

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 35 OF 2019

BETWEEN : STATE

AND : ERNEST PICKERING

Counsel : Ms S Naibe for State
: Mr T Varinava for Accused

Date of Hearing : 19th – 20th August, 2019
Date of Summing Up : 21st August, 2019

SUMMING UP

- [1] Lady and Gentlemen 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.
- [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 the 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 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] I turn now to deal with what the prosecution must prove. The Accused is charged with digital rape. The prosecution alleges that the Accused in January 2018 penetrated the vagina of the complainant, a child under the age of 13 years, with his fingers.
- [18] For the Accused to be guilty of digital rape, the prosecution must prove beyond reasonable doubt that he penetrated the vagina of the complainant with his fingers or an object. The slightest degree of penetration is sufficient. The prosecution is not required to prove that the complainant did not consent or that the Accused knew she did not consent. The law is that a child under the age 13 years does not have the capacity to give consent to sexual penetration of her vagina. The age of the complainant and her relationship with the Accused is not in dispute. At the relevant time she was 5 years old and the Accused is her biological father. She did not have the capacity to give consent.
- [19] The real issue for you to determine is whether the Accused penetrated the vagina of the complainant with his fingers. There is no direct evidence that the Accused penetrated the complainant's vagina by inserting a finger. The complainant in her evidence said that the Accused touched her 'vara', pointing to her genital area. The prosecution has led medical evidence of a laceration 1 cm beside labia minora, the inner folds of vaginal opening. The prosecution is relying upon circumstantial evidence, that is, an inference that the Accused penetrated the complainant's vagina with his finger. The prosecution says that the alleged incident occurred when the complainant was under his custody and care when his wife left him with the child for one week after a domestic dispute in January 2018. The prosecution says the Accused had an opportunity to commit the alleged crime.

- [20] You must first consider all the evidence and decide what facts have been proved. From those facts you are entitled to draw proper inferences. An inference is a logical deduction from facts that have been proved. It must not be mere speculation or guesswork. It is not sufficient that the proved circumstances are merely consistent with the Accused having committed the crime. To find him guilty you must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the facts proved. It must be an inference that satisfies you beyond reasonable doubt that the Accused committed the crime. If the inference to be drawn from the circumstantial evidence falls short of that standard then your opinion must be not guilty.
- [21] 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.
- [22] The first prosecution witness was the complainant's mother, Adi Venina Roko. She gave evidence that she has been married to the Accused for four years and together they have four children – two daughters and two sons. The complainant is their second child. The couple resided at Waiyavi Stage 5 in Lautoka with their children in a shared home. She said she left her daughters behind with the Accused for one week in January 2018 following a domestic dispute. When she returned after a week to retrieve her daughters with the assistance of the police she went to live with her parents at Waiyavi Stage 4. The following day she went to visit her cousin, Agnes McGoan. She took the complainant with her to her cousin's home. When she was at her cousin's home, the complainant told her that her 'vara' was sore, referring to her vagina. When she asked the complainant what happened she said daddy touched her 'vara'. She couldn't believe what she heard. She called her cousin to hear what the complainant was telling her. She said the complainant repeated what she told her earlier in her cousin's presence.

- [23] Ms McGoon gave evidence of the circumstances under which she heard the complainant report to her mother that the Accused had touched the complainant's vagina. Both women then contacted their cousin in Nadi and went to see her with the complainant. They took the complainant for a medical examination before filing a police report.
- [24] Ms McGoon in cross examination admitted that in her police statement she had said that the complainant reported the alleged incident to them at her cousin's home in Nadi, but her evidence is that the complainant reported the alleged incident at her home in Lautoka. She said she was overwhelmed by all the happenings on the same day. She said she later called Police and corrected herself that the complaint was made in her home in Lautoka and not in her cousin's home in Nadi. I must give you a further direction regarding this inconsistency. Evidence is what the witness told us in court on oath. Police statement is not evidence. However, you may take into account the inconsistency in the police statement when you consider whether a witness is believable as a witness. In examining the inconsistency, 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 the witness's evidence is inaccurate or you may accept the reason the witness has provided for the inconsistency and consider the witness to be a reliable. That is a matter for you to consider.
- [25] There is a further direction that I wish to give you regarding the complaint evidence, that is, the report that the complainant made to her mother in the presence of her aunty, Ms McGoon that the Accused had touched her genital area. 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 mother and an aunty 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.

- [26] The third witness was Dr Shafique. She medically examined the complainant on 11 January 2018 at Nadi Hospital. The doctor found a laceration beside the complainant's labia minora. The laceration was 1 cm and healing. The doctor said the injury was 4 to 5 days old. She said the injury could have been caused by forceful penetration by a finger. She ruled out scratching because a scratch would have caused an abrasion and not a laceration. What weight you attach to the medical evidence and the doctor's opinion is a matter for you. The medical evidence of course does not prove that the Accused penetrated the vagina of the complainant with his finger. But it is a piece of evidence that you may consider with all other evidence to determine whether the charge against the Accused has been proven beyond a reasonable doubt.
- [27] The final witness for the prosecution was the child complainant. She is now 6 years old. Due to her tender age, she gave unsworn evidence. She was reminded to tell the truth. At first she was reluctant but her tender age and the formal court environment may explain her reluctance. She did say that she told her mother that the Accused had touched her 'vara' referring to her vagina. She told the court that the Accused touched her vagina at their home. In cross examination she denied anyone coached her to say that in court.
- [28] That brings me to the end of the prosecution case.
- [29] The defence called the Accused to give evidence. His evidence is of denial of the charge. He admits having extra marital affairs and matrimonial problems with his wife but he denies sexually abusing his daughter, the complainant. He does not know the reasons why the complainant accused him of touching her vagina but he suspects his wife has coached her to say that in order to punish him for his infidelity. The defence case is of denial of the charge and that the complainant was coached to fabricate the allegation of sexual abuse against the Accused.
- [30] 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 touched her vagina and if

you feel sure from all proved facts that the only logical inference is that the Accused penetrated the complainant's vagina with his fingers, then you may express an opinion that the Accused is guilty of the charge. But if you do not believe the complainant's evidence that the Accused touched her vagina, or if you not sure whether the Accused penetrated the complainant's vagina with his fingers, or if you have a reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty of the charge.

- [31] 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