

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

**Criminal Case No.: HAC 17 of 2018**

**BETWEEN** : STATE

**AND** : KAONDIDO TUTARA

**Counsel** : Ms D. Rao for the State  
Ms M. Tuiloma and Ms K. Boseiwaqa for the Accused

**Dates of Hearing** : 13 - 15 May 2019

**Date of Summing Up:** 17 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 elected not to give evidence. That is perfectly his right. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing, one way or the other. You will have to decide whether, on the prosecution's evidence, you are sure of his guilt.
- [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. She is a child under the age of 18 years. 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 four representative counts. On each representative count the prosecution alleges that 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 per different locations, 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 of rape during the period alleged per each count.

[18] 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 four counts or not guilty on all four 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.

[19] I turn now to deal with what the prosecution must prove. On all four counts, the Accused is charged with rape. To prove rape, 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 that sexual intercourse, the complainant did not consent to it.
3. That the Accused knew that the complainant did not consent.

[20] I will explain each of these three elements of the charge in turn.

[21] 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. This element is not in dispute.

[22] The term consent means consent freely and voluntarily given by the complainant to engage in sexual intercourse. Consent can be given verbally, or expressed by actions. On the same note, absence of consent does not have to be in words; it also may be communicated in other ways. Consent obtained after persuasion is still consent. However, the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be

regarded as consenting to the sexual intercourse. A person who submits to sexual acts with another person as a result of threats or force or exercise of authority is, by law, not to be regarded as consenting to the sexual acts. In this case, the prosecution says that the complainant expressly did not consent to sexual intercourse.

- [23] On the element of knowledge, 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 that the complainant did not consent to sexual intercourse. This is a subjective, and not an objective test. In this case, the prosecution says the Accused knew the complainant did not consent because she told him he did not want to have sex. Whether or not the complainant consented to sexual intercourse or whether the Accused knew she did not consent are issues for you to determine.
- [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] In this case the prosecution and the defence have agreed to certain facts. You have been given copies of the Agreed Facts. The Agreed Facts are part of the evidence and you should accept these Agreed Facts as accurate and the truth. They are, of course, an important part of the case. The agreement of these facts has avoided the calling of a number of witnesses, and thereby saved a lot of court time.
- [26] 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 was her guardian and maternal uncle – mother's brother. At all material times she resided with the Accused and his family.

[27] In relating to the alleged incidents between May and August 2017 (count one), the complainant said the Accused approached and had sexual intercourse with her in their home at Vunimoli, Labasa. The incidents occurred at night in her bedroom when her aunty (the Accused's wife) and her cousin were asleep in the same room. Her aunty slept on the floor while her cousin slept on a separate bed next to her bed. She said she did not want to have sex with the Accused. She said she told the Accused that she did not want to have sex but he did not listen. She did not raise alarm because she felt ashamed. The incidents of sexual intercourse were repeated many times on different occasions. She did not report the incidents because she was afraid of the repercussions. She said the Accused threatened to hit her or chase her away from home if she reported the incidents to anyone.

[28] In relating to the alleged incidents subject of count two, the complainant said that in October 2017, the Accused had sexual intercourse with her on numerous occasions when they were living at Korotari, Labasa and when her aunty will be away visiting relatives. She said that there were instances when the Accused held her back from accompanying her aunt to visit the relatives saying she had house chores to do. She described the incidents of sexual intercourse as unhappy moments because she did not want to have sex with the Accused. She said that despite telling the Accused it was enough the Accused had sexual intercourse with her. She said that she did not report the incidents because of the fear of repercussions of reporting. She said that the Accused threatened to hit her if she reported the incidents.

[29] In relating to the alleged incidents subject of count three, the complainant said that in December 2017, the Accused had sexual intercourse with her on numerous occasions when they moved back to their Vunimoli home. She said one of the incidents was witnessed by her cousin, Sinto who was sleeping on her bed in the same bedroom. She said that she wanted to run away from her home when the Accused had sexual intercourse with her. She said she did not want to have sex with the Accused. She said she told the Accused that she did not want to have sex but he did not listen. She said he kept on forcing her. She said she feared she would get pregnant and not able to go to school. She did not report the incidents because she feared the Accused would assault her for reporting.

- [30] In relating to the incidents subject of count four, the complainant said between January and February 2018, the Accused had sexual intercourse with her when they were staying at Waidamudamu, Labasa. She said she did want to have sexual intercourse with the Accused. She told him he had a wife. She did not report to her aunt because she feared her aunt would not believe her. She said she was scared of being assaulted for reporting to anyone. Eventually, she confided in and informed her school friend, Alena what her uncle had been doing to her. She told Alena that the Accused was having sex with her and that she did not like it. She accompanied Alena to her home.
- [31] The next witness was Sinto Baiaki. She spoke about an incident she had witnessed in December 2017 when she was sharing the bedroom with the complainant while they were staying at Vunimoli, Labasa. She witnessed the Accused enter their bedroom and approach the complainant on her bed. She heard them whispering and then he turned off the light. She witnessed him taking off his clothes and having sex with the complainant. She did not report the incident because she was afraid of her parents and the Accused who was her uncle.
- [32] The next witness was Alena Salaceva. You will recall that the complainant told us that she confided in and reported to Alena that her uncle (the Accused) was having sex with her and that she did not like it. Alena gave evidence of that complaint and the circumstances under which the complaint 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 friend 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.

- [33] That was the prosecution case.
- [34] The Accused chose not to give evidence or call any witnesses. Let me remind you that that is perfectly his right and you must not draw any adverse inference against him for exercising his rights.
- [35] The defence case is that the Accused had consensual sexual intercourse with the complainant on all the alleged incidents. Counsel for the Accused says that the complainant's failure to raise alarm during the incidents or to report immediately after the incidents to a person whom she might reasonably have expected to complain or report is inconsistent with the conduct of a person who had been raped. The defence says that you should, therefore, regard the complainant's evidence that she did not consent to sexual intercourse with the Accused as false. This is a matter which you should consider, but I must warn you that failing to raise an alarm or the delay in reporting does not necessarily indicate that the evidence of the complainant 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 raped hesitates in raising an alarm or making a complaint. In this case, the complainant was a child living away from her parents and the Accused was a person of authority over her as her uncle and as her guardian. Do you accept the complainant's reasons that she feared being disbelieved for raising alarm or was afraid of the repercussions of complaining to be reasonable in the circumstances of this case? That is a matter for you to consider.
- [36] If you disbelieve the complainant on lack of consent, that is the end of the matter and your proper opinion would be not guilty of rape. Similarly you should acquit the Accused on rape if you have a reasonable doubt.
- [37] However, it is not in dispute that the Accused had sexual intercourse with a 15-year old girl. If you have doubts about the complainant's evidence or disbelieve her when she said she did not consent to sexual intercourse, the correct opinion to tender would be one of not guilty of rape but guilty of defilement of a girl between the ages of 13 and 16, an offence contrary to section 215(1) of the Crimes Act. The law is that when a person is charged with rape and the court is of opinion that he is not guilty of that



offence but guilty of an alternative offence, the relevant one of which here is the offence of defilement which I have just referred you to, the court may find the Accused guilty of the alternative offence. A person is guilty of defilement if he had sexual intercourse with a girl between the age of 13 and 15 years and that the person did not reasonably believe that the girl was over 16 years of age. There is no suggestion that the Accused thought his niece who was Year 8 student under his care at the material times was over 16 years of age. Consent is not a defence for the offence of defilement.

- [38] To return to the Information before you. If you believe the complainant is telling you the truth about not consenting to sexual intercourse on the occasions charged and if you are sure that the Accused knew she did not consent, then you may find the Accused guilty of rape. But if you believe the complainant gave her free and voluntary consent to sexual intercourse with the Accused, then your opinion will be not guilty of rape but guilty of defilement. You will only be asked for your opinion on the alternative offence of defilement if you give an opinion that the Accused is not guilty of rape. These are matters for you to consider along with all my directions before you arrive at your opinions.
- [39] Please now retire to deliberate on your opinions. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them.



A handwritten signature in blue ink, appearing to be "DG", written over a dotted line.

**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for the Accused