

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 001 OF 2018S

STATE

Vs

JOSUA BUETA

Counsels : Ms. S. Sharma for State
Ms. L. Ratidara for Accused

Hearings : 12 and 13 June 2019.

Summing Up : 14 June, 2019.

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 their 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, on 14 December 2017, at Lami in the Central Division, rape the complainant (PW1)?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was charged with “rape”, contrary to section 207 (1) and (2) (a) of the Crimes Act 2009. It was alleged that, on 14 December 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 (i) 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 (i) 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 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.

F. THE PROSECUTION'S CASE

15. The prosecution's case was founded on the 24 years old female complainant's verbal evidence. She lived with her parents and two daughters in a farm in Naitasiri. On 13 December 2017 (Wednesday), she came to Suva and stayed with a cousin in Lami. At 8 pm on 13 December 2017, she went to the Sandunes Nightclub in Suva. She went alone. She met some friends in the nightclub and was drinking liquor with them. At about 12 am, the next morning, the 14th December 2017 (Thursday), she went to the Union Nightclub.
16. At the nightclub, she met the accused and three of his friends. She was invited to drink liquor with them, and she agreed. At about 3 am, she agreed to go out with the accused and two of his friends to drink liquor elsewhere. All of them appeared to be drunk. On their way to Lami, they purchased some more liquor. They went to a spot pass Namuka Village. At the spot, the female complainant, the accused and two of his friends consumed liquor.
17. A while later, the complainant had sexual intercourse with one Molitoni, the accused's friend. It appeared the sexual encounter was consensual. After the same, the accused asked the complainant for sex. According to the complainant, the accused and his friends allegedly forced her to have sexual intercourse with the accused without her consent. It was alleged that Molitoni punched her repeatedly, and according to the prosecution, the accused allegedly knew she was not consenting to sex with him at the time he inserted his penis into her vagina.

18. The matter was later reported to police. An investigation was carried out. The accused was questioned by police. On 18 December 2017, he was brought before the Suva Magistrate Court 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

19. On 12 June 2019, 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 chose to give sworn evidence and called no witness, in his defence. That was his right.
20. The accused's case was very simple. He admitted he met the complainant at the Union Nightclub. He said, they danced and drank liquor together. He admitted they went in a car to Lami, and drank at a secluded spot with two other friends. He admitted he had sexual intercourse with the complainant, at the material time, that is, his penis penetrated the complainant's vagina. However, he said, the complainant allegedly consented to having sex with him, at the time.
21. Because of the above, the accused is asking you as assessors and judges of fact, to find him not guilty as charged. According to him, he had consensual sex with the complainant, at the material time, and there was nothing wrong with the same. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

22. 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 Agreed Facts; then the State's case against the accused; then the accused's case and lastly the need to look at all the evidence.

(b) **The Agreed Facts:**

23. The parties submitted an "Agreed Facts", dated 7 June 2019. It contained 9 paragraphs of Agreed Facts. Because the "Agreed Facts" are not disputed by the parties, you may take it that the prosecution had proven those facts beyond a reasonable doubt. The significance of the "Agreed Facts" was that it set the stage of what occurred before the allegation of rape occurred.
24. Furthermore, on the first element of the offence of rape as discussed in paragraph 10 (i) and 11 hereof, that is, that the accused's penis penetrated the complainant's vagina, at the material time, the complainant and accused's sworn evidence, confirmed the above element. Although the above fact was not contained in the "Agreed Facts dated 7 June 2019", you may take it the parties do not dispute that the first element of rape, as discussed above, had been proven beyond reasonable doubt by the prosecution.
25. The above will enable us to concentrate on the disputed issues in this case, that is, whether or not the complainant consented to sex with the accused at the material time, and whether or not he knew that the complainant was not consenting to sex, at the time?

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

26. The State's case against the accused is founded basically on the verbal evidence of the complainant (PW1). You have heard and watched her give evidence in court on 12 June 2019. You have watched how she answered the questions put to her by the prosecution and defence counsel. I am sure her evidence is still fresh in your mind, and I will not bore

you with the details. However, I will summarize to you the salient points as it related to the allegation of rape.

27. The complainant (PW1) said, she lived with her parents in a farm in Naitasiri. She had two young daughters. She was 24 years old. She came to Suva and stayed with a cousin in Lami on 13 December 2017, a Wednesday. At 8 pm, she went alone to Sandunes Nightclub and consumed liquor. She met some friends and they drank 6 bottles of long neck beer. At about 1 am, in the early morning of 14 December 2017, a Thursday, she went to the Union Nightclub.
28. At the nightclub, she met the accused and danced with him. The accused invited her to drink liquor with them, and she agreed. At about 3.30 am, at the invitation of the accused to drink elsewhere, she agreed to go with the accused and his friends to drink elsewhere. They went in a vehicle and stopped somewhere in Lami, and bought further drinks. They then went to a secluded spot pass Namuka Village, and drank liquor near a mango tree.
29. According to the complainant (PW1), the accused and his friends then forced her to have sexual intercourse with one Molitoni, the accused and another man. She said, she did not consent to the accused penetrating her vagina with his penis, at the time. She also said, the accused knew she was not consenting to sex with him, at the time, because they were forcing her to submit to him. If you accept the complainant's above evidence as credible, 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.

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

30. The accused admitted in his sworn evidence that he had sexual intercourse with the complainant, at the material time. He admitted his penis penetrated the complainant's vagina, at the material time. He said, the complainant consented to the above. He said, he met the complainant at the Union Nightclub early morning on 14 December 2017. He said,

he invited the complainant to dance and drink with him and his friends. He said, the complainant willingly came and danced and drank with him. He said, they felt for each other and were kissing in the nightclub. It appeared both were drunk at the time. Accused said, he invited the complainant after 3.30 am on 14 December 2017 to go elsewhere and drink. According to the accused, the complainant willingly came with him and his friends at a secluded spot pass Namuka Village to drink.

31. The complainant said, she first had what appeared to be consensual sex with one Molitoni. After that, Molitoni's wife rang him on his phone. According to the accused, when the complainant heard Molitoni talking on the phone to his wife, she started coming onto the accused. Accused said they later went out and had consensual sex. He said, he did not force the complainant to have sex with him. When having sex with her, accused appeared to say that he knew she was consenting to sex with him. Because of the above, the accused is saying he is not guilty as charged.
32. If you accept the accused's evidence as credible, you must find the accused not guilty as charged. If otherwise, you must find him guilty as charged. It is a matter entirely for you.

(e) The Need To Consider All The Evidence:

33. The prosecution called two witnesses:
 - (i) Complainant (PW1); and
 - (ii) Doctor Shelvin Kapoor (PW2).They tendered one exhibit:
 - (i) Prosecution Exhibit No. 1 – PW1's medical report.The defence called only one witness, that is, the accused. Altogether, you have a total of three witnesses, on whose evidence, you will have to make a decision.
34. You have to analyze and compare the above evidence together. Also consider the Agreed Facts submitted by the parties. If I haven't mentioned a piece of evidence you consider

important, please take it on board, in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his/her evidence in your deliberation. If you find 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

35. 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.

36. Your possible opinions are as follows:

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

37. 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.




Salesi Temo
JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused : **Legal Aid Commission, Suva.**