

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CRIMINAL JURISDICTION**

**Criminal Case No: HAC 66 of 2017**

**BETWEEN:**                    **THE STATE**

**AND:**                            **SETAREKI VUKICANAGAUNA**

**Counsel:**        **Ms A Vavadakua for State**  
                      **Ms K Boseiwaqa for Accused**

**Date of Hearing:**        **04 and 05 June 2018**

**Date of Summing Up:** **06 June 2018**

**SUMMING UP**

- [1] Madam Assessors and Gentleman Assessor, 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 remain silent. You must not draw any adverse inference against him for not giving evidence. He does not have to prove his innocence. He does not have to prove anything.
- [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 a representative count of rape. A representative count means that the prosecution must prove beyond reasonable doubt that one of the incidents of the alleged rape occurred between the period 26 December 2015 and 8 January 2016.
- [18] I turn now to deal with what the prosecution must prove. To prove rape as alleged, the prosecution must prove beyond reasonable doubt that the Accused penetrated the complainant's vagina using his penis. 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, the birth certificate of the complainant was tendered in evidence and is marked PE1. It is not in dispute that the complainant was born on 23 March 2003. She was 12 years old in December 2015 and January 2016 when the allegation arose. Even if the complainant had consented to sexual intercourse, her consent is no consent under the law.
- [19] In relating the alleged incident, the complainant said she had accompanied her parents and siblings to their farmhouse in Lekutu immediately after Christmas in 2015. In 2015, she was in Year 6. The Accused is her cousin. He has a farmhouse next to the complainant's house in Lekutu. The first incident occurred when the complainant went to wash dishes at a tap outside the Accused's house. While she was washing dishes the Accused exposed his private genital to her and called her inside his house. She went inside the house and took off her clothes. She said the Accused licked her vagina and had sexual intercourse, that is, he inserted his penis inside her vagina. The next day the Accused called her again inside his house and repeated the incident. He inserted his penis inside her vagina. He took his penis out and rubbed it. She said a 'white thing' came out of his penis. She put on her clothes and went outside. When the Accused invited her on the third occasion, she did not go back inside the house because he had told her that the white thing that came out of his penis can make her pregnant. She said she did not tell her parents of the incidents because she was scared that her parents would scold her. The first time she confided in and reported the incident was her school teacher in the third school term of 2016. She told her teacher what the Accused had done to her.

- [20] Evidence was led from the school teacher, Ms Kosoniu that on 23 September 2016, the complainant reported the alleged sexual incident after the teacher had a session on hygiene, safety and sexual health with the senior school girls. Ms Kosoniu's evidence is that at first the complainant was reluctant to speak out, but after some prodding and assurance that she could confide in her, the complainant revealed that the Accused had sexual intercourse with her.
- [21] 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. Do you accept the complainant's explanation that she did not tell her parents because she was scared that they would scold her for reporting a sexual incident involving an older male relative? You may consider the cultural constraints and the age gap between the complainant and the Accused. The complainant was 12 years old and a primary school student while the Accused was an older male cousin. It is for you to decide whether the evidence of this complaint to Ms Kosoniu 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.
- [22] The last witness for the prosecution was the complainant's father, Mr Tuiwaiselele. Mr Tuiwaiselele gave evidence of a traditional apology presented to him and his family by the Accused and his family after the alleged incident involving his daughter were reported to police. The Accused had accompanied his elders and family and presented the apology. During the apology, the Accused was crying. Counsel for the Accused submits that presenting a traditional apology does not necessarily mean that forgiveness is being sought because harm was done to the victim. Traditional apology can be done to fuse tensions between two families and the evidence of the apology in itself is not evidence of guilt. What weight you want to attach to this piece of evidence is a matter for you. You may consider the evidence of traditional apology together with all other evidence led at the trial when considering the charge against the Accused. That was the evidence in summary for the prosecution.

[23] The two witnesses called by the defence gave evidence of the Accused's 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 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 evidence Jale Valetino and Pita Koroi that the Accused who is their cousin was with them in Namukalau from 25 December 2015 until 31 January 2016 then the Accused could not have been in Lekutu to commit the alleged crime. But if you reject the evidence that the Accused was in Namukalau 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.

[24] If you believe the complainant is telling the truth that the Accused penetrated her vagina with his penis on one occasion then the proper opinion would be guilty of rape. If you disbelieve the complainant on the issue of penetration, then the proper opinion is not guilty. The real issue for you to consider is whether the Accused had sexual intercourse with the complainant on one occasion? Your possible opinions are 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.



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 State

Office of the Director of Legal Aid Commission for Accused