

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

**CRIMINAL CASE NO. 039 OF 2019**

**BETWEEN**                   :           **STATE**

**AND**                               :           **WAISAKE TULAVU**

**Counsel**                       :           Ms S Shameem & Ms U Tamanikaiyaroi for the State  
Ms S Daunivesi & Ms T Kean & Mr E Sau for the Accused

**Date of Hearing**           :           **5 October – 9 October 2020**

**Date of Summing Up:**           **13 October 2020**

**SUMMING UP**

- [1] Lady and Gentlemen 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 reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of that charge.
- [6] The Accused has chosen to give evidence. The Accused was not obliged to give evidence. He does not have to prove his innocence. He does not have to prove anything. However, he has chosen to give evidence. You must take what he has said into account when considering the issues of fact which you have to determine. It is for you to decide whether you believe the evidence of the Accused or whether it may be true. If the account given by the Accused is or may be true, then the Accused must be acquitted of the charges. But even if you entirely reject the account given by the Accused, that would not relieve the prosecution of its burden of making you sure by evidence of the Accused's guilt in respect of the charge which you have to consider.
- [7] 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.
- [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 his or her individual opinions orally on the charges 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. Those opinions must be based solely upon the evidence, that is, the sworn testimony of the witnesses that was called at the trial.
- [10] 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 read in the newspapers about this case. Focus solely on the evidence which you have seen, heard, or examined in this court.
- [11] This summing up is not evidence either, nor are counsel's addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [12] 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.
- [13] 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 witness's evidence and demeanour. You can accept part of the witness's testimony and reject other parts. The witness may have told the truth about one matter and lie about another; or he or she may be accurate in saying one thing and be wide of the mark about another.
- [14] 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.
- [15] I turn now to deal with what the prosecution must prove. The Accused is charged with five counts. But you must consider each count separately, when you examine the case in your deliberations. Look at the evidence as it affects each count separately. Your

opinions about the charges could differ from one to the other, depending on the view you took on each count and the evidence available on each count.

[16] There are three complainants in this case. I will refer to them as first, second and third complainants in my summing up. Counts one and two relates to the first complainant. Both charges allege digital rape. The only difference between the two charges is the date of the alleged incidents. To prove digital rape as alleged on counts one and two, the prosecution must prove the following elements:

1. On the alleged date and place, the Accused penetrated the vagina of the first complainant with his fingers,
2. The first complainant did not consent to the acts of penetration,
3. The Accused knew that the complainant did not consent.

[17] Counts three and four relates to the second complainant. Count three alleges digital penetration using fingers, while count four alleges sexual intercourse, that is, penetration of vagina with penis. To prove counts three and four, the prosecution must prove the following elements:

1. On the alleged date and place, the Accused penetrated the vagina of the second complainant with his fingers and penis,
2. The second complainant did not consent to the acts of penetration,
3. The Accused knew that the complainant did not consent.

[18] Let me explain these elements of rape in detail.

[19] The acts of penetration without the informed consent of the complainants is the physical element of rape. Slight penetration is sufficient. The prosecution does not have to prove that full penetration occurred nor does it have to prove that the Accused ejaculated in the case of sexual intercourse.

[20] But, the prosecution must prove beyond reasonable doubt that when the Accused penetrated the vagina of the complainants with his fingers on counts one, two and three

and with his penis on count four, he did so without their consent. The term consent means consent freely and voluntarily given by a person to engage in the physical act of sexual penetration. Consent can be given verbally, or expressed by actions. On the same note, 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 act is not, by reason only of that fact, to be regarded as consenting to the sexual act. A person who submits to sexual act with another person as a result of false and fraudulent representation about the nature or purpose of the act, by law, not to be regarded as consenting to the sexual act. For the Accused to have obtained consent of the complainants by false and fraudulent representation about the nature or purpose of the sexual act, the prosecution must prove that the Accused knowingly made a representation that was not true and was intended to deceive the complainants to act upon it.

[21] In this case the prosecution alleges that the Accused obtained the consent of the complainants by representing the alleged acts of sexual penetration was necessary for their spiritual deliverance, which he knew was not true but was intended to deceive the complainants to act upon. If that is what occurred in this case then you may think that the complainants did not freely and voluntarily consented to the sexual acts? That is a matter, of course, for you to consider.

[22] The third element of rape is that the Accused knew that the complainants did not freely and voluntarily consent to the alleged sexual acts. 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 complainants 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 that the complainants did not give their consent freely and voluntarily.

[23] So for each count of rape (counts 1-4) the issues for you to consider are:

1. Whether the Accused penetrated the vagina of the complainant concerned either with his fingers or penis?



2. Whether the complainant concerned freely and voluntarily consented to the act of sexual penetration or whether the Accused obtained their consent by false and fraudulent representation about the nature or purpose of the said act?
3. Whether the Accused knew that the complainant did not consent to the alleged sexual act of penetration?

[24] On count five, the Accused is charged with sexual assault on the third complainant. An assault in law means intentional touching or application of force or threat of touching or application of force without the consent of the complainant. For the Accused to be guilty of sexual assault, the prosecution must prove beyond reasonable that the Accused unlawfully and indecently assaulted the complainant. The word "unlawfully" means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. A valid consent to a sexual act as I have explained to you is one that is given freely and voluntarily by the complainant, without false and fraudulent representation by the Accused about the nature or purpose of the sexual act. The prosecution alleges that the Accused touched the vagina of the third complainant without her consent.

[25] So the issues for you to consider on count five are:

1. Whether the Accused without lawful excuse touched the vagina of the third complainant?
2. Was the said act without the consent of the third complainant?
3. Would the right-minded persons consider the said act to be indecent?

[26] 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.

- [27] You each have been given a copy of the Admitted facts. You must treat the admitted facts as true when consider the charges in this case.
- [28] The first witness for the prosecution was Salaceili Molidegei, the complainant on counts one and two. When the allegations arose she was married and was residing with her husband at Lutu Village, Naitasiri. The Accused is a distance relative of her husband. She told the Court that she met the Accused at her village when he came there to pray for one of her husband's relative suffering from stroke. They had a conversation about her not able to conceive and the Accused invited her and her husband to his church to be prayed over. At the time she believed that she was unable to bear children because of a family curse.
- [29] On the invitation of the Accused she went to the Accused's church at Cunningham to be prayed over. She said she can't remember the exact date, but it was the Mother's Day weekend. When she arrived at the Accused's house in the evening, the Accused was the first person to greet her and invited her into his house. She went into the kitchen and saw some girls preparing dinner. The Accused invited her to have dinner also.
- [30] After she had dinner the Accused called her to the porch for prayer at around 10pm. When she went to the porch the Accused told her that she have to be delivered by having sex with another man who was not her husband. He convinced her that her husband was also under a curse. She told him she was married and was afraid, but he insisted that the only way to be delivered of her curse was to have sex with a man. He told her to remove her tights and underwear and bring the oil. She went inside the house and brought the oil. He told her to pour the oil into his hands, which she did. After that he started touching her vagina with his oiled hands. While he was touching her vagina he told her that there was "so much curse within her". He told her that she had to be delivered that night because the Holy Spirit told him so. She said he penetrated her vagina with his fingers. She felt his fingers inside her vagina. She said neither did the Accused ask her for her permission nor did he tell her before penetrating her vagina with his fingers. She said she allowed the Accused to penetrate her vagina because he was a "talatala" meaning pastor and she believed him when he told her he would heal her and break her curse that was within her. She stayed that night at the Accused's home.

- [31] Ms Boladegei said the second alleged incident occurred the following morning when she was about to have her breakfast. She said the Accused called her in his room. When she entered his room she saw one Mere Ilisoni sitting down with the Accused. She said he told her that she had to be delivered that day. She was wearing the same clothes from the previous night. He told her to remove her tights and underwear which she did. He penetrated her vagina with his fingers and told her that there was something growing or swelling inside her vagina. She said she felt ashamed but did not say anything as Mere Ilisoni was present inside the room. He then told her that one Sosi would deliver her that day. Sosi was called inside the room and the Accused explained to him that he was to deliver Ms Boladegei by having sexual intercourse with her, but Sosi refused by keeping quiet.
- [32] Later that day when Ms Boladegai's husband came to the church premises the Accused told the couple to have sex but he did not reveal to Ms Boladegai's husband the incident that occurred the previous night. She said she was ashamed and frightened to tell her husband about what occurred the previous night because the Accused had told the couple that they both were cursed. She only revealed about the incidents to her husband when she returned to the village and was having devotion. She said she did not reveal the alleged incidents to anyone because she was ashamed and did not expect that to be done to her in church.
- [33] The next witness was Ms Adi Ema Qereqeretabua, the complainant on counts three and four. In 2018, she was residing at Lutu village, Wainimala due to her employment at a local school. She came to know about the Accused and his church, Agape Healing Ministry when they came to the village to conduct a church service for the school students. After the church service she went to a house in the village where the Accused was conducting a healing prayer service for people who needed healing. While she was present in the healing service the Accused called upon Ms Qereqeretabua to be prayed over by his team by laying their hands on her shoulder and back.
- [34] After the prayer, the Accused invited her to his church in Cunningham to be prayed for because she had been cursed from both her maternal and paternal sides. She first went to the church in Cunningham in March that year. She said she was prayed over by the



Accused and his team when she went to their church. Thereafter, she started attending their church every fortnight and also participated in some of their house to house healing ministries. She said the Accused was in control of his church members who would obey his instructions.

[35] In relating to the alleged incidents in June 2018 Ms Qereqeretabua said she stayed at Cunningham and after dinner that night she went straight to sleep. She said the Accused's wife was not at home. At around 1am Mere Illisoni woke her up and told her to go to the porch where the pastor was waiting. She said the other girls were fast asleep. She said she stood up and went straight to the porch. She said Mere Illisoni went back to sleep. When she arrived at the porch she saw the Accused. He told her to sit next to him. She said the porch light was off but she could see his face from the light from the neighbouring house. He told her that she needs to be delivered of her curse and Sakiusa need to deliver her. He explained to her that to be delivered of her curse she needs to have sex with one of the elders in the church. When this was said to her she said no. He then told her to go inside the room where the males were sleeping to get the holy oil. She went and brought the oil. He moved her closer to him and dipped his fingers into the bowl of oil and penetrated her vagina with his fingers after pulling her underwear down. While he penetrated her vagina he said words to the effect 'oh yes God there is more curse here'. She said she felt embarrassed and moved backwards.

[36] At that point he told her to go and call Sakiusa from the room he was sleeping. She did. When she returned to the porch with Sakiusa the Accused had gone to his room. She said when Sakiusa told her to have sexual intercourse with him to be delivered, she said no as she had a boyfriend. While she was having a conversation with Sakiusa, the Accused returned to the porch and told her and Sakiusa to hurry up before the light breaks. She said she was stunned. He told Sakiusa to get back into the church while he questioned her whether she loved her family or not, suggesting that she should have sexual intercourse with Sakiusa if she wanted her family to be delivered from the curse. He said that while she will be having sexual intercourse with Sakiusa he will be praying for her at the altar and that is the end of it. He then got Sakiusa back into the porch and made her bend over for Sakiusa to deliver her of her family curse while he will be sitting down there to monitor. She said she bend down with her hands on the Accused knees as Sakiusa

penetrated her vagina with his penis from behind after pulling her underwear down. She said that when Sakiusa was penetrating her the Accused was touching his penis on top of his clothes. After Sakiusa penetrated her vagina three times, the Accused told him to go back to his room. She said the Accused told her that “Sakiusa with the bad body odour, does not know how to deliver”.

[37] After Sakiusa had left the porch, the Accused said words to the following effect “can you forgive talatala if talatala is going to deliver you”. She said she felt ashamed and she was just sitting down and looking at him. He grabbed her by her waist with his hands and said it’s not finished yet. He then penetrated her vagina with his penis several times. She said he did not ask her permission to penetrate her vagina with his penis. She said she did not raise alarm or shout for help because she believed the Accused when he told her that the only way to be delivered from her family curse was to have sexual intercourse with a man.

[38] After having sexual intercourse, the Accused told her to forgive him for what happened and not to tell anyone. He then wiped his penis with the white bed sheet on the railings, went into his room and got a bottle of perfume for her to put on before calling other youths for the morning prayer session. She did not inform anyone in the church about the incidents because she felt ashamed and felt that they wouldn’t believe her as the Accused was their pastor. She said she continued to stay at the church because the Accused had promised that there was going to be a sacrament to be held at her home but when the sacrament did not take place she returned to Lutu village and only attended church services in the company of somebody without staying overnight at the church. She said she did not complain to anyone because she did not have the courage to do so.

[39] The third witness was Lanieta Likuaue, the complainant on count five. She is a young woman in her early twenties who lived with her family at Gaji Road. She said she is related to the Accused from her father’s side and called him uncle. She said on occasions the Accused conducted their church service at her neighbour’s house at Gaji Road. She said that on 15 September 2018 she met the Accused at Suva bus stand with her aunty and discussed her problem of weight loss even when she ate a lot. He told her in the presence of her aunty that she needed a deliverance and that he wanted to see her the

same evening at his church in Cunningham after she had apologised to her father. She returned home and apologised to her father before heading to Cunningham without her father's knowledge as directed by the Accused.

[40] She said when she arrived at the Accused's church at around 8pm, the youths were having a service while the Accused was inside a room. After the service they had dinner together with the Accused and his spouse inside their house. After dinner the Accused called her out to the porch. She went to the porch with her aunty Kalesi but the Accused told Kalesi that he wanted to see the complainant privately.

[41] After Kalesi left, the Accused gave the complainant three options and one of the options was to be delivered. The complainant revealed to the Accused that she had abdominal pain and he told her that he will massage her stomach, to which she agreed because he was a pastor. She said he went inside the house and brought oil. He told her to stand up and he switched off the porch light saying people are watching. He told her to pull up her top, which she did. He then put on the oil and massaged her stomach. He told her to move closer to him while they faced each other. He asked her personal questions about her boyfriend and also suggested to try an older guy. While he was saying that his hand went inside her underwear and he touched the top part of her vagina. At that moment she realised something was not right and she told him that her stomach only is paining not her vagina. He removed his hand from her vagina and said that the sickness was not in her stomach but in her vagina, which needs to be delivered. He then told her to sit down and not to tell anyone about what had happened and for her to keep it as a secret, or something will happen to her like she will die. She said she did not agree for him to touch her vagina. She said he kept asking her to be delivered by having sex with a guy residing in Makoi but she just wanted him to pray over her and then for her to return home. He then told her that he was lazy and for her to go inside the house and get the girls there to pray for her. She did that and then returned to her home.

[42] She said she reported the incident to police on 25 September after revealing the incident to her uncle and aunty. She said after the incident was reported to police, the Accused accompanied his wife and some others to a relative's house at Gaji Road and offered an

apology to the complainant about what he had done, saying he was just playing. She said she was not aware of any animosity between her father and the Accused.

- [43] All three complainants were cross examined on their reasons for not raising alarm or reporting immediately after the alleged incidents occurred. The defence has argued that the delay by the complainants in making a complaint to a person whom they might reasonably have expected to complain is inconsistent with the conduct of a truthful person who had been sexually assaulted. The defence says that you should, therefore, regard the complainants' evidence that the Accused raped or sexually assaulted them 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 complainants is false. It may indicate fabrication on the part of the complainants, but does not necessarily do so. There may be good reasons why a person who has been sexually assaulted hesitates in making a complaint. Do you accept the complainants' reasons that they felt ashamed or confused to raise alarm or to complain against a pastor to be reasonable in the circumstances of this case. That is a matter for you to consider.
- [44] The fourth and the final witness for the prosecution was Reverend Penaia Tabua. Reverend Tabua gave evidence of the background of the Accused and the Agape Healing Ministry Church. Reverend Tabua said that although Agape Healing Ministry Church had affiliation with the Assemblies of God, the Church had self-autonomy in terms of self-govern, self-propagate and self-support. He said neither the Bible nor the Assemblies of God Church permits use of sexual acts between men and women for spiritual deliverance. He said when the senior leaders of the Assemblies of God Church learnt of the allegations against the Accused they suspended his licence of preaching and governing the church in October 2018.
- [45] That is a summary of the evidence of the prosecution witnesses.
- [46] The Accused in his evidence denies all the allegations against him. He said he knew about the first complainant and her husband's desire to have children during a church service at Lutu village and that he invited the couple to his church. He said the first



complainant turned up at his church alone and stayed with him and his family and other church members for three weeks.

[47] The Accused said he came to know the second complainant from a church service he had conducted at Lutu village. He admits having a conversation with her about her believing her family was under a curse. He said after that service the second complainant started attending his church services at Cunningham.

[48] The Accused said he knew the third complainant through her father. He admits meeting the third complainant at the Suva bus stand on 15 September 2018 where he had a conversation with her regarding her weight loss and he invited her to his church to be prayed for that afternoon. He said the third complainant did turn up at his church that evening and that he prayed for her privately at the porch using oil and touching her stomach over her clothes. He said the complainant appeared to have been possessed with a demonic spirit causing her stomach pain. He admits later he went to a house at Gaji Road after there were rumours that he had touched the private parts of the complainant but he denied apologizing to the complainant. He said instead the complainant said she forgave him and nothing had happened.

[49] The Accused admits that he had made contact with the three complainants when they came to his church for prayers, but his interaction with them was limited to prayers in the presence of his other church members, or within the vicinity of his church members. He said he did not make any representation to the complainants about engaging in sexual acts for spiritual deliverance as alleged by them.

[50] The defence case is one of denial of the charges and that the allegations of rape and sexual assault are fabricated by the complainants.

[51] Lady and Gentlemen Assessors, the resolution of the charges are depended upon whether you believe the accounts of each complainant as true. On each count of rape and sexual assault, if you believe the accounts of the complainants as credible, and if you feel sure that the Accused committed the alleged sexual acts either without the consent of the complainants or by obtaining their consent by false and fraudulent representation about



the nature or purpose of the sexual acts, and with the knowledge that the complainants did not consent to the sexual acts, then you may express opinions of guilty in respect to that charge. But if you do not believe the accounts of the complainants, or if you are unsure of any elements of the alleged offences, or if you have a reasonable doubt as to the guilt of the Accused, then you must find the Accused not guilty in respect to that charge. Remember to consider each count separately.

[52] On each count, 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.

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



A handwritten signature in black ink, appearing to read "Daniel Goundar", written over a dotted line.

**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused