

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 34 of 2016

STATE

V

- 1. VILIAME LIVANASIGA SEMO**
- 2. NACANIELI BULIVOU**

Counsel : Ms. R. Uce for the State.
: Ms. P. Reddy for the first Accused.
: Ms. K. Vulimainadave for the second Accused.

Dates of Hearing : 05 and 06 May 2020
Closing Speeches : 07 May, 2020
Date of Summing Up : 07 May, 2020

SUMMING UP

(The name of the complainant is suppressed she will be referred to as "KK")

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are

matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an 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 facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused persons are guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused persons. There is no obligation on the accused persons to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

8. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of all the accused persons guilt, before you can express an opinion that they are guilty. If you have any reasonable doubt about their guilt, then you must express an opinion that they are not guilty.
9. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this court room.
10. You must decide the facts without prejudice or sympathy for either the accused persons or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

12. The accused persons are charged with the following offences: (a copy of the amended information is with you).

COUNT ONE

[REPRESENTATIVE COUNT]

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

VILIAME LIVANASIGA SEMO, between the 1st day of January 2014 and 31st day of December, 2015 at Nadi in the Western Division penetrated the vagina of “**KK**” with his penis.

COUNT TWO

[REPRESENTATIVE COUNT]

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

VILIAME LIVANASIGA SEMO, between the 1st day of January 2014 and 31st day of December, 2015 at Nadi in the Western Division indecently and unlawfully assaulted “**KK**” by rubbing his penis on her vagina.

COUNT THREE

[REPRESENTATIVE COUNT]

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

NACANIELI BULIVOU, between the 1st day of August, 2014 and 31st December, 2015 at Nadi in the Western Division penetrated the vagina of “**KK**” with his tongue.

COUNT FOUR

Statement of Offence

[REPRESENTATIVE COUNT]

SEXUAL ASSAULT: Contrary to section 210 (1) (b) (i) of the Crimes Act 2009.

Particulars of Offence

NACANIELI BULIVOU, between the 1st day of August, 2014 and 31st December, 2015 at Nadi in the Western Division procured “**KK**” to rub the penis of **NACANIELI BULIVOU** with her hand.

COUNT FIVE

[REPRESENTATIVE COUNT]

Statement of Offence

INDECENTLY INSULTING OR ANNOYING ANY PERSON: Contrary to section 213 (1) (a) of the Crimes Act 2009.

Particulars of Offence

NACANIELI BULIVOU, between the 1st day of August, 2014 and 31st day of December, 2015 at Nadi in the Western Division with intent to insult the modesty of “**KK**”, masturbated in front of the said “**KK**”.

COUNT SIX

[REPRESENTATIVE COUNT]

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

NACANIELI BULIVOU, between the 1st day of January 2014 and 31st day of December, 2015 at Nadi in the Western Division indecently and unlawfully assaulted “**KK**” by rubbing his penis on her buttocks.

REPRESENTATIVE COUNT

Ladies and Gentleman Assessors

13. You will note that all the above counts are representative counts, which covers a period between the 1st day of January, 2014 and the 31st of December, 2015. By a representative count the prosecution alleges that

more than one offence as described in the information was committed during the period specified in the counts. The law says that it shall be sufficient for the prosecution to prove that between the specified dates in the counts at least one offence was committed.

Ladies and Gentleman Assessors

14. As you are aware, after the prosecution closed its case, this court had ruled that the first accused Viliame Semo had a case to answer in respect of count two being the offence of sexual assault only which means you are not to consider the offence of rape in count one for this accused.
15. As for the second accused, this court ruled that this accused had a case to answer in respect of the lesser offence of sexual assault in count three and not for the offence rape as per the information and you are to also consider count six being another offence of sexual assault. In the circumstances you are not to disregard counts four and five completely.
16. To prove the offence of sexual assault the prosecution must prove the following elements of this offence beyond reasonable doubt:
 - (a) The accused persons;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant "KK" as follows:
 - 1). the first accused rubbed his penis on her vagina;
 - 2). the second accused rubbed his penis on her buttocks; and also
 - 3). licked her vagina.
17. The first element of the offence of sexual assault is concerned with the identity of the persons who allegedly committed the offence.

18. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
19. The final element of assault is the unlawful use of force on the complainant by the act of rubbing of penis on the complainant’s vagina, the rubbing of penis on her buttocks and the licking of her vagina.

You should ask yourself:

- a) whether you consider the force which was used could have been sexual because of its nature; and
 - b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that use of force is in fact sexual in nature.
20. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then you must find the accused persons guilty of the offence of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused persons not guilty.
 21. In this trial the accused persons have denied committing the offences of sexual assault as alleged. It is for the prosecution to prove beyond reasonable doubt that it was the first accused who had unlawfully and indecently rubbed his penis on the complainant’s vagina, and that it was the second accused who had rubbed his penis on the buttocks of the complainant and also licked her vagina, between 1st January, 2014 and 31st December, 2015.

22. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
23. In this case, the first accused has a case to answer for one count of sexual assault and the second accused has a case to answer in respect of two counts of sexual assault.
24. You should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. If you find an accused guilty of one count that does not automatically make him guilty for the remaining counts. You must also not assume that because one accused is guilty of a count the other must be guilty as well.

ADMITTED FACTS

25. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
26. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
27. I will now remind you of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. This was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not

important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

28. The prosecution called one witness to prove the charges against both the accused persons.
29. The complainant who was 9 years of age in the year 2014 and a class 4 student at that time informed the court that sometimes in the year 2015 the first accused Viliame who was her cousin had come to her house with his parents and his sister Seruwaia.
30. The parents of the complainant and the parents of the first accused were having a kava session in her house since it was night time the complainant with her two year old cousin Kini and Seruwaia went to sleep in her bedroom.
31. After a while the first accused came into the bedroom and walked to where the complainant was lying down. The accused removed his pants and underwear and then removed the complainant's pants and panty and started to rub his penis on her vagina.
32. The complainant was afraid so she did not do anything, at this time both her cousins were sleeping in the same room. The complainant did not tell anyone about what the first accused had done to her because she was afraid that nobody would believe her. The first accused had done this to her on more than one occasion in the year 2015.
33. In regards to the second accused the complainant told the court that Nacanieli Bulivou was her grandfather who had come to stay with her family at Nawaka, Nadi. The complainant used to call the second accused

Tutu Buli. The complainant recalled on one occasion in the year 2014 when she was in her bedroom during night time the second accused who used to sleep in the living room came into her bedroom.

34. In the bedroom the complainant was with her two year old cousin brother who was sleeping at the time. The complainant was wearing her pants, t-shirt and panty. The second accused came into the bedroom opened his pants and rubbed his penis on her buttocks from on top of her clothes whilst she lay on the bed. Whilst doing this, the second accused came to know that the complainant was awake so he turned her to face him and then pulled down her pants and panty and licked her vagina.
35. The complainant was helpless, she did not do anything, after a while the second accused left, thereafter the complainant pulled up her panty and pants and went to sleep. The complainant did not tell anyone about what the accused had done to her because she was afraid. According to the complainant the accused had done this to her on more than one occasion.
36. On another occasion, in late 2014 or early 2015 the second accused took the complainant and her two year old cousin Kini to her aunt's house at Navakai, Nadi. In the night the complainant felt uncomfortable sleeping in the living room so she went into the bedroom where the second accused was sleeping and she slept on the bed next to the accused.
37. After a while the second accused started to touch the complainant's thighs and then pulled down her skirt and panty and started licking her vagina. The complainant tried turning away telling the accused to move but the second accused kept on pulling her clothes while she kept on pushing him. The second accused did not move away but finally the complainant was able to move around and get out of the bed and leave.

38. The complainant was scared and helpless, she did not tell anyone at her aunt's house because she thought they won't believe her. Also on one occasion the complainant had gone for a swim with her family members but she did not tell anyone since all her family members were busy and having fun and she did not want to spoil their mood.
39. In 2016 the complainant told her cousin Seruwaia about what the first and the second accused persons had done to her in 2014 and 2015. The reason why the complainant told Seruwaia was because Seruwaia had some suspicion that something was going on. Thereafter Seruwaia told the complainant's grandmother Moira Williams. When the complainant was questioned by her grandmother she confirmed the incidents the matter was then reported to the police by the complainant's parents.
40. Upon cross examination by the counsel for the first accused, the complainant stated that Seruwaia was the same age as her and in 2015 they were 10 years of age and that Seruwaia was close to her, the complainant agreed that she did not wake up Seruwaia or inform her other family members or shout or alert anybody about what the first accused had done to her.
41. The complainant also agreed that she had the opportunity to wake Seruwaia but she had chosen not to do so. The complainant explained that the reason why she did not tell anyone about the incident was because nobody would believe her since the first accused and his family were close to her parents and her parents trusted them.
42. The complainant disagreed that she did not tell Seruwaia immediately after the incident because nothing had happened. The complainant said she did not tell Seruwaia because Seruwaia was the sister of the first accused, although she told Seruwaia some months later.

43. The complainant maintained that she did not make up a story against the first accused and that she told the truth.
44. Furthermore, when it was suggested that the reason why she did not shout or alert anybody was because the first accused had not done anything to her, the complainant replied that she did not know what to do at the time. The complainant also stated that she did not tell her teacher because she thought it was best if the matter stayed within the family and also she did not know what to do.
45. Upon cross examination by the counsel for the second accused the complainant stated that she saw the second accused in her room because there was a lamp shade which gave enough light to see who was in the room. The reason why the complainant did not kick, or shout or scream when the accused was licking her vagina and rubbing his penis on her buttocks was because she did not know what to do at the time. The complainant agreed that on one occasion she had slept beside the second accused although he had rubbed his penis on her buttocks and licked her vagina.
46. The complainant agreed that she did not tell any of her family members about what the accused was doing to her but she maintained that it was true that the accused had licked her vagina and also rubbed his penis on her buttocks. The complainant also agreed that when her parents would be away the second accused would look after her and that she always obeyed the accused. The complainant denied that she had lied about the allegations against the second accused and she also denied that it was her grandmother Moira who had informed the police about the allegation.
47. In re-examination the complainant clarified that although she had the opportunity to wake Seruwaia she could not reach out to Seruwaia in the bedroom. Also the complainant did not tell Seruwaia after the first accused

had left the bedroom because she did not know what to do and also that nobody would listen to her. The complainant also stated that the first accused had rubbed his penis on her vagina once only.

48. The complainant stated that she did not kick, shout or scream because she felt that she could not do anything. The reason why the complainant had gone to sleep with the second accused at her aunt's house was because they were not allowed to go into the other room in the house so she went into the room where the second accused was sleeping. Furthermore, the house was full of people and she only found space in the bed where the accused was sleeping and she also thought the second accused was asleep.

49. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

50. At the end of the prosecution case you heard me explain options to both the accused persons. They have those options because they do not have to prove anything. The burden of proving both the accused persons guilt beyond reasonable doubt remains on the prosecution at all times.

51. The accused persons chose to remain silent and did not call any witness that is their right and you should not draw any adverse inference from the fact that the accused persons decided to remain silent and not call any witness.

52. From the line of cross examination the defence takes the position that the accused persons did not commit the offences as alleged. The first accused

contention is that if the allegation was true then the complainant would have woken up Seruwaia who was the same age as her in 2015 and that she had the opportunity to do so.

53. Furthermore, the complainant would have informed her family members or shouted or alerted someone within the household about what the first accused had done to her but she did not because nothing had happened. Moreover, the complainant was going to school at that time and she could have told her teacher but she did not because nothing had happened. The first accused is asking you not to accept the reasons given by the complainant for not telling anybody.
54. Finally, the complainant had made up a story against the first accused and had not told the truth.
55. The second accused contention is that the complainant did not kick, or shout or scream or resist when she could have done. The allegation cannot be true because if it was the truth the complainant would not have slept beside the second accused at her aunt's house hence she cannot be believed.
56. The complainant also did not tell any of her family members about what the accused was doing to her and had lied about the allegations against the second accused.
57. The defence is also saying that the evidence of the complainant is not probable in the circumstances of this case.
58. This was the defence case.

ANALYSIS

59. The prosecution alleges that between the 1st day of January, 2014 and 31st day of December, 2015 the complainant was a child of 9 years and 10 years of age.
60. In the year 2015 the first accused had come to the house of the complainant with his parents and his sister Seruwaia, that night whilst others were having a kava session this accused went into the bedroom of the complainant. In the bedroom the accused removed his pants and underwear and then removed the complainant's pants and panty and started to rub his penis on her vagina.
61. The complainant was afraid so she did not do anything, the complainant did not tell anyone about what the first accused had done to her because she was afraid nobody would believe her.
62. In regards to the second accused the prosecution alleges that Nacanieli Bulivou who was the complainant's grandfather had come to stay with her family at Nawaka, Nadi. In the year 2014 when the complainant was in her bedroom the accused went into her bedroom.
63. In the bedroom he opened his pants and rubbed his penis on her buttocks from on top of her clothes whilst she lay on the bed. After doing this, the accused pulled down her pants and panty and licked her vagina.
64. The complainant felt helpless and she did not do anything, after a while the accused left. The complainant did not tell anyone about what the accused had done to her because she was afraid.
65. On another occasion, in late 2014 or early 2015 the accused took the complainant and her two year old cousin Kini to her aunt's house at

Navakai, Nadi. In the night the complainant felt the accused started to touch her thigh and then he pulled down her skirt and panty and started licking her vagina. The complainant tried turning away telling the accused to move but the second accused kept on pulling her clothes and she kept on pushing him.

66. The complainant was scared and helpless, she did not tell anyone at her aunt's house because she thought they wouldn't believe her.
67. On the other hand both the accused persons had denied the allegations they contend that the complainant did not tell the truth but made up a story to implicate both the accused persons. If what she told the court was the truth then she would have told her parents or her school teacher or raised an alarm by shouting or screaming or even kicking the accused persons when she had all the opportunity to do so but she did not. Finally the defence says the story narrated by the complainant should not be believed.

Ladies and Gentleman Assessors

68. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide whether the prosecution witness is reliable or not. You observed the witness give evidence in court. You decide if this witness was forthright and truthful or not. You may use your common sense when deciding on the facts. Assess the evidence of the witness and her demeanour in arriving at your opinions.
69. In deciding the credibility of the witness and the reliability of her evidence it is for you to decide whether you accept the whole of what the witness said, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether the witness told the truth and is correctly recalling the facts about which she has testified. You

can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another or be accurate in saying one thing and not be accurate in another.

70. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against both the accused persons have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or not.
71. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
72. If you accept the version of the defence you must find the accused persons not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused persons guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
73. The accused persons are not required to prove their innocence or prove anything at all. They are presumed innocent until proven guilty.
74. In this case, the first accused faces one count of sexual assault and the second accused faces two counts of sexual assault.
75. As I have mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count and each accused separately from the other. If you find an accused guilty of one count that does not automatically make him guilty for the remaining counts. You must also not assume that because one accused is guilty of a count the other must be guilty as well.

76. Your possible opinions are:-

1. COUNT TWO – **SEXUAL ASSAULT:** Accused one - GUILTY OR NOT GUILTY.
2. COUNT THREE - **SEXUAL ASSAULT:** Accused two - GUILTY OR NOT GUILTY.
3. COUNT SIX - **SEXUAL ASSAULT:** Accused two - GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

77. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.
78. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.


Sunil Sharma
Judge



At Lautoka

7 May, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for both the Accused persons.