

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

**CRIMINAL CASE NO. 278 OF 2019**

**STATE**

**V**

**MOHAMMED YUNUS KHAN**

**Counsel: Ms U Tamanikaiyaroi for the State**

**Mr K Gosai with Ms B Pillay for the Accused**

**Date of Hearing: 3 February – 4 February 2021**

**Date of Summing Up: 5 February 2021**

**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 a reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of the charge.
- [6] 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. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [7] 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.
- [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.
- [10] Those opinions must be based solely upon the evidence. Evidence consists of sworn testimony of the witnesses, what each witness has told the court in the witness box.
- [11] 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 heard about this case outside the courtroom. Focus solely on the evidence which you have seen, heard, or examined in this court.
- [12] This summing up is not evidence either, nor are counsel's opening or closing addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [13] 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.
- [14] 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 witnesses' evidence and demeanor together with all of the evidence in the case. You can accept part of a witness's testimony and reject other parts. A witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and be wide of the mark about another.

[15] 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.

[16] I turn now to deal with what the prosecution must prove. The Accused is charged with three counts. 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] The prosecution alleges that the Accused raped the complainant on three separate occasions. Counts one and two allegedly occurred between October and November 2017 at Olosara, Sigatoka. Count three allegedly occurred in August 2018 at Kulukulu, Sigatoka.

[18] To prove the charge of rape on each of the three counts the prosecution must prove beyond reasonable doubt the following elements:

1. That on the said date and place the Accused had carnal knowledge of the complainant.
2. That the complainant did not consent.
3. That the Accused knew the complainant did not consent.

[19] Let me explain each of these ingredients in detail.

[20] Firstly, the prosecution must prove that the Accused had carnal knowledge of the complainant. Carnal knowledge is an old fashion phrase for sexual intercourse. Sexual intercourse means penetration of vagina by penis. So the prosecution must prove that the Accused penetrated the complainant's vagina with his penis

on each of the three occasions alleged. The slightest degree of penetration is enough, and it is not necessary to prove that ejaculation took place.

[21] Secondly, the prosecution must prove beyond reasonable doubt that when the Accused had sexual intercourse on each of the three alleged occasions, he did so without the complainant's consent. The term consent means consent freely and voluntarily given by the complainant to engage in sexual intercourse. Consent can be given verbally, or expressed by actions. Similarly, 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's consent to sexual intercourse is not freely and voluntarily given if it is obtained by force, threat or intimidation. Similarly, a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

[22] Thirdly, it must be proved that the Accused knew that the complainant did not consent. A person's state of mind is as much a question of fact for you to determine as any other question of fact. It is not possible to have direct evidence of this. No witness can look into the Accused's mind and describe what he was thinking or knew at any particular time. However, it is something that can often be inferred from all the proved facts and circumstances. They include, for instance, what the Accused himself actually did. That will often be a very important matter. A person's actions, in themselves, may clearly show his intention or knowledge. Other matters that may be relevant are what the Accused said and did before the alleged offence. What the Accused said at the time of the alleged offence. What the Accused said and did after the alleged offence, and what the Accused said in evidence. You should consider all the proved facts and circumstances, including those I have just mentioned, and from them you are entitled to draw proper inferences as to whether the Accused knew the complainant did not consent on each of the alleged incidents.

- [23] On the basis of these legal principles that I have explained to you, you must consider the evidence in this case and decide whether the charges of rape have been proved by the evidence led by the prosecution.
- [24] 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.
- [25] Both sides have agreed to certain facts. The Agreed Facts are to be taken as true when you consider the evidence and the charges.
- [26] The prosecution called one witness, the complainant. It is not dispute that at the relevant time she was a teenage girl (15 years old) and living with her mother and her stepfather, the Accused at Sigatoka. She was still in primary school.
- [27] In relating to the first alleged incident in 2017 the complainant said the incident occurred around Diwali when she was home alone with the Accused. Her mother had gone to work and her siblings were at school. She did not go to school that day because she was sick. She was in her room folding clothes when the Accused approached her and said that he wanted to sleep with her. She said no to him and told him that he was like her father. He came close to her. She tried to run by he grabbed her hand and pushed her on the bed. He held her hands and removed her clothes. He removed his clothes. He penetrated her vagina with his penis for about a minute. He then wiped his penis and left the room. She did not report the incident to anyone because she was scarred of the Accused.
- [28] In relating to the second alleged incident in 2017 the complainant said she was alone at home as she did not go to school that day. She said the Accused approached her and said he wanted to sleep with her. When she replied no he touched her breast from inside her clothes. He first removed her clothes and then

his. He penetrated her vagina with his penis for a short time. He told her not tell her mother. After that he went inside the bathroom to wash himself. She said she reported the incident to her mother that same afternoon when she returned home from work. She said her mother did not believe her. She later reported the incident to the Accused's mother who assured her that she was going to do something but she also did not do anything.

[29] The complainant said the third incident occurred in August 2018 when they had moved to Kulukulu, Sigatoka. She said her mother had gone to work but her siblings were at home. The Accused made her siblings to go outside the house. He locked the door and approached her when she was in the kitchen. He carried her to his room. She said to him not to do it. He did not say anything but carried on. He placed her on top of his bed and removed her clothes. He removed his clothes and penetrated her vagina with his penis for a short time. After that he left for his mother's home.

[30] The complainant said she did not report the incident to her mother when she returned home that night because her mother had not believed her on her earlier report. She said she left home after the third incident and went on to live with a friend.

[31] The complainant said she did not consent to sexual intercourse with the Accused on all three occasions.

[32] In cross examination, the complainant admitted reporting to police an incident of assault by her mother in early 2017 when her teachers questioned her about a cut on her lips. She said that her boyfriend and his sister accompanied her to police station when she first reported the sexual allegation against the Accused in 2019. She said she gave a second statement to police when her mother told her to withdraw the case. She said she gave a third statement to the police on 25 January 2021 in which she lied that she consented to sexual intercourse with the Accused on the second and third occasions after he persuaded her for sex. She explained that she lied out of concern for her mother who wanted her to

withdraw the case. She denied fabricating the sexual allegation against the Accused so that she could go and live with her boyfriend. She said she burned herself in September 2018 when the Accused swore at her.

[33] I must give you a further direction regarding the complainant's evidence and the inconsistency contained in her third police statement of 25 January 2021. The complainant told the court that she lied in that police statement that she had consented to sexual intercourse on the second and third occasions because she was concerned about her mother. She said her evidence in court that she did not consent to sexual intercourse with the Accused on all three alleged occasions is true.

[34] Evidence is what the witness told us in court on oath. Police statement is not evidence. However, you may take into account the inconsistency in the police statement when you consider whether a witness is believable as a witness. In examining the inconsistency, you will wish to decide, first, whether there is in fact an inconsistency and if you decide there is one whether it is a material and relevant inconsistency. If there is an inconsistency, it might lead to conclude that the witness is generally not to be relied upon, or that a part of the witness's evidence is inaccurate or you may accept the reason the witness has provided for the inconsistency and consider the witness to be a reliable. That is a matter for you to consider.

[35] That was the prosecution case.

[36] The Accused has elected to give evidence. He 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 found not guilty. 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.

[37] The Accused in his evidence denies the allegations. He said that the allegations are not true. He said that he treated the complainant like his daughter. He said the complainant had behavioural issues while she was living with them. He said that they were having problems controlling the complainant. He said that they got social welfare officers to counsel her on at least two occasions when the complainant ran away from their home. He said the rape allegations have been fabricated by the complainant because she was involved with a boy and she wanted to go and live with him. He said that when they did not agree for her to go and live with her boyfriend she burned herself in protest. He said he treated her burn wounds with traditional methods.

[38] The next two witnesses were the social welfare officers. Both officers had some contact with the complainant before she lodged her complaint of rape against the Accused to police in 2019. They said that they were aware that the complainant's mother was having trouble in controlling her. Their evidence is that they did not receive any complain of rape against the Accused by the complainant until her police report in 2019. They said the complainant was brought to Suva to be kept under the State's care after they discovered that she was pregnant.

[39] Lady and Gentlemen assessors, while the evidence of pregnancy was led by the defence, you must not hold that against the Accused. There is no suggestion that the Accused was responsible for the complainant's pregnancy.

[40] The next witness was the complainant's mother. She said that she had problems controlling the complainant while she was living with her and the Accused at Sigatoka. She said that the complainant never complained to her that the Accused had raped her.

[41] The final witness was the Accused's mother. She denied that the complainant ever complained to her that the Accused had sexually abused her.

- [42] That sums up the evidence for the defence.
- [43] The prosecution case is that on three occasions between October 2017 and August 2018 the Accused had sexual intercourse with the complainant. The prosecution says the first two incidents took place at Olosara while the third incident took place at Kulukulu, Sigatoka. The prosecution submits that the complainant did not consent to sexual intercourse with the Accused and that he knew she did not consent. The prosecution submits that the Accused is guilty of rape as charged on counts 1-3.
- [44] The defence case is that the allegations of rape are not true, but are fabricated by the complainant so that she could go and live with her boyfriend who the complainant's mother did not approve because the complainant was underage at the relevant time. The defence says that the delay by the complainant in reporting the incidents to people she came in contact after the alleged incidents such as her school teachers and the social welfare officers is inconsistent with the conduct of a truthful person who had been raped. The defence says that you should, therefore, regard the complainant's evidence that the Accused raped her as false.
- [45] 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 raped hesitates in reporting the incident afterwards.
- [46] In this case, the complainant was a child and a female and the Accused was an adult male and an authority figure. The complainant said she was scared of the Accused and that when she did report to her mother, her mother did not believe her, and that when she reported to the Accused's mother she did not do anything. Do you accept the complainant's reasons for the delay in complaining about the allegation of rape to be reasonable in the circumstances of this case? That is a matter for you to consider.

[47] All three elements of rape are in dispute. On each count of rape, the questions for you are:

Whether the Accused had sexual intercourse with the complainant?

Whether the sexual intercourse was without the consent of the complainant?

Whether the Accused knew that the complainant did not consent to the sexual intercourse?

[48] The prosecution's case wholly rests on the complainant's evidence. On each count, if you believe the complainant is telling you the truth that the Accused penetrated her vagina with his penis without her consent and that he knew she had not consented, then you render opinion that the Accused is guilty of the charge.

[49] 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.

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

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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for the State

Gosai & Nambiar Lawyers for the Accused