

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No: HAC 79 of 2013

BETWEEN:

THE STATE

AND:

JOSEFA VEREVOU

Counsel: Mr. F. Lacanaivalu for State
Mr. M. Fesaitu for Accused

Date of Hearing: 23 December 2014

Date of Summing Up: 24 December 2014

SUMMING UP

- [1] Madam 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 State. In our system of justice there is a presumption of innocence in favour of an Accused. The State brings the charge against the Accused. Therefore it is for the State 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] The Accused has elected to give evidence although 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 and 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.
- [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. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [8] In this case, the complainant gave evidence behind the 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 gives. The fact that the evidence has been so given must not in any way be considered by you as prejudicial to the Accused.

- [9] 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 charge against the Accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.
- [10] 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.
- [11] 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.
- [12] 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.
- [13] 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.
- [14] 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.
- [15] 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 demeanour 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.
- [16] 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 State.

[17] The Accused is charged with three counts of rape. You have heard that the Accused has pleaded guilty to counts 2 and 3. The fact that he has pleaded guilty to counts 2 and 3 is now known to you, but it can have no bearing on your decision on count 1. The prosecution has to prove its case against the Accused on count 1.

[18] I turn now to deal with what the prosecution must prove. To prove rape as alleged on count 1, the prosecution must prove beyond reasonable doubt that the Accused penetrated the complainant's vagina using his finger. The slightest penetration is sufficient. It is not necessary to prove lack of consent on behalf of the complainant. The law is that a child under the age of 13 years is incapable of giving consent to any form of sexual penetration. In the present case, it is not in dispute that the complainant was 12 years old when the allegation on count 1 arose. If you are satisfied beyond reasonable doubt that the Accused penetrated the complainant's vagina with his finger then you may find him guilty of rape. If you are not satisfied that penetration had occurred, you must consider the lesser or alternative offence of sexual assault, notwithstanding that the Accused is not charged with sexual assault.

[19] The Accused is guilty of sexual assault if he unlawfully and indecently assaulted the complainant. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. The Accused admits sexually assaulting the complainant by placing his hand on her genital area. The defence says that the Accused is not guilty of rape but guilty of sexual assault on count 1. The real issue for you to consider is whether there was penetration of the complainant's vagina?

[20] You heard two versions of facts. One version is of the complainant and the other version is of the Accused. The complainant told you that while she was asleep the Accused came to her bed, caressed her breasts and inserted his finger inside her vagina. She felt physical pain in her vagina. The Accused told you that as he went past the complainant's bed, she pulled his hand towards her and touched his private parts. She took his hand and caressed her breasts and then moved his hand to her genital area. He touched the complainant's private parts for 5 minutes but he did not

insert his finger inside her vagina. It is for you to decide which version is credible and reliable. But 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 on the charge of rape.

[21] If you believe the complainant is telling the truth that the Accused penetrated her vagina with his finger then the proper opinion would be guilty of rape. If you disbelieve the complainant on the issue of penetration, but believe the Accused that he only touched her genital area then you must find the Accused not guilty of rape but guilty of sexual assault.

[22] Your possible opinions are either guilty or not of rape. If you find the Accused guilty of rape, then you must not consider the lesser or alternative offence of sexual assault. It is only if you find the Accused not guilty of rape, you express an opinion that he is guilty of sexual assault. 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.



Daniel Goundar
JUDGE



At Labasa

24 December 2014

Solicitors:

Office of the Director of Public Prosecutions for State

Office of the Director of Legal Aid Commission for Accused