

IN THE HIGH COURT OF FIJI AT LABASA

CASE NO: HAC. 52 of 2019

[CRIMINAL JURISDICTION]

STATE

V

ALIFERETI LAGOLEVU

Counsel : Mr. I. Rakaria for the State
Ms. R. Raj with Ms. K. Boseiwaqa for the Accused

Hearing on : 21 - 23 September 2020

Summing up on : 23 September 2020

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "KV". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should 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 you agree with that opinion. You are the judges of facts.

2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room and the admitted facts. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. 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 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 the complainant. No such emotion should influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and

decide how much of it you believe. You may believe all, part or none of any witness' evidence.

6. The complainant (PW1) said she is 16 years old and she gave evidence about incidents that had allegedly taken place in 2016 and in 2018. You may have come across children of her age. You will have an idea of the way a child of a particular age behave, think, talk and the way they describe things.
7. Children can be confused about what has happened to them. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time what they were doing was wrong.
8. I mention these possibilities because experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case however, is a decision for you to make.
9. 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 you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.
10. 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. Inconsistencies may lead you to question the reliability of the evidence given by a witness.

11. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should see whether there is any acceptable explanation for it. In this regard, you may bear in mind that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail given by a witness to be the same from one account to the next.
12. Accordingly, if there is a significant inconsistency in the evidence given by a witness, it might lead you to conclude that the witness is generally not to be relied upon and reject the entire evidence of that witness; or, you may reject the part of that witness' evidence that you may find unreliable given the inconsistency and accept the part of the evidence you consider reliable; or if you find that the inconsistency has been duly explained you may disregard the inconsistency and accept the entire evidence of the witness as reliable.
13. 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. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
14. 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 proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to

draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.

15. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
16. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
17. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you have a reasonable doubt in respect of even one of those elements, as to whether the prosecution has proved that element beyond reasonable doubt, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.
18. You are not required to decide every point the lawyers 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 those charges have been proved.
19. Please remember that 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 necessary.
20. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

FIRST COUNT

Statement of Offence

Rape: contrary to Section 207(1) and (2) (b) of the Crimes Act, 2009.

Particulars of Offence

ALIFERETI LAGOLEVU, between the 11th of August 2018 to the 26th of August 2018 at Navunievu, Bua in the Northern Division penetrated the vagina of **KV**, with his finger, without her consent.

SECOND COUNT

Statement of Offence

Sexual Assault: contrary to Section 210 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

ALIFERETI LAGOLEVU, between the 01st of January, 2018 to the 31st day of December 2018 at Navunievu, Bua in the Northern Division, unlawfully and indecently assaulted **KV** by grabbing both her breasts.

THIRD COUNT

Statement of Offence

Indecently Insulting or Annoying Any Person: contrary to Section 213 (1) (b) of the Crimes Act, 2009.

Particulars of Offence

ALIFERETI LAGOLEVU, between the 01st of January, 2016 to the 31st day of December 2016 at Navunievu, Bua in the Northern Division, intruded upon the privacy of **KV** by doing an act likely to offend her modesty.

21. After the prosecution case was closed, it was decided not to proceed against the accused in relation to the third count above. Therefore, your deliberation is required only in relation to count one and count two above.
22. When you consider whether the prosecution has proved count one and count two, you should bear in mind that those two charges should be considered separately. You should not find the accused guilty of the other count simply because you would find him guilty of one count.
23. Let us look at the evidence in relation to counts one and two. Please remember that I will only refer to evidence which I consider important to explain the case

and the applicable legal principles to you. If I do not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

24. The first prosecution witness ("PW1") said in her evidence that;
- a) *She is 16 years old. Between 11/08/18 and 26/08/18, during school holidays, while she was swimming in the river, the accused jumped into the river and pulled her legs. At that time she was floating on the water, facing upwards. She said the accused parted her legs and pulled her towards his private part. Thereafter the accused held one of her legs with one hand and put the other hand inside the clothes she was wearing and put his fingers inside her vagina. She said she was wearing an underwear, tights and then shorts apart from her tight west. The tights and the shorts she was wearing that day were not that tight. She felt the accused's fingers inside her vagina and the accused was moving his finger.*
 - b) *Whilst the accused was doing this she kicked him and then questioned him "what are you doing?" The accused said "no, I just pulled your leg" and then he stood up and left. She said she did not agree for the accused to do what he did. She was afraid and shocked. She did not inform any one about this incident because she thought about the accused. She said earlier that the accused is her uncle and also her grandfather and the accused loves her a lot.*
 - c) *She recalled that, during the period between 01/01/18 and 31/12/18, one day when she was frying pancake at home, the accused came to her house. He sat down and smiled with her. When she asked what he wants, he told her that he wants to drink water and then he stood up and came to her. She said that the accused came behind her and touched both her breasts from behind. She did not agree for the accused to touch her breasts. Then he slid his hands downwards and made her lie down. Thereafter the accused inserted his hand inside her skirt and touched her vagina, outside. She said that the accused was lying on top of her when he did that and that she screamed.*
 - d) *She said that her younger sister had seen what happened and had informed her mother. Last year her mother had informed the village-headman about the matter and the village-headman instructed them to report the matter. She told the village-headman whom she referred to as Uncle Joti that she had forgiven the accused and she cannot report him.*
 - e) *During cross-examination she said that the accused pulled her towards him in the river causing her to submerge in the water and that was the time he inserted his hand. She explained that the accused pressed his hand on her stomach area tightly and then inserted it forcefully through her clothes.*

25. That was the evidence for the prosecution. The accused opted to give evidence on oath.

26. The accused in his evidence said that;

- a) *His sister is married to PW1's family. In relation to the first allegation, he said that, on that particular day, he came to the river to have a bath after working in the farm. He saw PW1 and another in the river which he referred to as 'pool' and PW1 told him to come and bathe. He told her that he will have his turn after PW1 and the other finish bathing. PW1 then insisted for him to join them.*
- b) *He said that PW1 was floating in the 'pool' which was structured in 'V' shape. He said that you cannot rush into the pool and therefore he was cautious when he went into the pool. When he stepped in, he had to brace himself by holding onto PW1's feet. After that he went to the center of the pool. PW1 was swimming side to side but she did not come into contact with him. After having his bath he left while PW1 and the other were still in the river. He said that he only touched PW1's feet in order to balance himself and PW1 had made up a story that he touched her in the pool. He said that he is not admitting the allegation that he pulled PW1 towards him and penetrated her vagina with his fingers.*
- c) *He said that he is also not admitting the allegation that he grabbed PW1's breasts while she was frying pancakes during the period between 01/01/18 and 31/12/18. He said that it was not his intention to go there, but because PW1 took 40 cents he had in his hands in coins after she tapped his hands causing the coins to fall, he went after her to ask for that money. He said that PW1 took the coins which fell and put them in her pocket.*
- d) *He said that before that day he had given \$10 to PW1 and her mother for their fare to go to Labasa and at that time no one else wanted to assist them. He said that PW1 and her mother asked him for that money at that time but this second time PW1 took the money from him by force and in a manner he did not like. So he went to PW1 and asked her for the money she took and he also told her that he is the only person who assisted her and her mother when they were looking for money to go to Labasa. He said that he told PW1 that if he knew that she would take the 40 cents in that manner, he would not have given the money for her and her mother to go to Labasa on the previous occasion. He said that he is not admitting that he got on top of PW1 and that he that touched her private part.*

27. That was the evidence led in this case. Additionally, both parties have admitted the following facts which you should consider as being proved beyond reasonable doubt;

1. THAT Alivereti Lagolevu is the Accused in this matter and was 56 years of age in the year 2019.
2. THAT the Accused is originally from the Mataqali of Naulana in the district of Bua.
3. THAT the Accused was born on the 3/3/1963.
4. THAT the Accused was a farmer at the time of the offence.
5. THAT the Accused resided at Waitabu Settlement, Navunievu Village at the time of the offence.
6. THAT complainant in this matter is KV and she was born on the 11/2/2004 and was 15 years old in the year 2019.
7. THAT at the time of the offending the complainant resided with her parents at Nakuni at Navunievu Village in Bua.
8. THE complainant and the Accused are related in this matter through paternal links.
9. THAT the complainant was a Year 10 student at Holy Family Secondary School in the year 2019 and earlier that year she was residing with her grandparents (namely Malakai Yadraca and Silina Baleiloa) at Tuatua Housing Labasa.
10. THAT the complainant returned to her parents at Nakuni, Navunievu Village, Bua before she could sit for her Year 10 examination as she was ill.
11. THAT sometimes **between 11th day of August, 2018 and the 26th day of August, 2018** whilst the Accused and the complainant was swimming in the River at Navunievu, Bua, the Accused touched the complainant in the water.
12. THAT sometimes **between 1st day of January, 2018 and the 31st day of December 2018** the complainant was frying pancake at her house the Accused entered the complainant's house.
13. THAT sometimes **between 1st day of January, 2016 and the 31st day of December, 2016** the Accused called the complainant to his house at Navunievu, Bua.
14. THAT on the 5th day of November, 2019 at around 10am the complainant was called to the Turaga ni Koro's (Joti Nasena) house.

Analysis

28. To prove the offence of rape in this case, the offence the accused is charged with on the first count, the prosecution should prove the following elements beyond reasonable doubt.
- a) the accused;
 - b) penetrated the vagina of PW1 with his fingers;
 - c) without the consent of PW1; and
 - d) the accused;
 - (i) knew or believed that PW1 was not consenting; or
 - (ii) was reckless as to whether or not she was consenting.
29. In this case there is no dispute about the identity of the accused. The accused has admitted being there at the alleged place of offence at the material time, but he denies committing the offence. According to the accused the allegation against him is fabricated and PW1 was lying.
30. The second element involves penetration. The law says that this element is complete on penetration to any extent. Therefore, it is not necessary to have evidence of full penetration. A slightest penetration is sufficient to satisfy this element.
31. PW1 said that the accused penetrated her vagina with his fingers while they were in the river, by inserting his hands inside the clothes she was wearing at that time. She explained to you how the accused pulled her towards him from her legs while she was floating and how the accused penetrate her vagina. The accused denies this version of PW1. He says that he simply had to hold onto PW1's feet in order to balance himself when he got into the river and that was all what happened. The defence argues that the account given by PW1 is not probable and it is not possible for the accused to penetrate PW1's vagina in the manner she explained.

32. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated PW1's vagina without her consent.
33. PW1 said that she did not agree for the accused to penetrate her vagina. She said that she struggled and she kicked the accused when the accused did that. PW1 was 14 years at that time and the accused was 55 years old and he was related to her as her uncle and also as a grandfather.
34. 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.
35. However, as I have already highlighted, the accused denies penetrating PW1's vagina altogether.
36. Apart from proving that PW1 did not consent for the accused to insert his fingers inside her vagina, the prosecution should also prove that, either the accused knew or believed that PW1 was not consenting; or the accused was reckless as to whether or not PW1 was consenting. This is the fourth element of the offence of rape.
37. It is not difficult to understand what is meant by "the accused knew or believed that PW1 was not consenting". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that PW1 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 PW1's vagina, you may find that the accused was reckless as to whether or not PW1 was consenting. Simply put, you have to see whether the accused did not care whether PW1 was consenting or not.
38. You should also 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 on relevant proven facts and circumstances.

39. Accordingly, considering the facts and circumstances you would consider as proved beyond reasonable doubt, you have to decide whether it has been established that, either the accused knew or believed that PW1 was not consenting for him to penetrate her vagina or he did not care whether PW1 consented or not. Remember that the accused's version is that he did not penetrate PW1's vagina at all.
40. To establish the second count where the accused is charged with the offence of sexual assault the prosecution should prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) unlawfully assaulted the PW1; and
 - c) the said assault is indecent and sexual.
41. There is no dispute about the identity of the accused in relation to this count as well. The accused has admitted being there at the alleged place of offence at the material time, but he denies committing the offence. According to the accused the allegation against him is fabricated and PW1 was lying.
42. Assault is the use of unlawful force. A touch constitutes an assault if it is done without the consent of another or without a lawful excuse.
43. According to PW1 the accused grabbed her breasts from behind and then he came on top of her after making her lie down and touched her private part. PW1 said that she did not agree for the accused to do this to her. If this version of PW1 is true, this act would constitute an assault. The accused denies grabbing PW1's breasts and then getting on top of her and touching her private part. According to him he simply went to PW1's house that day to ask for the money PW1 took from him in a manner he did not like. According to him, this

allegation is also fabricated. The defence also argues that the version of PW1 in relation to this count is also not probable.

44. The word “unlawfully” simply means without a lawful excuse. As the accused denies carrying out the assault as claimed by PW1, he is not claiming in this case that he had a lawful excuse.
45. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. You should also ask yourself, firstly, whether you consider that indecent assault could also have been sexual because of its nature; and if the answer is ‘yes’, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.
46. In relation to this element, you have to consider whether the assault (if you are satisfied beyond reasonable doubt that there was an assault) was indecent and also whether that assault was sexual in nature. That is, if you find that PW1’s version is true, you have to think whether, a right minded person would consider the grabbing of the complainant’s breasts in the circumstances explained by PW1 was indecent and it was also sexual in nature. You should take into account the manner the accused engaged in the alleged conduct and what he did before and after that conduct. Again, remember that the accused denies PW1’s version altogether.
47. In this case PW1 did not complain to anyone. It was her sister who had informed the mother and then it was the village-headman who had instructed her and her mother to make a complaint to police. PW1 said that she did not complain because she thought about the accused who is her uncle and also related to her as a grandfather. She said that the accused loves her.
48. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to

the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, if there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. You should therefore consider whether there is a reasonable explanation for PW1 not to complain about the incidents on her own and for the delay in reporting this matter. However, remember that your task is to decide whether you are sure that PW1 has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

49. Counsel for the defence pointed out certain inconsistencies. You should follow the directions I have already given you when you deal with any inconsistency you may come across.
50. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
51. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
52. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in relation to each count;
 - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.

(iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

53. Any re-directions?

54. Madam and Gentlemen 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 you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

55. Your opinion should be whether the accused is guilty or not guilty on each count.



A handwritten signature in blue ink, appearing to read "Vinsent S. Perera".

Vinsent S. Perera

JUDGE

Solicitors;

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