

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 181 OF 2018S

STATE
Vs
KITONE SOSICENI TOKALAU

Counsels : **Ms. W. Elo for State**
Ms. M. Vateitei for Accused
Hearing : **17 February, 2020.**
Summing Up : **18 February, 2020.**

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.

2. State and Defence Counsels have made their submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.
3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you. I will now read the same to you:

“... [read from the information]....”

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, on 16 April 2018, at Nasinu in the Central Division, rape the complainant (PW1)?

E. THE OFFENCE AND IT'S ELEMENTS

9. For the accused to be found guilty of “rape”, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused’s penis penetrated the complainant’s vagina;
- (ii) without her consent; and
- (iii) he knew she was not consenting to 9 (i) above, at the time.

10. The slightest penetration of the complainant’s vagina with the accused’s penis; is sufficient to satisfy element no. 9 (i) above. It is irrelevant whether or not the accused ejaculated.

11. “Consent” is to agree freely and voluntarily and out of her own freewill. If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, that “consent” is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all.

12. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to 9 (i) above, at the time. You will have to

examine the parties' conduct at the time, and the surrounding circumstances, to decide this issue.

13. If you find the elements of rape, as described in paragraph 9 hereof, satisfied by the prosecution beyond reasonable doubt, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.

F. THE PROSECUTION'S CASE

14. The prosecution's case were as follows. It was based solely on the verbal evidence of the complainant (PW1). On 16 April 2018, PW1 was 20 years old and residing with her parents and siblings at Vatuwaqa, Suva. At the time, she was in a relationship with a Mr. S. Vuki, her present husband. The accused, at the time, was Mr. Vuki's best friend. They had known each other since they were young. The accused was 25 years old at the time.
15. On 15 April 2018, a Sunday, PW1 was with her boyfriend Mr. Vuki at his family's house in Caubati. According to the prosecution, Mr. Vuki went out at night and returned with his best friend, the accused, and four other boys. They returned with some liquor and decided to party until Monday morning. The accused, M. Vuki, PW1 and the four boys drank until Monday morning. They started drinking in the sitting room, and ended up in the bedroom. All were absolutely drunk.
16. According to the prosecution, PW1's boyfriend fell asleep next to the bedroom door before 10 am on Monday morning. The accused and the other boys left the room at about 10 am. According to the prosecution, PW1 slept beside her boyfriend at about 10 am Monday morning. According to the prosecution, she suddenly awoke at about 1 pm Monday afternoon, and felt something penetrating her vagina. She saw the accused penetrating her vagina with his penis, without her consent. According to the prosecution, PW1 resisted to no avail, and the accused knew she was not consenting to the same, when he blocked her mouth with his hand, to avoid her raising the alarm.

17. The matter was reported to police. An investigation was carried out. As a result, the accused was charged with raping PW1 on 16 April 2018. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

18. Yesterday, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation 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 remain silent and called no witness. That was his constitutional right.
19. Nothing negative whatsoever should be imputed to the accused when he chose to exercise his right to remain silent. This is because the burden to prove his guilt beyond reasonable doubt, remains with the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. Remember what I told you in paragraph 4 hereof, and I repeat the same here. There is no burden on the accused to prove his innocence, or prove anything at all. He is presumed innocent until he is proven guilty beyond a reasonable doubt. He is entitled, as he had done here, to fold his arms, sit there in the dock, and demand the prosecution prove his guilt beyond a reasonable doubt.
20. So, in this case, you will have to carefully examine the prosecution's case and decide whether or not the accused was guilty as charged. The prosecution's case was based fundamentally on the verbal evidence of the complainant, and you will have to decide whether what she alleged against the accused had made you sure of the accused's guilt. If you are sure of his guilt, you must find him guilty as charged. If otherwise, you will have to find him not guilty as charged. It is a matter entirely for you.

21. Because he pleaded not guilty to the charge, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

22. In analyzing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the Agreed Facts, then the State's case against the accused. Then, we will discuss the Accused's case. Then we will consider the need to look at all the evidence.

(b) **The Agreed Facts:**

23. The parties had submitted an "Agreed Facts", dated 26 April 2019. A copy of the same is with you. Please, read it carefully. There are 4 paragraphs of "Agreed Facts". Because the parties are not disputing the same, you may treat the same as established facts, and that the prosecution had proven those facts beyond a reasonable doubt.

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

27. The State's case against the accused rested solely on the verbal evidence of the complainant (PW1), given in court yesterday. You had watched her give evidence, you had observed her demeanor and you had observed her reactions to the questions thrown at her by the prosecution and defence counsels. I am sure that the details of her evidence are still fresh in your minds. However, in this case, I will not bore you with the details of her evidence, but will concentrate on the salient points on the evidence, and whether or not the elements of the charges had been proven by the prosecution beyond a reasonable doubt.

25. On the first element of the offence of rape as discussed in paragraph 9(i) hereof, the question becomes: Did the accused's penis penetrate the complainant's vagina on 16 April 2018? In her evidence, the complainant said she awoke after 1 pm on 16 April 2018 to find the accused penetrating her vagina with his penis. If you accept this evidence, then the prosecution had proven the first element of rape beyond reasonable doubt. If you reject the complainant's evidence on the above issue, you must find the accused not guilty as charged. It is a matter entirely for you.
26. Assuming you find the accused's penis penetrated the complainant's vagina on 16 April 2018, the next question becomes: was it done with her consent? The complainant, in her evidence said, she did not consent. She said, she resisted him to no avail. She said, she tried to raise the alarm, but the accused blocked her mouth with a hand. You must examine the whole of the complainant's evidence. If you find she did not consent to the accused's penetrating her vagina on 16 April 2018 with his penis, then you will have to move on to consider the last element of the offence of rape, that is, did he know that the complainant was not consenting to his penis penetrating her vagina at the time? If, on the other hand, you find that the complainant gave her consent to the accused penetrating her vagina with his penis at the time, or you are not sure on this issue, you must find the accused not guilty as charged. It is a matter entirely for you.
27. Assuming you find that the complainant did not give her consent to the accused penetrating her vagina with his penis at the time, then the last question becomes: did he know at the time that she was not consenting to sex? The complainant said, when she woke up to find the accused's penis in her vagina, she resisted him. However, she said, her resistance was to no avail. She said, the accused pinned her hands onto the bed with one hand. She said, she called for her boyfriend to wake up, but she said, he blocked her mouth with another hand. How you answer this question is entirely a matter for you.

28. If you accept the complainant's evidence on the allegation as credible, you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.

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

29. I had summarized the accused's case to you from paragraphs 18 to 21 hereof. I repeat the same here. If you reject the complainant's evidence, you must find the accused not guilty as charged.

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

30. The State called only one witness, the complainant herself. A crime can be proven on the basis of the verbal evidence of one witness alone, if you, as assessors and judges of fact, accept the same. If you accept the complainant's evidence, you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.

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) 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



Solicitor for the State
Solicitor for the Accused

: **Office of the Director of Public Prosecution, Suva.**
: **Ms. M. Vateitei, Barrister & Solicitor, Suva.**

A handwritten signature in blue ink, appearing to be "Salesi Temo".

Salesi Temo
JUDGE