

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. 049 OF 2020

BETWEEN : STATE

AND : PATRICK RIANCO JOHN BALEILAU

Counsel : Ms K Semisi for the State
Mr M Fesaitu and Ms F Singh for the Accused

Date of Hearing : 27 – 29 January 2021

Date of Summing Up: 29 January 2021

SUMMING UP

- [1] Ladies and Gentleman 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.

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] In this case the complainant gave evidence behind a screen. The giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness give. The fact that the evidence had been so given must not in any way be considered by you as prejudicial to the Accused.
- [16] I turn now to deal with what the prosecution must prove. The Accused is charged with three 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.

[17] On count one, the Accused is charged with sexual assault. The prosecution alleges that between 24 August 2019 and 25 August 2019 the Accused unlawfully and indecently assaulted the complainant by kissing her mouth and touching her breasts.

[18] To prove sexual assault, the prosecution must prove the following elements:

1. That the Accused on the said date and place assaulted the complainant,
2. That the assault was unlawful and indecent,
3. That the assault was without the consent of the complainant,
4. That the Accused knew that the complainant was not consenting.

[19] Let me explain these elements in detail.

[20] Firstly, the prosecution must prove beyond reasonable doubt that the Accused by his act assaulted the complainant. An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that caused the complainant fear or pain. There is no suggestion in the present case that, if the Accused touched the complainant as the prosecution alleged he did, the touching was lawful.

[21] Secondly, the prosecution must prove beyond reasonable doubt that the assault was indecent. The word “indecent” means contrary to the ordinary standards of respectable people in this community. It is for you to determine the standards prevailing in our community when deciding whether the prosecution has satisfied you beyond reasonable doubt that the acts alleged (kissing and touching breasts) in this case was indecent. For an assault to be indecent it must have a sexual connotation or overtone. If an accused touches the complainant’s body or uses in a way which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent. In deciding whether the prosecution has proved this essential ingredient of the charge, you should take into consideration all the surrounding circumstances including the Accused’s words and/or

actions, the respective ages of the Accused and the complainant, any relationship which may have existed between them and the nature of the act relied upon.

[22] Thirdly, the prosecution must prove beyond reasonable doubt that the Accused did the alleged act without the complainant's consent, knowing that she was not consenting. Consent involves the conscious and voluntary permission by the complainant to the Accused to touch the complainant's body in the manner that he did. Consent or the absence of consent can be communicated by the words or acts of the complainant.

[23] However, consent is not a defence to a charge of sexual assault if the complainant is under the age of 16 years at time of the alleged assault. In the present case, the age of the complainant at the relevant date is not in dispute. In August 2019, she was 14 years of age. Also there is no suggestion by the Accused that he had reasonable cause to believe and did in fact believe that the complainant was of or above the age of 16 years. The issue of whether the Accused knew that the complainant was not consenting does not arise as the complainant was under the age of 16 years at the relevant time.

[24] In summary, the issues for you to determine on count one are:

1. Whether the Accused without lawful excuse kissed the complainant or touched her breasts? and
2. Whether the acts of kissing and touching the breasts of a 14- year girl were contrary to the ordinary standards of respectable people in this community?

[25] If you are satisfied beyond reasonable doubt that the Accused did the alleged acts and that those acts were contrary to the ordinary standards of respectable people in this community, then you render opinion of guilty of sexual assault. But if you are not so satisfied or if you have reasonable doubt as to the guilt of the Accused you must render opinion of not guilty of sexual assault.

[26] On counts two and three the Accused is charged with rape. The essential ingredients of rape are:

1. On the alleged date and place, the Accused had sexual intercourse with the complainant, that is, he penetrated her vagina with his penis,
2. The complainant did not consent to sexual intercourse,
3. The Accused knew that the complainant did not consent.

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

[28] The act of sexual intercourse without the informed consent of the complainant 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.

[29] But, the prosecution must prove beyond reasonable doubt that when the Accused penetrated the vagina of the complainant with his penis, he did so without her consent. The term consent means consent freely and voluntarily given by a person to engage in the physical act of sexual intercourse. 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.

[30] The third element of rape is that the Accused knew that the complainant did not freely and voluntarily consented to the alleged sexual intercourse on the two occasions. 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 complainant 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 complainant did not give her consent freely and voluntarily.

[31] So for each count of rape (counts 2 and 3) the issues for you to consider are:

1. Whether the Accused had sexual intercourse with the complainant by penetrating her vagina with his penis?
2. Whether the complainant consented to the act of sexual intercourse?
3. Whether the Accused knew that the complainant did not consent?

- [32] 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.
- [33] You each have been given a copy of the Admitted facts. You must treat the admitted facts as true when you consider the charges in this case.
- [34] The background facts about the complainant are not in dispute. The complainant is a child. Her date of birth is 11 July 2005. In August 2019 she was 14 years old and was a class 8 student. She lived with her relatives in Nabua after her parents separated. She was being taken care by a relative whom she referred to as her grandmother. The Accused is her cousin but she called him uncle.
- [35] In relating to the incidents on 24 August 2019 at around midnight the complainant said she was with her cousins yarning when her grandmother called her and confronted her with an allegation of smoking. When she denied the allegation her grandmother smacked her several times. She said that the Accused intervened and took her outside, two blocks away from her flat. He lit a cigarette and gave it to her to smoke while he took a video of her using his mobile phone. After that he took the cigarette away and told her to go inside the toilet. She did. He followed and locked the toilet door from inside. He sucked her mouth and placed his hand inside her t-shirt and bra and touched her breasts. She said she was scared and was crying. She said she told him she did not like what he was doing to her. He told her if she won't do it he will give her a hiding. He got her to pull down her shorts and underwear and face the wall. He made her bend down and then he penetrated her vagina with his penis from behind. She could feel the pain inside her vagina. She told him she did not want it but he kept doing it. He stopped when she cried to him and told him that it was sore. After that he left the toilet.
- [36] The complainant said when she returned to her flat, the Accused followed and lay between her and his girlfriend on the mattress. She said while they were lying on the mattress the

Accused made her watch intimate acts that he did to his girlfriend while she was asleep. He then left the room after waking his girlfriend for a smoke outside.

- [37] In relating to the second alleged incident the complainant said she woke up and went to the toilet. She said that the Accused followed her to the toilet and locked the door from inside. He told her not to shout. She said she started crying. She cried loud and he blocked her mouth. He told her to turn around and face the wall. She told him she didn't want to. He made her remove her shorts and underwear. He made her turn and face the wall. He penetrated her vagina with his penis. She told him to stop but he kept doing it. After he finished he left the toilet. She said she did not immediately report the incident to anyone because he had threatened to give her a hiding.
- [38] The complainant said she reported the incidents to her class teacher when she returned to school that term. She said she told her teacher that the Accused did the bad thing to her, that is, put his penis inside her vagina. The complainant said she complained to her class teacher after her relatives did not attend to her complain but tried to cover up her report.
- [39] The complainant's class teacher gave evidence that on 17 September 2019 the complainant complained to her during recess time when the other children were not in the classroom that her uncle Patrick had sex with her. The teacher said she referred the matter to police on the same day.
- [40] There is a further direction that I wish to give you regarding the complaint evidence. In a case of sexual offence, recent complaint evidence is led to show consistency on the part of the complainant, which may help you to decide whether or not the complainant has told you the truth. It is for you to decide whether the evidence of this complaint given to the class teacher helps you to reach a decision, but it is important that you should understand that the complaint is not independent evidence of what happened between the complainant and the Accused, and it therefore cannot itself prove that the complaint is true. You must consider these matters if you decide to rely upon the complaint evidence to assess whether the complainant's evidence is consistent and therefore believable.
- [41] Counsel for the Accused says that the delay by the complainant in reporting the alleged incidents immediately after the alleged incident is inconsistent with the conduct of a

truthful person who had been sexually assaulted or raped. The defence says that you should, therefore, regard the complainant's evidence that the Accused sexually assaulted and raped her as false.

[42] 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 complainant is false. It may indicate fabrication on the part of the complainant, but does not necessarily do so. There may be good reasons why a person who has been sexually assaulted hesitates in reporting immediately after the incident.

[43] In this case, the complainant was a child and a female and the Accused was an adult male and an immediate family member. She said she was scared of the Accused and that when she complained to her family members they tried to cover up her report. Whether you accept the complainant's reasons for the delay in reporting the alleged incidents to be reasonable in the circumstances of this case is a matter for you to consider.

[44] The third witness was the interviewing officer, WPC Waqatairewa. She said that the Accused in his police statement on 3 October 2019 stated that he was in Lautoka between 23 August 2019 and 28 August 2019 at his cousin, Martin's house.

[45] The fourth prosecution witness was Dr Vakadamu. He examined the complainant on 17 September 2019 at the CWM hospital. The doctor said he did not find any fresh signs of trauma on the complainant's vagina except that her hymen was not intact indicating a history of trauma in that area.

[46] That is a summary of the evidence for the prosecution.

[47] The Accused gave evidence and called three witnesses.

[48] The Accused's evidence is that he was in Lautoka at his cousin, Martin's house between 23rd and 28th August 2019. His cousin, Martin Muaiava, cousin's wife, Vikatorie Muaiava and his fiancé, Lusiana Baleicakaulevu gave evidence supporting his alibi, that is, the Accused was not in Suva but with them in Lautoka at the time of the alleged offences. Under cross examination these witnesses admitted that they cannot remember other dates

the Accused was with them but they could remember 24th August 2019 because they held a netball team bonding function at Martin and Viktorie's residence. Martin also admitted that when he gave his police statement he could not remember the exact date in August 2019 when the Accused was at his home but after discussing the matter with his wife he was able to work out the date.

- [49] There is further direction that I must give you regarding the defence of alibi. An alibi means that the Accused was not at the scene of crime when it was committed. As the prosecution has to prove the Accused's guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that the alibi was false, that does not by itself entitle you to convict the Accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a defence. If you believe the alibi evidence then the Accused could not have been in Suva to commit the alleged crime. But if you reject the evidence that the Accused was in Lautoka at the material time, that does not itself mean that the Accused is guilty. You must decide guilt on the evidence led by the prosecution.
- [50] The prosecution's case wholly rests on the complainant's evidence. On count one, if you believe the complainant is telling you the truth that the Accused kissed her and touched her breasts and if you feel sure that those acts were contrary to the ordinary standards of respectable people in this community, then you render opinion that he is guilty of sexual assault.
- [51] On counts two and three, if you believe the complainant is telling you the truth that the Accused had sexual intercourse with her without her consent and knowing she had not consented on the two alleged occasions, and if you feel sure of the Accused's guilt, then you render opinion that he is guilty of rape.
- [52] But if you do not believe the account of the complainant or if you have a reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty of the charges. Remember to consider each count separately.
- [53] 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.

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



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

Hon. Mr Justice Daniel Goundar

Solicitors:

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