T. Tuenuku for the State*
Ms. S. Ali for the Accused

Hearing on : *03rd of August 2020*

Summing up on : *04th of August 2020*

SUMMING UP

(The name of the complainant will be suppressed and will be referred to as S.M)

Ladies and gentleman assessors;

1. It is now my duty to sum up the case to you. Your opinion is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the assessors of facts.

2. As the representatives of the society, your duty here is sacred. Your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offences, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to you in my opening address, your opinion should be based only on them. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel

during the examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the available evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witness give evidence before this court, her behavior when she testified and how she responded during cross-examination. Applying your day to day life experiences and your common sense as representatives of the society, consider the evidence of the witness and decide how much of it you believe. You may believe none, a part or all of this witness's evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him/her or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.

8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provide for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept.

12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there is more than one reasonable inference to draw, against the accused, as well as in his favor, based on the same set of proved facts, then you should draw the most favorable inference to the accused.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond a reasonable doubt, for you to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offences against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of an offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty of that offence. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.
15. You are not required to decide on every point the Counsels in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges are proved against the accused.

16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not a must.

17. Let us look at the Information. Though the Director of Public Prosecutions has charged the accused of 8 counts, at the conclusion of the prosecution case you saw the court acquitting the accused of the 2nd, 3rd 4th and the 5th counts as the prosecution has not adduced any evidence in relation to them. The remaining counts to be tried are;

COUNT 1

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (a) and (3) of the Crimes Act of 2009

Particulars of Offence

Saimoni Pita Koro, between the 01st day of January 2016 and the 31st day of December 2016 at Delana Settlement, Soa Village, Nakorotubu, Ra in the Western Division, had carnal knowledge of S.M. a child under the age of 13 years.

COUNT 6

Statement of Offence

INDECENT ASSAULT: Contrary to section 212(1) of the Crimes Act of 2009.

Particulars of Offence

Saimoni Pita Koro, on the 17th of February 2019 at Soa Village, Nakorotubu, Ra in the Western Division, unlawfully and indecently assaulted S.M. by kissing her mouth.

COUNT 7

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) of the Crimes Act of 2009.

Particulars of Offence

Saimoni Pita Koro, on the 17th of February 2019 at Soa Village, Nakorotubu, Ra in the Western Division, unlawfully and indecently assaulted S.M. by sucking her breast.

COUNT 8

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (a) of the Crimes Act of 2009.

Particulars of Offence

Saimoni Pita Koro, on the 17th of February 2019 at Soa Village, Nakorotubu, Ra in the Western Division, had carnal knowledge of S.M. without her consent.

18. First I will deal with the elements of the offence of Indecent Assault accused of in the 6th count.

Section 212 (1) of the Crimes Act states that;

- 212.- (1) A person commits a summary offence if he or she unlawfully and indecently assaults any other person.

Penalty– Imprisonment for five years.

- (2) It is no defence to a charge for an indecent assault on a boy or girl under the age of 16 years to prove that he or she consented to the act of indecency.

19. Therefore the essential elements that the prosecution should prove are;

- i) The Accused
- ii) unlawfully and indecently
- iii) assaulted the alleged victim.

The Accused is guilty of **Indecent Assault**, if he unlawfully and indecently assaulted the victim. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. Assault can be defined as an application of unlawful force on another's body. If the alleged victim is below the age of 16 years by the time the alleged incident took place, consent of the victim is not a defense.

Using the above definitions you should consider whether there is doubt in respect of any of the above elements, especially whether the accused has used any physical force.

- 20. If you find that you have a reasonable doubt in regards to any of the said elements, you should find the accused not guilty of Indecent Assault.
- 21. The 7th count is of sexual assault.

- 210.-(1) A person commits an indictable offence (which is triable summarily) if he or she—
 - (a) Unlawfully and indecently assaults another person;

Therefore the elements that the prosecution should prove in establishing 'Sexual Assault' would be;

- i) The Accused,
- ii) Unlawfully and indecently,
- iv) Assaulted the alleged victim.

These terms would have the same meanings I explained above in relation to the offence of Indecent Assault. The difference between the Indecent assault and the

sexual assault would be that for the former the assault being indecent in the minds of right thinking person is sufficient and for the latter, the assault needs to be more of a sexual nature.

22. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the 7th count, to wit; the count of sexual assault.

23. Now I will deal with the essential elements of the offence of Rape alleged in the 1st and the 8th counts.

Section 207(1) of the Crimes Act reads as;

207. —(1) Any person who rapes another person commits an indictable offence.

Section 207 (2) (a) and (3) of the Crimes Act reads as;

(2) A person rapes another person if —

(a) The person has carnal knowledge with or of the other person without the other person's consent;

(3) For this section, a child under the age of 13 years is incapable of giving consent.

24. Accordingly, in this case, to prove the offences of Rape as for the alleged 1st and 8th counts the prosecution must prove the following elements beyond a reasonable doubt.

(i) The accused;

(ii) penetrated the vagina of S.M with his penis,

(iii) It was done without the consent of S.M; and

(iv) Either the accused;

knew or believed that S.M was not consenting; or
was reckless as to whether or not he was consenting.

It should be remembered that in proving the 1st count the prosecution need not prove the (iii) and (iv) above as it is admitted that the S.M was below the age of 13 years in 2016.

25. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.
26. The second element is penetration of the S.M's vagina with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration.
27. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the vagina of the complainant, without the complainant's consent.
28. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact, that there was no physical resistance alone, shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
 - i) by force; or
 - ii) by threat or intimidation; or
 - iii) by fear of bodily harm; or
 - iv) by exercise of authority.
29. Apart from proving that the complainant did not consent for the accused to penetrate her vagina with the accused's penis, the prosecution should also prove

that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.

30. It is not difficult to understand what is meant by the words "the accused knew or believed". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina with his penis, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
31. Please remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based upon relevant proven facts and circumstances.
32. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the 1st and the 8th counts of Rape.
33. The following were recorded as the admitted facts by the prosecution and the defense.
 - i) That the complainant in this matter is S.M, 15 years, class 7 student of Soa Village, Nakorotubu, Ra.
 - ii) That the accused person in this matter is Saimoni Pita Koro, 43 years, Farmer of Soa Village, Nakorotubu, Ra.
 - iii) That the complainant is the biological daughter of the accused.

- iv) That the complainants mother and the accused's wife passed away in 2013.
- v) That since 2013, the accused had stayed with the complainant and his 6 other children.
- vi) S.M, the complainant was born on 26th of July 2004.
- vii) The complainant told her school teacher, Emori Rokotakala about what her father did to her, on the 18th of February 2019.
- viii) The complainant's school teacher, Emori Rokotakala made the complaint to the head teacher, on the 19th of February 2019.
- ix) They lodged the complaint to the police on the 20th of February 2019.
- x) The medical findings contained in D(12) and D(14) of the medical report of the complainant are also admitted.(A copy of the said medical findings is attached.)

These admitted facts need no further proof. You should consider them as already proved. If there happens to be any inconsistency between the admitted facts and the evidence, the admitted facts prevail.

Summary of Evidence

34. The PW1, S.M is the sole witness for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. Her evidence is that;

- i) Presently, she is 16 years old and is a student of St. John's Primary school.
- ii) The accused, Saimoni Pita Koroi is her father and her mother has passed away in 2013. She has four elder brothers and two younger sisters. Since 2013, she had been living with her father and the siblings.

- iii) In 2016, they were living in the Delana Settlement in Ra. By then 3 of her brothers were at Vatuwaqa with her maternal grandmother and she was with the father and one of her elder brothers and her two younger sisters.
- iv) One night, in 2016 the accused has asked her to massage him. She has gone and massaged him and then he has requested her to sit on his penis.
- v) Here the witness states that it was hard and painful. But she goes on to state that the accused did not enter his penis into her vagina.
- vi) In 2019, she was living with the accused and her aforesaid siblings at the Soa Village. She goes on to describe an incident that took place on the 15th of February, of which the accused was not charged with. As the accused is acquitted of the 2nd to 5th counts, you can safely ignore the said evidence.
- vii) On the 17th of February 2019, she has been at home in the Soa Village. In the evening the accused has gone to drink grog at the school. She has been with her younger sisters and the grandfather. Whilst they were asleep at night, she has heard someone knocking at the door and opened it. The accused has come in and gone to his bed. She has gone back to sleep. Then she has heard the accused calling her. He has asked her to come and lie next to him. After a while she has got up and gone to the outside. Later she has come back and sat in the sitting room. Then the accused has called her again and one of her younger sisters has woke up and told her so. She has asked the younger sister to shut up and go back to sleep. Though the accused has called her again she has not gone there into his room as she was afraid of what the accused did to her before. Then the accused has said if she does not come to him, he will come to her. When she still remained seated, the accused has come to her, pinched her in her ears and has taken her to his room.
- viii) Then he has told her to take her clothes off and when she refused, he has forced her to take them off. Thereafter he has started to touch her and she has cried. He has asked her why she is crying and has slapped her. Then he has taken off his pants and she has wanted to get away from

there but the accused has prevented her by pulling her from the hands. Then the accused has made her lay down and raped her by inserting his penis into her vagina. She has not consented for the accused to insert his penis in to her vagina and she has not liked it as the accused is her father. She has asked him to not to do it but he has not listened.

- ix) That incident has taken place on Sunday the 17th of February 2019, in the night. In addition to entering his penis into her vagina, on that day, the accused has kissed her in the mouth and around her neck during the sexual intercourse. Further, the accused has sucked her breasts too at that time.
- x) The witness states that the accused has had sex with her once before in 2016. She did not tell that before in her evidence because she was afraid of the accused and his relatives who were present outside the court today. As you have observed her throughout her evidence, it is up to you to give that explanation an appropriate weight in consideration of her evidence.
- xi) Referring back to the incident that took place in 2016, the witness states that some of her clothes were removed by the accused at that time when she was massaging him. Her skirt and the underwear were removed by him. Then he has got hold of her and made her sit on his penis forcefully. In doing so, he has inserted his penis into her vagina.
- xii) She has not told anyone of the said incident. Her father, the accused has inserted his penis into her vagina on two occasions. They are, firstly in the year 2016 and secondly, on the 17th of February, 2019.
- xiii) She has informed these incidents to her school teacher, Mr. Emori on the 18th of February 2019. After she told Mr. Emori, she was scared to go back home and has gone and stayed with Mr. Emori for two days. She was examined and medically checked by a doctor subsequently.

35. In answering the cross examination by the counsel for the accused, the witness states;

- i) In 2016, she was staying with her father, her grandfather and two of her sisters. The house they were staying was an open plan house without partition of rooms.
- ii) The girls' area was covered with curtains and the accused's bed was in a separate area. Her grandfather also slept inside the house but was on a separate area.
- iii) She admits that the accused held her forcefully and made her sit on his penis. She also admits that she has not told it to anyone then. It is suggested that she has not told anyone because nothing has happened and she denies it and states that she has not told anyone because she was scared. When it is suggested that at no time the accused inserted his penis into her vagina, the witness denies it and states that the accused did so twice.
- iv) The grandfather who was with them is the father of her father, the accused. In answering a question by the court, the witness stated that her maternal grandmother is still alive, but they were prevented from associating them by her fathers' relatives.
- v) The house in Soa Village, which they were living in 2019, had three rooms separated by curtains. On the 17th of February, the witness states that she did cry and one of her younger siblings woke up.
- vi) She admits that there were rumors going around the Village of her having a relationship with a boy. She denies that those rumors were about a sexual relationship that they were allegedly having. She admits that the accused questioned her about the said relationship. She denies that her father slapped her because she refused to answer him and states that he slapped her because he was angry that she did not go to his room when he called.

- vii) She states that she did not come out with the truth in the morning because she was scared and later told the truth and nobody told her to tell so.
36. With leading the evidence of PW1, the prosecution closed their case. The defense made an application under section 231 (1) of the Criminal Procedure Act, submitting that the prosecution has failed to submit evidence covering the elements of the 2nd, 3rd, 4th and 5th counts and moved for an acquittal. The Prosecution conceded to it and the Court being satisfied that there was insufficient evidence covering the said counts acquitted the accused of the said 2nd, 3rd, 4th and 5th counts. The Court also being satisfied that there is sufficient evidence covering the 1st, 6th, 7th and the 8th counts decided to call for defense in regards to them, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.
37. The accused having understood his rights elected to remain silent exercising his constitutional right and to not to call any witnesses on his behalf. You should not draw any adverse inference of it as it is his right and he is not bound to prove anything.
38. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
39. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are

proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offences have been proven beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

40. The Accused has indicated his stance through cross examination and it was that he has not done any of the alleged acts. In other words he denies committing any of the alleged offenses. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.

41. With the submission of the accused's stance, one of the three situations given below would arise;
 - (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily accepting his stance you may think, 'well what he suggests could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offences and also you reject the accused's stance only, you should find the accused guilty of the alleged count.

42. Any re-directions? — none

43. Lady and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When each of you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

44. Your opinion should be;

Whether the accused is guilty or not guilty of the alleged offence of;

- i. Rape as for the 1st count,
- ii. Indecent Assault as for the 6th count,
- iii. Sexual Assault as for the 7th count
- iv. Rape as for the 8th count.




Chamath S. Morais

JUDGE

Solicitors for the State : *Office of the Director of Public Prosecutions, Lautoka*

Solicitors for the Accused : *Legal Aid Commission, Lautoka.*