

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 026 OF 2017LAB

STATE

vs

SAKEO MATAI

Counsels : Ms. A. Vavadakua for State
Ms. R. Boseiwaqa for Accused

Hearings : 27 and 28 November, 2018

Summing Up : 29 November, 2018

SUMMING UP

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. I will now read the same to you:
“... [read from the information]...”

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:
 - (i) Did the accused, between 20 and 30 April 2017, in Bua in the Northern Division, rape the complainant (PW1)?

E. THE OFFENCE AND IT'S ELEMENT

9. The accused was charged with “rape”, contrary to section 207 (1) and (2) (a) of the Crimes Act 2009. It was alleged that, between 20 and 30 April 2017, the accused allegedly penetrated the complainant's vagina with his penis, without her consent. It was also alleged that, the accused knew she was not consenting to the above, at the time.

10. For the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused's penis penetrated the complainant's vagina;
 - (ii) without her consent ; and
 - (iii) he knew she was not consenting to 10 (1) above, at the time..
11. The slightest penetration of the complainant's vagina with the accused's penis; is sufficient to satisfy element no. 10 (1) above. It is irrelevant whether or not the accused ejaculated.
12. "Consent" is to "agree freely and voluntarily and out of her own freewill". If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, 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.
13. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to 10 (i) above, at the time. You will have to examine the parties' conduct at the time, and the surrounding circumstances, to decide this issue.
14. If you find the elements of the offence of rape, as described in paragraph 10 hereof, satisfied by the prosecution beyond reasonable doubt, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.
15. The charge is a "representative count". This meant that the prosecutor was charging the accused for alleged sexual acts committed between two separate dates, involving days or months. This is not unusual, because in most child sex offence cases, the child complainant cannot recall the exact date of the alleged offences, but recall the incident occurring between two dates, thus the "representative count". A child, in law, is someone under 18 years old. If you find and accept a single sex offence occurring between the two mentioned dates, that will be sufficient to prove the offence on that particular count. The prosecution does not need to prove all the alleged sex offences occurring between the two mentioned dates.

F. THE PROSECUTION'S CASE

16. The prosecution's case were as follows. The female complainant (PW1) is 15 years old. In April 2017, she was residing at Lekutu, Bua with her father and stepmother. Her biological parents separated

when she was very young. The accused, on the other hand, appeared to be 51 years old. He is married to the complainant's father's elder sister. By marriage, he is the complainant's uncle.

17. According to the prosecution, the complainant and her step-mother were not on good terms. They fell out. Her step-mother did not want the complainant to reside with them. She did not know where to go. According to the prosecution, she later decided to go and stay with her uncle (accused) and her aunty. When she arrived at her uncle's house, her aunty was away in Suva. Nevertheless, her uncle allowed her to sleep in a room in their house.
18. Between 20 and 30 April 2017, the complainant was sleeping in her uncle's house, in a room. According to the prosecution, the accused allegedly came to her that night. He allegedly began to touch her, and removed her clothes. Then he allegedly tied a piece of cloth over her mouth, presumably for her not to raise the alarm. He later allegedly inserted his penis into the complainant's vagina, without her consent, and he well knew she was not consenting to the above. He later allegedly told her not to tell anyone about the incident.
19. The matter was later reported to police. An investigation was carried out. The accused was later arrested and taken to Nabouwalu Magistrate Court on 26 May 2017 charged with raping the complainant. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

20. On 27 November 2018, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the rape allegation 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 remain silent and choose not to call any witness. That was his right.
21. Nothing negative whatsoever should be imputed to the accused when he choose to exercise his right to remain silent. This is because the burden to prove his guilt beyond reasonable doubt, remains with the prosecution throughout the trial, and it never shift to the accused, at any stage of the trial. Remember what I told you in paragraph 4 hereof, and I repeat the same here. There is no burden on the accused to prove his innocence, or prove anything at all. He is presumed innocent until he is proven guilty beyond a reasonable doubt. He is entitled, as he had done here, to fold his arms, sit there in the dock, and demand the prosecution prove his guilt beyond a reasonable doubt.

22. He had denied the charge by pleading not guilty to the same. Because of the above, he is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

23. In analysing 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 analysing the evidence, we will first discuss the State's case against the accused; then the accused's case, and lastly the need to look at all the evidence..

(b) **The State's Case Against the Accused:**

24. The State's case against the accused was based wholly and fundamentally on the complainant's verbal evidence given in court on 27 November 2018. She was examined-in-chief by the prosecution, and not cross-examined nor re-examined on 27 November 2018. You had watched her give evidence in the courtroom. You had the opportunity to examine how she responded to prosecution's counsel's questions. You examined her demeanour while she was giving evidence in court. I am sure her evidence is still fresh in your minds, and I will not bore you with the details. However, I will summarize the salient points of her evidence, as it related to the elements of the offence of rape.
25. In her evidence, the complainant said that the accused came to her while she was sleeping in a room in their house. She said, the accused began touching her. She said, it was dark at night, and there was no light in the room. She said, the accused began to remove her clothes. She said, the accused later tied a piece of cloth over her mouth, presumably to prevent her from raising the alarm. Later, he allegedly inserted his penis into her vagina, without her consent, and he well knew she was not consenting to the same, at the time. She said, the accused later told her not to inform or tell anyone about the incident.
26. The complainant (PW1) also said in her evidence that, at the time of the incident, it was night time. PW1 said, it was dark in the room. There was no light in the room. PW1 said, she did not know who put his penis into her vagina, at the material time. PW1 said, she could not see the face of the person who was attacking her that night. PW1 said, she heard him warned her not to tell anyone about the incident. PW1 said, she could not identify whose voice was it. PW1 said, he didn't know who was the person who inserted his penis into her vagina that night. Later PW1 said, it was the accused who did

the above to her, because of his sweaty smell that night. That was how PW1 identified the accused that night.

27. When considering the complainant's identification evidence against the accused, I must direct you, as follows, as a matter of law. First, whenever the case against an accused depends wholly or substantially, on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, I am warning 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 may be mistaken. Second, you must closely examine the circumstances in which the identification was 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? How often? Has she any special reason for remembering the accused's face? Was a police identification parade held? Third, are there any specific weaknesses in the identification evidence? If the quality of the identification evidence is good, you may rely on it. If the quality is bad, you must reject it.
28. In this case, the complainant (PW1) initially said, in her evidence that, it was her uncle, the accused, who came to her at the material time, and inserted his penis into her vagina, without her consent. She said, the person tied a piece of cloth around her mouth to prevent her from raising the alarm. This obviously showed that he well knew she was not consenting to sex at the time, because he had to gag her. When it comes to identifying the alleged rapist, the complainant said, she could not see his face, as it was dark in the room. She said there was no light in the room. She also said, she didn't know who allegedly raped her that night. For one thing, the complainant's identification evidence against the accused was inconsistent with each other. At first, she said, it was the accused who allegedly raped her. Later, because she could not see the face of the alleged rapist, she said, she does not know who allegedly raped her that night. In my view, the only way to connect the accused to the crime committed against the complainant that night, was her own identification evidence against him. In my view, her identification evidence against the accused was very weak and of a low quality. In any event, how you treat her identification evidence is entirely a matter for you.

(c) The Defence's Case:

29. I had outlined the accused's case from paragraphs 20 and 22 hereof. I repeat the same here. If you accept the defence's case, you must find him not guilty as charged. If otherwise and you accept the prosecution's case, you must find him guilty as charged. It is a matter entirely for you.

(d) The Need to Look at All the Evidence:

30. The prosecution called three witnesses, PW1, PW2 and PW3. They submitted one exhibit, that is, the complainant's medical report, Prosecution Exhibit No. 1. The defence gave no evidence. You must consider the above evidence together. If I haven't mention a piece of evidence you consider important, please take it on board in your deliberation. If you consider a witness credible, you are entitled to accept the whole or some of his/her evidence, in your deliberation. If you consider a witness not credible, you are entitled to reject the whole or some of his/her evidence in your deliberation. You are the judges of fact.

I. SUMMARY

31. 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.

32. Your possible opinion are as follows:

(i) Count No. 1 : Rape - Guilty or Not Guilty

33. 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 your decisions.




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JUDGE

Solicitor for State : Office of the Director of Public Prosecution, Labasa
Solicitor for Accused : Office of Legal Aid Commission, Labasa