

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

Criminal Case No. HAC 370 of 2018

BETWEEN : STATE

AND : JAI RAJ NAICKER

Counsel : Mr Y Prasad & Ms S Swastika for the State
Ms S Prakash for the Accused

Dates of Hearing : 1 – 2 May 2019

Date of Summing Up: 6 May 2019

SUMMING UP

- [1] Ladies and Gentleman 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 that charge.
- [6] 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 each charge which you have to consider.
- [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 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.
- [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 prosecution.

[17] The Accused is charged with three counts. You must consider each count separately, when you examine the case in your deliberations. You are not obliged to find the Accused guilty either on all three counts or not guilty on all three counts. 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.

[18] I turn now to deal with what the prosecution must prove. On count 1, the Accused is charged with rape. To prove count one, the prosecution must prove the following elements beyond reasonable doubt:

1. That at the time and place alleged, the Accused had sexual intercourse with the complainant.
2. That at the time of sexual intercourse the complainant was a child below the age of 13 years.

[19] I will explain each of these two elements of the charge in turn.

[20] Sexual intercourse is penetration by a man's penis into a woman's vagina. The slightest degree of penetration is enough, and it is not necessary to prove that ejaculation took place.

[21] When the complainant is a child under the age of 13 years at the time of sexual intercourse, the prosecution is not required to prove that the child complainant did not consent. The law is that a child under the age of 13 years does not have the capacity to consent to sexual intercourse. What the prosecution must prove is that at the time the sexual intercourse took place, the complainant was a child under the age of 13 years. The birth certificate of the complainant is an agreed document. You will see from that document that the complainant was born on 15 February 2005. So on the alleged date of the first incident, 10 December 2017, the complainant was 12 years 10 months old – a child under the age of 13 years. If you accept that the complainant was under the age of 13 years on 10 December 2017, then the only issue you have to

decide on count one is whether the Accused had sexual intercourse with the complainant as alleged.

[22] The second count is a representative count of sexual assault. The prosecution alleged that between 1 January 2017 and 31 December 2018 the Accused committed numerous offences of the same kind. Instead of loading the Information with counts charging many offences, they have selected one as an example, as they are entitled to do. To find the Accused guilty of a representative count you must be sure that he committed one such offence (sexual assault) during the period concerned. For the Accused to be guilty of sexual assault, the prosecution must prove beyond reasonable doubt that the Accused 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. As to whether the act of touching breasts or genitals of an adolescent girl, you must ask yourselves what right-minded persons would think of this act. Was the act so offensive to current standards of modesty and privacy as to be indecent? In considering these questions you may consider the general nature of the relationship between the Accused and the complainant and the age gap between them to decide whether or not the act was indecent. If you are satisfied beyond reasonable doubt that the Accused without lawful excuse touched the complainant's breasts or genitals on at least one occasion and that the act was such that right-minded persons would consider being indecent, then you may find the Accused guilty on count 2. If you are not so satisfied then you must find him not guilty on count 2.

[23] On count 3, the Accused is charged with digital rape. It is alleged that the Accused penetrated the vagina of the complainant with his finger between 1 September 2018 and 12 September 2018. To prove digital rape as alleged on count 3, the prosecution must prove beyond reasonable doubt the following matters:

1. that the Accused penetrated the complainant's vagina with his finger.
2. that at the time of that act of penetration, the complainant did not consent to it.

3. that the Accused knew that the complainant did not consent. This is a subjective, and not an objective test. You might ask how, in the absence of an admission by the accused, the prosecution can prove that the accused was aware that the complainant did not consent. The prosecution asks you to infer from other facts which it has set out to prove, that the Accused must have known and that he did indeed know.

[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] The first prosecution witness was the complainant. She is a child. Her age and her relationship with the Accused are not in dispute. The Accused is her stepfather and paternal uncle - biological father's younger brother. At the material time she resided with the Accused, her biological mother and five siblings at Wainibokasi Road. Their home comprised of two bedrooms and a sitting room. The complainant shared one room with other siblings. The Accused slept in the other room while the mother slept in the sitting room with a newly born child.

[26] In relating to the alleged incident subject of count one, the complainant said on 10 December 2017 between 10-11pm the Accused asked her to tuck in the mosquito net to his bed. Earlier that night she was watching a movie on the Accused's mobile phone with her siblings. She said when she was about to leave the bedroom after tucking the mosquito net, the Accused held her hand and made her lie on the bed. She tried to free herself by pushing his hand away but wasn't successful. She was alone in the bedroom. Her siblings had gone off to sleep in their room. She said the Accused held her hand tightly and started to undress her. She was lying on the bed. After undressing her, he pulled down his pants and took his penis out. She said she was crying and was scared. He was on top of her. He pressed her hand on her stomach tightly. He inserted his penis into her vagina for 3 to 4 minutes. He stopped

because she was in pain and was moving. He warned her not to tell anyone. Otherwise, he will poison everybody's food. She did not report the incident to anyone.

[27] In relating to the alleged incidents subject of count two, the complainant said between 1 January 2017 and 31 December 2018, the Accused constantly touched her breasts and private parts with his hands. He would do that when she would be sitting on the bed watching movie and while her other siblings would be concentrating on the movie. She did not complain to anyone because he threatened her that he would poison everybody's food and kill them.

[28] In relating to the alleged incident subject of count three, the complainant said that between 1 September 2018 and 12 September 2018, she was watching a movie with her siblings while sitting on the bed with her legs up on the mattress when the Accused touched her vagina (place where she has menses from) with his hand. When she was asked how deep did he touch – she said nearly one inch. You will recall the complainant was cross examined about this incident on the basis that her police statement does not expressly mentions the said incident. She agreed that there is no specific mention of this alleged incident in her police statement. She explained that her statement was obtained in a rush at the police station. I must give you a further direction regarding this omission.

[29] The complainant's evidence is what she told us in court on oath. Her police statement is not evidence. So what use you can make of her police statement. You may take into account the inconsistencies in the complainant's police statement when you consider whether she is believable as a witness. In examining the inconsistencies, 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 her evidence is inaccurate or you may accept the reason she has provided for the inconsistency and consider her to be a reliable witness. That is a matter for you to consider.

[30] I turn now to the medical evidence. The complainant was medically examined on 12 September 2018 by Dr Ongbit. The doctor noted an hymnal laceration at 4 o'clock position on the vaginal wall. The injury was healed, that is, more than 2 weeks old. There were no sign of fresh injuries. The doctor said hymnal laceration could be caused by anything going through the vaginal opening such as a finger or a penis. In cross examination the doctor said that it is very unlikely for hymnal laceration to occur by scratching or while shaving pubic hair. What weight you put to the medical evidence is a matter for you bearing in mind the medical evidence alone does not prove that the Accused committed the alleged sexual acts.

[31] The next witness was a school teacher, Mrs Tevola. You will recall that the complainant told us that she confided and reported to Mrs Tevola that her stepfather had raped her. Mrs Tevola gave evidence of that report and the circumstances under which the report was made to her by the complainant. There is a further direction that I wish to give you regarding the complaint evidence. 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. It is for you to decide whether the evidence of this complaint given to a school teacher 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. You must consider these matters if you decide to rely upon the complaint evidence to assess whether the complainant's evidence is consistent and therefore believable.

[32] That was the prosecution case.

[33] The Accused in his evidence denied the allegations. He described his relationship with the complainant as normal. He said at times he was strict on his children to study and make something of their lives. He said he never threatened the complainant that he would poison everybody's food as he also had his own child in the house.

[34] The defence case is that the sexual allegations made against the Accused by the complainant are not true. Counsel for the Accused says that the layout of the house

without much privacy, presence of other members of the household at all times and the delay by the complainant in making a complaint to a person whom she might reasonably have expected to complain is inconsistent with the conduct of a truthful person who had been sexually assaulted. The defence says that you should, therefore, regard the complainant's evidence that the Accused raped and sexually assaulted her as false. 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 complaint 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 sexually assaulted hesitates in making a complaint. In this case, the complainant was a child and the Accused was a person of authority over her as her stepfather. Do you accept the complainant's reasons that she was scared to raise alarm or to complain to be reasonable in the circumstances of this case. That is a matter for you to consider.

[35] The prosecution's case wholly rests on the complainant's evidence. If you believe the complainant is telling you the truth that the Accused had sexual intercourse with her when she was under the age of 13 years as alleged on count one, that the Accused touched the complainant's breasts or genitals on at least one occasion as alleged on count two and that the Accused penetrated the complainant's vagina with his finger without her consent and knowing she had not consented as alleged on count three, then you may express an opinion that the Accused is guilty of the charges. But if you do not believe the complainant's evidence that the Accused sexually abused her as alleged in the three charges or if you have reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty of that charge.

[36] 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
Legal Aid Commission for the Accused