

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 362 of 2019

[CRIMINAL JURISDICTION]

STATE

V

ILIASERI MELVIN BALE

Counsel : Ms. S. Sharma for the State
Ms. N. Mishra for the Accused

Hearing on : 25 – 27 January 2021

Summing up on : 28 January 2021

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as “VW”. No newspaper report or radio broadcast of the proceedings shall reveal the name or address, 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. 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.
7. 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. You may also find inconsistencies when you compare the evidence given by different witnesses on the same issue. Inconsistencies may lead you to question the reliability of the evidence given by a witness.
8. 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.
9. 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.

10. 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.
11. 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 proven 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 proven facts, then you should not draw the adverse inference.
12. 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.
13. 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.
14. 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 offence in a short while.

15. 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.
16. 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.
17. 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

ILIASERI MELVIN BALE on the 17th day of October 2019 at Nasinu, in the Central Division penetrated the vagina of **VW** with his fingers, without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

ILIASERI MELVIN BALE on the 17th day of October 2019 at Nasinu, in the Central Division penetrated the vagina of **VW** with his penis, without her consent.

18. You would note that the accused is charged with two counts. You have to consider the two charges separately. You should not find the accused guilty of the other count simply because you would find him guilty of one count.

19. To prove the offence of rape in this case, the prosecution should prove the following elements beyond reasonable doubt.
- a) the accused;
 - b) penetrated the vagina of PW1 with his fingers/penis;
 - 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.
20. Now let me take you through the evidence in this case. 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. As I have already told you have to treat the admitted facts as facts that are already proven beyond reasonable doubt.
21. The first prosecution witness ("PW1") said in her evidence that;
- a) *She is 26 years old. When she was asked whether she can remember the date 17/10/19, she first said that she does not remember this date clearly. That day around 3.00am she met the accused while she was at Temptation Nightclub drinking rum and cola with her friends. Before coming to the nightclub she was drinking grog and that was from the previous evening. She said that the accused offered to buy food for her and her friends and to drop them home after they leave the nightclub.*
 - b) *They went to Nabua to look for food. Thereafter being invited by the accused, she went with him to his house to have more drinks after dropping her friends. She said that she went to the accused's house though she only met him that night, because she still wanted to drink. They bought drinks from a shop near the accused's house and then went to his house. They went to the accused's bed room. There was one single bed and one double bed and a table in between. She sat on the single bed and the accused on the double bed. They were drinking and having a conversation.*
 - c) *She said the accused tried to kiss her after he pulled out some weed and smoked it. The accused came to the single bed and while both of them were sitting at the edge of the mattress, the accused kept leaning onto her, trying to kiss her. She moved back trying to get away because she didn't want to kiss him. She said she cannot remember all the details but the accused pinned her down on the bed and*

held both her hands from one hand. Then she remember the accused pulling her pants down. She was wearing denim shorts and a t-shirt. She said that the accused pulled her pants only up to her calves. She was in shock and she froze.

- d) Then the accused inserted three fingers inside her vagina. She was in shock and did not know what was happening. She felt like he put his fingers all the way. She did not agree for him to do that and she asked him to stop when he was pulling her pants down. She said she cannot remember for how long the accused was inserting the fingers and may be it was for five minutes. She said, during this time she was crying and she asked him several times to stop. She couldn't remember whether he was still holding onto her hands when he was inserting his fingers in her vagina. She said that she was at the edge of the bed and the accused was standing, leaning over her. She did not do anything because she was in shock.
- e) Then she remember the accused putting his penis inside her vagina. When he did that she was lying on the bed but her legs were hanging off the edge of the mattress. The accused was on his feet, was standing. Her pants were still around her calves. When he was inserting his penis, she cried and asked him to stop. She was upset and scared. She said that she didn't agree for the accused to insert his penis in her vagina. She said that he was inserting it probably for a few seconds. He stopped and apologized to her saying that he was really stoned. At this point she just wanted to go home because she didn't understand what happened.
- f) She asked him to walk her out because she could hear people moving around. The accused asked her to wait. So she waited and started drinking again. After a while he pushed her down and she remember him biting her chest and her neck. He stopped because she was crying and then he told her to get out of the house. She stood up and left. She said that she left through the side door because there were people in the living room. She got into a cab and went straight home.
- g) The same morning, she asked her friend KB what is rape and then the friend asked her what happened. Then she told the friend everything. She talked to this friend over the phone. Initially she didn't want to report the matter, but the week after she went to the police because it kept bothering her.
- h) During cross-examination her answer to several questions was that she cannot remember. She couldn't remember whether she met the accused's sister-in-law. When it was suggested that she kissed the accused back, when he kissed her, she said she cannot remember. She couldn't remember whether she lay down on the double bed after kissing each other.

22. The second prosecution witness was PW1's friend KB ("PW2"). She said that;

- a) She is a lawyer. PW1 was introduced to her in early 2018. On 17/10/19, PW1 sent her a text, asking her the definition of rape while she was in Taveuni. She sent her a text defining it and she also differentiated rape and sexual assault. She spoke to her over the phone when she got back to the hotel. PW1 told her that 'it' might have happened to her and she understood that 'it' meant rape. She told

PW1 to explain in detail and then PW1 started with saying that the guy had put his fingers down her panty and into her vagina. She then asked whether it was inside or outside and PW1 said that she thought, felt that it may have gone inside.

b) She stressed to PW1 that she should be sure and asked her to repeat the story. PW1 then relayed the story. PW1 told her that while she was drinking with the accused in the room, the accused started making physical advances. She said that PW1 was asking questions and was telling her what happened. After she heard everything, she told PW1 to report it. But she told PW1 that PW1 needed to be sure and clearly recall what happened.

23. That was the evidence for the prosecution. Thereafter the accused was explained his options according to law and he chose to give evidence on oath.

24. The accused said in his evidence that;

a) On 17/10/19, at Temptation Nightclub, PW1 approached him and told him that she knows him. He didn't know her. He said that when the nightclub was about to close and his friends were leaving, PW1 pulled him back and offered him cigarettes and drinks and he accepted it. While her friends left the nightclub and went towards the BBQ stall near Westpac, PW1 stayed back for him. When they reached the BBQ stall it was closed. Then they went to Nabua looking for another BBQ stall which was also closed. Thereafter PW1's friends wanted to be dropped at their respective homes and because PW1 said she wanted to drink some more, he asked her if she wants to have drinks at his place. She agreed. They bought some drinks on their way and went home. When he asked her if she wanted to drink in his room, she did not reply, but she followed him into his room.

b) PW1 sat on the single bed and he sat on the double bed. That morning, his mother, sister-in-law, his younger siblings and his niece were there at home and most of them were awake. The two of them started drinking and were having a conversation. Later she wanted to use the toilet and he gave her the directions. They continued drinking after she returned from the toilet and they smoked while drinking. PW1 then went to the toilet again. When she came back, she sat next to him on the double bed.

c) He asked her age and she said she is 19. They continued to drink. At one point he leaned towards PW1 and kissed her. She kissed him back and then lay down on the

bed. He got on top of her and kissed her neck. She was not resisting. He then pulled her pants and the panty down half way her thighs while he was still on top of her. As he approached her private area, PW1 grabbed his hand and told him to stop because she is a virgin and that she has a boyfriend. He did not reach her private part because she stopped him. While he was still on top of her, he had a 'stern' discussion with her as to why she kept on lying about her age. After that he got up. PW1 also got up and pulled up her pants.

- d) They again sat on the double bed and started having a conversation again. Then his sister-in-law came to the room looking for his younger brother. By the time the sister-in-law left the drinks were finished. PW1 asked him to get some more but he disagreed because he had classes at 11.00am. Then PW1 looked angry because she wanted to drink more. She went to the toilet again and came back into the room. She then asked him to drop her home, but he told her to sleep for a while and that he will drop her later. PW1 didn't agree. She opened the door and walked out of the house. He followed her. His mother was in the kitchen at this time. PW1 got onto a cab and left.*

25. The second witness for the defence was the accused's sister-in-law ("DW2"). She said that;

- a) On 17/10/19 between 6.00am and 7.00am she was in her room which was opposite the accused's room. She said that she saw the accused going into the room that morning and he was followed by a girl. She could hear them laughing and talking. After some time the girl came out to go to the toilet. They looked at each other and smiled. That girl went inside the accused's room and closed the door after she returned from the toilet. After about an hour the girl again went to the toilet and then went back into the room and closed the door. This time the girl didn't smile, she looked away. She heard them laughing and talking and then it was silent.*
- b) Thereafter she went to the accused's bedroom looking for the accused's younger brother. She knocked at the door and the accused opened. She saw the girl sitting on the queen sized bed at the edge and was wearing a pullover covering the head. She saw the girl for the third time when the girl came out of the room to leave the house. She said that the girl went through the back door and looked angry. There were others*

in the house that morning and her mother-in-law was washing the dishes when the girl left.

Analysis

26. With regard to making a complaint about the alleged incident, please note that, 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. If there is a delay in making a complaint, you should see whether there is a reasonable explanation to such delay. Ultimately your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.
27. Now let us look at each element of the offence of rape.
28. The first element is concerned with the identity of the accused. In this case there is no issue in relation to identity.
29. The second element involves the 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 or ejaculation. A slightest penetration is sufficient to satisfy this element.
30. The accused denies penetration in relation to both charges.
31. PW1 in relation to the first count said that the accused inserted three fingers inside her vagina, and in relation to the second count she said that the accused inserted his penis inside her vagina.

32. When you consider the evidence in relation to the second element in both charges, evidence of PW2 becomes relevant.
33. The prosecution says that PW2 is a recent complaint witness. You heard in this case that PW1 had spoken to her friend PW2 about the incident, the same morning. In this regard you should consider whether that was a prompt complaint regarding the incident and whether PW1 sufficiently complained of the offences the accused is charged with.
34. A recent complaint need not specifically disclose all the ingredients of the offence and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. However, please remember that this evidence of recent complaint is not evidence as to what actually happened between PW1 and the accused. The second prosecution witness cannot confirm whether the content of that complaint is true because she was not there to witness what happened between PW1 and the accused. It may only assist you to decide whether PW1 is consistent and whether or not PW1 has told you the truth. In the end you are deciding whether PW1 has given a truthful account of her encounter with the accused.
35. The evidence of PW2 suggests that PW1 was not sure about what exactly happened between her and the accused. In relation to the first count, what PW2 was told is that the accused's fingers may have gone inside. PW2 did not mention in her evidence about PW1 telling her that the accused inserted his penis inside her vagina. It is pertinent to note that though PW2 said she told PW1 to report the matter, she also told PW1 that PW1 need to be sure and should clearly recall what happened. That means the first person PW1 spoke to about the incident was given the impression that PW1 was not sure of what happened. The defence points out that PW2's evidence of what PW1 told her and PW1's evidence in court was not consistent.

36. I should also direct you with regard to the relevance of intoxication to the offence of rape. In this case there was evidence that both PW1 and the accused had been drinking before the alleged incident.
37. Drunkenness can affect a complainant of a rape case in two ways. Firstly, a person who is drunk, depending on the degree of intoxication, may do things which he/she would not do or less likely to do if he/she is not drunk and later on may not remember what exactly happened or may forget whether he/ she actually consented to the relevant act or not.
38. Secondly, again depending on the degree of intoxication, the capacity of a complainant to exercise a choice may be totally removed. That is, if the complainant is heavily intoxicated to the extent that he/ she is no longer conscious of what is taking place around him/ her, so that the complainant is not in a position to consent to the relevant act.
39. When it comes to a rape charge, according to our law, drunkenness or intoxication which is self-induced, is not a defence. You need to look at all the circumstances as they would have appeared to the accused had he been sober. It is not a defence for an accused in a rape case to take up the position that he would not have behaved in the way he did, had he not been drunk. Therefore, considering the circumstances of this case you should bear in mind that intoxication cannot be considered as a defence.
40. You may consider the above and other relevant circumstances to come to a finding whether you can accept PW1's evidence to be credible and reliable and then finally decide whether you are satisfied beyond reasonable doubt that the accused penetrated PW1's vagina with his fingers in relation to the first count and that he penetrated PW1's vagina with his penis in relation to the second count.

41. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated PW1's vagina without her consent. You should consider the evidence in relation to this element in relation to each count only if you are satisfied beyond reasonable doubt that there was penetration of PW1's vagina in respect of each count.
42. 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;
 - a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
43. In relation to this third element, again the evidence of PW2 may be useful. PW2 did not say in her evidence that PW1 spoke to her in relation to the issue of consent.
44. Apart from proving that PW1 did not consent for the accused to insert his fingers/ penis inside her vagina as relevant to each charge, 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.
45. 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.

46. 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.
47. 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.
48. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
 - (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, or his witness, 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.

49. Any re-directions?
50. 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.
51. Your opinion should be whether the accused is guilty or not guilty on each count.




Vincent S. Perera
JUDGE

Solicitors;

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