

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 214 of 2019

[CRIMINAL JURISDICTION]

STATE

V

SELEMO WALEVU

Counsel : Ms. S. Swastika and Mr. Komaibaba for the State
Ms. N. Mishra and Ms. L. Taukei for the Accused

Hearing on : 22 – 24 June 2020

Summing up on : 24 June 2020

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as “SD”. No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are the judges of facts.

2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room and the admitted facts. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. A police statement of a witness can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court,

their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

7. The complainant said she is 17 years old and she gave evidence about an incident that had allegedly taken place last year in 2019. You may have come across children of her age. You will have an idea of the way a child of a particular age behave, think, talk and the way they describe things.
8. Children can be confused about what has happened to them. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time what they were doing was wrong.
9. I mention these possibilities because experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case however, is a decision for you to make.
10. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.

11. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by the witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, you may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
12. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
13. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
14. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

15. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
16. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
17. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
18. In order to prove that the accused is guilty of the offence, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you have a reasonable doubt in respect of even one of those elements, as to whether the prosecution has proved that element beyond reasonable doubt, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
19. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.

20. I must explain to you as to the reason for the use of the screen when the complainant gave evidence. It was a normal procedure adopted in courts on the request of the prosecution to make a particular witness relatively more comfortable when giving his/her evidence. You must not infer that such a protection to the witness was warranted due to the accused's behaviour and should not draw any adverse inference against him on that account.
21. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
22. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

Rape: contrary to Section 207(1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence

SELEMO WALEVU on the 19th day of March, 2019 at Nasauvere Primary School Compound, Vunidawa in the Eastern Division, had carnal knowledge of **SD**, without her consent.

23. To prove the offence of rape in this case, the prosecution should prove the following elements beyond reasonable doubt.
 - a) the accused;
 - b) penetrated the vagina of PW1 with his penis;
 - c) without the consent of PW1; and
 - d) the accused;
 - (i) knew or believed that PW1 was not consenting; or
 - (ii) was reckless as to whether or not she was consenting.
24. In this case the accused admits that he penetrated PW1's vagina with his penis on 19/03/19. But he says that he did that with the consent of PW1.

25. Therefore, what is disputed in this case are the third and the fourth elements which are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated PW1's vagina without her consent.
26. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
- a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
27. Apart from proving that PW1 did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that PW1 was not consenting; or the accused was reckless as to whether or not PW1 was consenting. This is the fourth element of the offence of rape.
28. It is not difficult to understand what is meant by "the accused knew or believed that PW1 was not consenting". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that PW1 may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate PW1's vagina, you may find that the accused was reckless as to whether or not PW1 was consenting. Simply put, you have to see whether the accused did not care whether PW1 was consenting or not.

29. You should also remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
30. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
31. The complainant (PW1) said in her evidence that;
- a) *She is 17 years old. She could not recall her date of birth. On 19/03/19 around 8.00pm to 9.00pm she was studying after having dinner and then went to sleep. As at this date, she was studying at Nasauvere Primary School which was a boarding school and she was boarded there. On 19/03/19, the accused and his wife were cooking for those who were boarded in that school and she said that the cook was in charge of her.*
 - b) *She said that after she went to sleep, she wanted to use the washroom to relieve herself. So she went to the washroom. When she opened the door to come out of the washroom, the accused was standing in front of the door. The accused then got hold of her by her right hand and pulled her to the kitchen which was situated 3 footsteps away from the washroom. The kitchen was made out of bamboo. At the kitchen, the accused pushed her down and pulled down her skirt and her panty. He said that the accused used the left hand to remove her skirt and the panty while he was pushing her down from his right hand. Thereafter the accused removed his trousers from his left hand while he was pushing her down with the right hand. The right hand of the accused was placed on her chest.*
 - c) *Thereafter the accused inserted his penis inside her vagina. She said she was scared while this was happening. The accused used his hands to brace himself and her hands were spread out and they were free. She said that the accused was inserting his penis inside her vagina for about 5 minutes and she felt pain on her stomach because it was the first time. She wiggled, trying to free herself, because of the pain. She did not say anything while she was trying to free herself. When she was asked why she didn't, she first shrugged her shoulders and when asked again, she said that she did not want to say anything to him.*

- d) *She said that her legs lay straight when the accused was on top of her. The accused told her that "if you shout, I will slap you". She felt scared when he said this. She said nothing when he said this to her. She said that the accused was on top of her and he was pushing her down with his right hand. After the accused had inserted his penis for about 5 minutes, the accused left. He did not say anything before he went outside. She then ran back to the dormitory. She was scared while she was running.*
- e) *She met her sister Mereani at the door to the dormitory and she asked her where she was. She told her that she was at the washroom. When Mereani asked for the second time, she told Mereani that she was raped.*
- f) *Next morning Mereani informed the accused's wife about what happened on the previous night. She came to know that Mereani did that because thereafter the accused's wife came and asked her what happened the previous night. She told the accused's wife that the accused did something to her and the wife got angry. After she told the accused's wife what happened and that the accused raped her, the wife told her and the other students not to tell the villagers about what happened. She felt scared when the accused's wife told her this as she thought that they would do something to her.*
- g) *She said that she only informed Mereani about this matter and her brother reported the matter to the police. The brother came to know about the matter after the accused's wife told the villagers at a village meeting that the accused was having an affair with a student in the boarding school.*
- h) *During cross-examination she said that her elder brother is the Turaga-ni-koro of their village. She agreed that on 17/03/19 which was a Sunday, she walked with the other students from their village to the school which was a 5 hour walk and the accused and his family also walked with them. She agreed with the suggestion that the accused and the family were supposed to be catering for the students that week. She denied walking next to the accused and being chased away by the accused's wife for her to walk with the other students.*
- i) *She agreed that the accused and his family were sleeping closer to the door of the dormitory. She denied the suggestion that she signaled the accused to go out of the dormitory and that she followed the accused. She denied agreeing with the accused to have sex and then having sexual intercourse with the accused with her consent. She agreed telling the police in her police statement that he accused told her that "do not shout, if you shout I will slap you" before she was taken to the kitchen.*
- j) *She agreed with the suggestion that she stayed back in the dormitory when all the other students had gone to the river to bathe, the next morning. She first denied the suggestion that the accused's wife asked her if she had been with the accused the previous night. Then when it was suggested that the accused's wife asked her whether she had done something with the accused and that she had denied that; she said that she only went to ask forgiveness from the accused's wife. She agreed with the suggestion that her elder brother Romanu found out about the incident three*

weeks after the incident. When it was suggested that she only said that she had been raped when Romanu confronted her because she was scared of telling him the truth, she said "yes".

- k) During re-examination she said that the reason for her to seek forgiveness was because she was afraid that the accused's wife might do something to her. She said she did not inform Romanu earlier because the accused's wife had told her and the students not to inform the villagers of what had happened.*

32. The second prosecution witness was Mereani Lomavere (PW2). She said;

- a) She is 12 years old and PW1 is her elder sister. Around 8.00pm to 9.00pm on 19/03/19, she was sleeping in the dormitory at Nasauvere Primary School. PW1 was sleeping with her. She said that, that night, PW1 told her that the "accused gave his fish to her" and she said by that she meant that the accused raped PW1. PW1 told her this when she asked PW1 for the second time where she was. PW1 also told her that the accused pulled her hand and took her to the kitchen. When she first asked PW1 where she was, PW1 told her that she was in the washroom.*
- b) The next day, she informed the accused's wife that the accused had raped PW1 in the kitchen and after that the accused and the wife had a fight. After the fight, the accused's wife told her not to inform the villagers at Tubarua about the rape or otherwise they will slap her.*
- c) During cross-examination she said that she was sleeping that night with PW1 and after some time when she woke up, she noticed that PW1 was not there. She agreed with the suggestion that the accused's wife also got up at that time and saw that she was awake. She agreed that when the wife of the accused asked, she told her that PW1 had gone to the bathroom and that PW1 had been gone for a while. She also agreed that PW1 walked into the dormitory, after she had told this to the wife of the accused.*
- d) When it was suggested to her that the accused's wife asked PW1 where the accused was, she said that the accused was bathing in the river. She agreed that on the following day, all the students apart from PW1 including her went in the morning to the river to bathe. She also agreed that when the accused's wife questioned PW1 again about what happened the night before, she was not there.*
- e) During re-examination she said that no one else was awake when PW1 told her about what happened that night and that the conversation with the accused's wife took place the next day.*

33. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the

prosecution at all times. The accused chose to give evidence on oath and called one witness.

34. The accused said in his evidence that;

- a) *On 17/03/19 he walked to the dormitory from his village with his wife and PW1. It took about 2 to 3 hours. He was going to the dormitory because he was to be the cook at the dormitory. While they were walking, his wife took the lead and PW1 slowed down to join him. PW1 then touched his buttocks and showed her tongue to him.*
- b) *He had known PW1 as they live in the same village. PW1 would call him brother. He said that they use to meet and speak with each other and PW1 use to show her feelings towards him by winking at him. She would call him to go down to the river. During the times they met, no one saw them.*
- c) *Around 8.00pm on 19/03/19, he was in the dormitory with his wife and the other students. As he was about to sleep, PW1 came to him 'trying to play' with him. She was touching him all around while he lay down. He said she touched his hips. After that he went to sleep. He shared the bed with his wife and his children. From where he was sleeping he could clearly see where PW1 was sleeping.*
- d) *When he got up at one point, he heard PW1 calling him. After that he got up to go to the washroom to relieve himself. While he was outside, PW1 came and asked him whether they can go to the kitchen. He said that PW1 touched his 'Sakalau', which he later said that he was refereeing to his penis by that word. She touched his stomach and then moved her hand down. He said that PW1 when she came to him, told him that she wants to 'do it'. She wanted to go to the kitchen and 'lie together'. They went to the kitchen and while they were at the kitchen PW1 took her clothes off and lay down. Thereafter PW1 removed his trousers. After that he inserted his penis inside PW1's vagina. He inserted his penis for 3 minutes and PW1 was hugging him while he was doing that. After that both of them put their clothes on and he went to the dormitory to sleep. He does not know where PW1 went and no one was awake when he went to the dormitory.*
- e) *He told his wife about what happened between PW1 and him on the next morning while they were in the kitchen. He said he asked for forgiveness from the wife.*

35. The second witness for the defence was Ulamila Qivi ("DW2"). She said that;

- a) *The accused is her husband. On 17/03/19 she walked with the accused and the students from the Tubarua village to Nasauvere Primary School. She said that the students were walking in front and herself and the accused were behind them. Then she noted PW1 slowing down and then looking at the accused. PW1 was also winking at the accused. She reprimanded PW1 who then left them.*
- b) *On 19/03/19 around 8.00pm to 9.00pm while she was lying down on her bed at the dormitory, she saw PW1 showing her tongue to the accused and also sitting in an*

- inappropriate way. When she spoke to the accused about it, the accused told her that 'seems like she likes me'. She again reprimanded PW1. Thereafter she fell off to sleep.*
- c) She woke up again around 1.00am and realized that there was no body by her side. She also saw Mereani sitting on her bed. When she asked Mereani 'where is Salome?', Mereani said that she had been awake for a long time and PW1 went to the washroom and PW1 had been missing for a long time.*
 - d) While she was conversing with Mereani, PW1 came. When she asked, PW1 said that she was in the toilet. At that time Mereani was lying on her bed.*
 - e) Next morning, she saw PW1 sitting down feeling tensed while the other students had gone to the river to bathe. When she asked 'did something happen?', PW1 came to her and sought forgiveness from her. PW1 told her that she followed the accused to the kitchen and then they started making love. When she asked PW1 whether the accused do something to her forcefully, PW1 told her that "we both wanted it". She accepted her apology. PW1 also told her not to inform anyone because she usually gets beaten and she also thinks about her family.*
 - f) Thereafter she spoke to the accused. When she asked him where he was the previous night, the accused told her that he went to have a bath in the river. After she told him about the conversation she had with PW1, he sought forgiveness from her.*
 - g) During cross-examination, she agreed that the fact that PW1 winked at the accused and that PW1 was staring at the accused on 17/03/19 and also the fact that PW1 told her that the accused did not force her, are not mentioned in her statement to police.*

Analysis

36. The prosecution says that they are relying on recent complaint evidence. You heard in this case that PW1 had made a complaint to her sister, the second prosecution witness (PW2) after the incident. In this regard you should consider whether that was a prompt complaint regarding the incident and whether PW1 sufficiently complained of the offence the accused is charged with.
37. Such complaint need not specifically disclose all the ingredients of the offence and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. However, please remember that this evidence of recent complaint is not evidence as to what actually happened between PW1 and the accused. The second prosecution witness cannot confirm whether the content of that complaint, that is, what she was told by PW1, is true. It is because

PW2 was not there at the time and at the place the alleged incident had taken place. PW2 did not see the incident from her own eyes. It may only assist you to decide whether PW1 is consistent and whether or not PW1 has told you the truth. In the end you are deciding whether PW1 has given a truthful account of her encounter with the accused.

38. In this connection you have to remember that, though the 12-year-old PW2 used the word 'rape' in her evidence, she may not have meant the offence of rape with the elements that I have explained to you when she used that word. She did not tell you what she meant or understood by that word. She may have used that word to simply refer to sexual intercourse and you know that merely having sexual intercourse is not sufficient to constitute rape. The prosecution should prove that the sexual intercourse took place without the consent of PW1 and that the accused knew that PW1 was not consenting or he simply did not care whether she would consent or not. Therefore, please remember that the evidence of PW2 with regard to what she was told by PW1 is relevant only for you to assess whether PW1 was telling the truth or not.
39. You can also consider the evidence of PW2 in your deliberation on the issue of consent. PW2 happens to be the first person according to the prosecution whom PW1 met soon after the alleged incident. Did PW2 mention to you PW1's demeanour when she saw PW1 that night, after the alleged incident? PW2 said that PW1 was sad, and she just knows that PW1 was sad. You may ask yourselves; is this helpful for you to decide whether the alleged incident took place without PW1's consent? PW1 said that she ran back to the dormitory after the incident because she was scared. Did PW2 say that PW1 came back to the dormitory running? Would she have forgotten such detail? Why did PW1 tell her that she was in the washroom when PW2 asked her the first time of her whereabouts? What made PW2 ask that question again?
40. In this case you also heard that the complaint to the police was made after PW1's brother Romanu who was the Turaga-ni-koro came to know about the incident.

The defence argues that PW1 had sexual intercourse with the accused with her consent, but she complained of being raped after her brother got to know about it. According to the evidence this matter was reported to police about 3 weeks after the incident.

41. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, if there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay. Your task is to decide whether you are sure that PW1 has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.
42. The defence says that PW1 was not a credible witness. The defence took up the position that the complainant had fabricated the allegation of rape because her elder brother found out about her having sexual intercourse with the accused.
43. Counsel for the defence pointed out certain inconsistencies. You should follow the directions I have already given you when you deal with any inconsistency you may come across.
44. Taking into account all the evidence led in this case, you have to decide whether that the prosecution has proven beyond reasonable doubt, that is, you are sure that PW1 did not consent for the accused to penetrate her vagina with his penis and the accused either knew that she was not consenting or that the accused did not care whether she consented or not.

45. You have to remember that you are not here to judge whether the accused is right or wrong morally. You are here to decide whether the accused had committed the offence of rape as stipulated in the law with the elements which I have explained to you.
46. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
47. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
48. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, or his witness, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

49. Any re-directions?

50. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

51. Your opinion should be whether the accused is guilty or not guilty.




Vincent S. Perera
JUDGE

Solicitors;

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