

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 009 OF 2016 LAB

STATE

V

SADDAM FIDA HUSSAIN

Counsels : Mr. R. Kumar for State  
Mr. A. Sen for Accused

Hearings : 24 and 25 July, 2017

Summing Up : 26 July, 2017

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**SUMMING UP**

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**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 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, and I will now read the same to you:

*"... [read from the information]...."*



**D. THE MAIN ISSUES**

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

- (i) On count no. 1, did the accused, on 26 February, 2016, at Tabia, in the Northern Division, sexually assault the complainant?
- (ii) On count no. 2, did the accused, on 26 February, 2016, at Tabia, in the Northern Division, rape the complainant?

**E. THE OFFENCES AND THEIR ELEMENTS**

9. The accused was charged with two counts. We will start our discussion with the 'rape' charge (count no. 2) as it is the more serious of the two. Then we will discuss the "sexual assault" charge (count no. 1). For count no. 2, for the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt, the following elements:

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

10. In law, the slightest penetration of the complainant's vagina by the accused's finger, is sufficient to satisfy element no. (i), as described in paragraph 9(i) hereof.

11. Consent is to "agree freely and voluntarily and out of her own free will". If consent was obtained by force, threat, intimidation or fear of bodily harm to herself, 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 her vagina been penetrated by his finger, at the time. You will have to look at the parties' conduct, at the time, and the surrounding circumstances, to decide this issue.



13. Count no. 1 involved the offence of "sexual assault". "Sexual Assault" is basically an aggravated form of "indecent assault". For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused
  - (ii) indecently and
  - (iii) unlawfully
  - (iv) assaulted
  - (v) the female complainant.
14. An "assault" is basically the unlawful application of force to the person of another. For example, if someone punches you or hits you with a stick, without your consent, that's an "unlawful application of force to your person". It is the least touching of another in anger which amounts to an assault. The assault is unlawful because you did not consent to it.
15. The assault must not only be unlawful, it must also be "indecent". An action is indecent if right – thinking members of society regard it as indecent. For example, a 23 year old man touching a 15 year old female's naked breast while showering without her consent, would be regarded as indecent by right-thinking members of society.
16. Remember, there are two counts in the information. You must consider them separately in the light of the total evidence presented.

**F. THE PROSECUTION'S CASE**

17. The prosecution's case were as follows. On 26 February 2016, the female complainant (PW1) was 15 years old and lived in Tabia with her father and two brothers. Attached to their house was their bathroom. Living near her house was the accused (DW1). He was 22 years old and lived with his parents. The complainant's and the accused's fathers were brothers, thus the complainant and the accused were cousin brother and sister. They had known each other since birth.
18. According to the prosecution, the complainant was having her bath in their family bathroom on 26 February 2016 after 5pm. It was still daylight and the same went into the bathroom and lighted the



same up. PW1 was bathing naked. According to the prosecution, the accused went into the bathroom and held the complainant from behind. With one hand he touched the complainant's right naked breast and with the other hand, he gagged her mouth. He later touched the complainant's vagina and poked the same with a finger. The complainant pulled his hand away from her mouth, and pushed him backwards.

19. She shouted at him in the bathroom, and he later fled the scene. She later went to her sister-in-law (PW2) and told her that the accused came into her bathroom. The matter was reported to police. An investigation was carried out. She was medically examined by a doctor (PW3) on 8 March 2016. The accused was later charged and taken before the Labasa Magistrate Court on 9 March 2016. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged on both counts. That was the case for the prosecution.

**G. THE ACCUSED'S CASE**

20. On 24 July 2017, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charges. In other words, he denied the allegations 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 choose to give sworn evidence and called no witness, in his defence. That was his right.
21. The accused's case was very simple. On oath, he denied going into PW1's bathroom on 26 February 2016 after 5pm. He denied gagging the complainant and touching her breast. He denied touching her vagina and denied poking the same with his finger. He admitted that PW1's father and his father were brothers, and the families lived next to each other. He admitted that on 26 February 2016 he was tying goats and cows near the complainant's house. However, he denied ever going into PW1's house or bathroom, at the material time.
22. Because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged on both counts. That was the case for the defence.



## H. ANALYSIS OF THE EVIDENCE

### (a) Introduction:

23. 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 State's case against the accused; then the accused's case and lastly, the need to consider all the evidence.

### (b) State's Case Against the Accused:

24. The State's case against the accused was based fundamentally on the complainant's direct evidence and her identifying the accused at the crime scene, at the material time. Next the State relied on the doctor's (PW3) evidence. The State also relied on the evidence of the complainant's sister-in-law (PW2).
25. You have heard and seen the complainant (PW1) give evidence in the courtroom on 24 and 25 July 2017. Her evidence is obviously still fresh in your mind. However, I will summarize the same for you. PW1 said, she was having a shower in her family bathroom on 26 February 2016 after 5pm. She said, it was still daylight and the light therefrom came into the bathroom and lighted the same. PW1 said, while having her bath, she said, the accused came into the bathroom. She said, the accused held her from behind. She was naked. She said, the accused, with one hand gagged her, and with the other hand touched her right breast. She said, the accused later touched her vagina and poke the same with his finger. She said, she saw he accused when he came into the bathroom. She said, she pushed him back. She said, she saw Saddam's face for 3 seconds. She said, she shouted and Saddam fled the scene.
26. In assessing the above evidence of identification, I must direct you as follows. First, whenever the case against the accused depends wholly or substantially on the correctness of one identification of the accused which the defence alleges to be mistaken, I must warn you of the special need for caution before convicting the accused in reliance on the correctness of the identification, because an honest and convincing witness could be mistaken. Second, you must examine closely the



circumstances in which the identification came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? If so, how often? Had she any special reason for remembering the accused's face? Was a police identification parade held? Thirdly, are there any specific weaknesses in the identification evidence? The answers to the above questions will determine the quality of the identification evidence. If the quality is good, you may rely on the identification evidence. If it's otherwise, you should reject it.

27. In this case, PW1 said, she saw the accused come into the bathroom. PW1 said, he came and stood behind her. PW1 said, the accused gagged her mouth, touched her right breast and later touched and poked her vagina with his finger. PW1 said, it was painful. She said, she pushed the accused back, took her arm off her mouth, and shouted. PW1 said, she saw his face for 3 seconds. He later fled. From the above, she must have observed his face for 3 seconds or more, as she saw him come into the bathroom. Distance wise, he was standing behind her and when she pushed him back, he was right there in front of her – possibly 1 foot away. PW1 said there was sunlight in the bathroom. It appeared there was no impediment in the way of her observing the accused. PW1 said, she knew the accused from birth and they were cousin brother and cousin sister. Their fathers were brothers. A special reason for remembering the accused's face was that this was the first time he had done this to her. This appeared to be a case of recognition and a police identification parade would be prejudicial to the accused's interest. Overall, it would appear the quality of PW1 identification evidence against the accused was high. However, whether or not you accept the same, is a matter entirely for you.
28. PW1 said, after the above alleged incident, she went to her sister-in-law (PW2), who resided nearby, to report the incident. PW1 said, she told PW2 that the accused came into the bathroom. PW2, in her evidence confirmed the above. PW2 said, PW1 told her Saddam came into her bathroom, covered her mouth, PW1 pushed him away and screamed, and Saddam fled the scene. PW1 said, she reported the incident to PW2 on 26 February 2016, while PW2 said it was on 19 February 2016. Note that PW1, PW2 and Saddam are all related. PW2's husband is Saddam's biological brother. PW1 is PW2's sister-in-law. In these circumstances, family loyalties could disrupt the truth. However, how you treat PW2's evidence is a matter entirely for you.



29. Lastly, the State relied on Doctor Inosi Vatucicila Voce's (PW3) evidence. PW3 medically examined the complainant on 8 March 2016 – approximately 11 days after the alleged incident. PW3 recorded his medical findings in PW1's medical report which he tendered as Prosecution Exhibit No. 1. In the report, PW3 noted no injuries to PW1's right breast. When examining her vagina, he found that her hymen was not there. PW3 said the absence of the hymen could be caused by the introduction of a blunt object into her vagina or by injuries. PW3 said, a finger is a blunt object and if the same is poked into a vagina, it could cause the absence of the hymen. PW3 said, the absence of the hymen injury was old. However, PW3 said, in 11 days after the alleged incident, the healing process in the vagina is fast and efficient because the vagina is rich with blood supply. Whether or not PW3's evidence supports PW1's version of events is a matter entirely for you.
30. If you accept the prosecution's version of events, you must find the accused guilty as charged on both counts. If otherwise, you must find the accused not guilty as charged on both counts. It is a matter entirely for you.

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

31. On oath, the accused denied the allegations against him. He said, he did not touch PW1's right breast. He said, he did not poke PW1's vagina as alleged. If you accept the accused's version of events, you must find him not guilty as charged. If otherwise, you will have to consider the prosecution's version of events.

**(d) Considering All the Evidence:**

32. Three witnesses gave evidence for the prosecution. Only the accused gave evidence for the defence. In total, four witnesses gave evidence in this case. The prosecution tendered the complainant's medical report as Prosecution Exhibit No. 1. You must consider all the evidence together. You must analyze and compare them. If you find a witness credible, you may accept the whole of his/her evidence or just some of it. If you find the witness not credible, you may reject the



whole of his/her evidence, or just some of it. You are the judges of fact. If I have failed to mention a fact that you consider important, please take it on board, in your deliberation.

I. **SUMMARY**

33. 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.

34. Your possible opinions are as follows:

(i)	Count No. 1	:	Sexual Assault	:	Guilty or Not Guilty
(ii)	Count No. 2	:	Rape	:	Guilty or Not Guilty

35. 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 the same.

  
**Salesi Temo**  
**JUDGE**



<b>Solicitor for the State</b>	:	<b>Office of the Director of Public Prosecution, Labasa</b>
<b>Solicitor for the Accused</b>	:	<b>Maqbool &amp; Company, Labasa</b>