

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

CRIMINAL CASE NO.: HAC 28 OF 2019

BETWEEN : STATE

AND : ALIKI RITALAU PRASAD

Counsel : Ms A. Vavadakua for the State
Mr P. Gade and Ms S. Devi for the Accused

Dates of Hearing : 24 - 25 June 2020

Date of Summing Up: 25 June 2020

SUMMING UP

- [1] Madam Assessors and Gentleman Assessor, 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 the charge.
- [6] The Accused has not given evidence in this case. That is his right. He is entitled to remain silent and to require the prosecution to make you sure of his guilt. You must not assume he is guilty because he has not given evidence.
- [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 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 read in the newspapers about this case. 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] In the present case, both sides have agreed to the following facts, which you must accept as true:

- 1.1 **THAT** the victim, in this case is **Jazmynne Gabriel Mallam**, (hereinafter referred to as “the child”) was born on 29/Dec/2006.
- 2.3 **THAT** the person charged in this case is **Aliki Ritalau Prasad**, who is the stepfather of the above mentioned child.
- 2.3 **THAT** **ARP**, and the child’s mother, **Loretta Chand**, have 2 sons together who are younger than the child. All 3 children have been living with their mother, **Loretta Chand**, and **ARP** for a number of years.
- 2.4 **THAT** sometime in February 2019, **ARP** took **the child** and younger step-brothers to the river at Cawaira for a swim. The child’s mother did not accompany them.

[18] I turn now to deal with what the prosecution must prove. The Accused is charged with digital rape of a girl under the age of 13 years. There are two essential elements that the prosecution must prove beyond reasonable doubt.

[19] Firstly, the prosecution must prove that the Accused penetrated, that is, inserted his finger into the complainant’s vagina. Slightest penetration is sufficient. The element of penetration is in dispute and it will be your task to determine whether this element has been proven.

[20] Secondly, the prosecution must prove that when the Accused had penetrated the complainant’s vagina, he did so without her consent. The law is that a child under the age of 13 years is incapable of giving consent to any form of sexual penetration. In this case, it is not in dispute that the complainant was 12 years old at the time of the alleged incident. She was born on 29 December 2006 (agreed fact 1.1). So in this case, it is not necessary to prove lack of consent because the complainant did not have the capacity to give consent to digital penetration of her vagina due to her tender age.

[21] The real issue for you to consider is whether the Accused penetrated the complainant's vagina using his finger as alleged by the charge.

- [22] In relating to the alleged incident the complainant told the court that the Accused took her and her two other younger siblings for a swim in a river. While they were at the river a couple known to them arrived and brought them some food. When the couple had left, the Accused pulled the complainant into deeper water to give a swimming lesson. While he was taking her into the deeper water he told her that he was going to touch her vagina. She was wearing tights on this day. She said the Accused removed her floating tube using one hand while holding her with the other hand. She said the Accused poked her vagina with his finger through her tights. She started crying and he told her not to let him go or she will drown. He told her not to complain to her mother when they returned home. She later told her mother about the incident when her mother questioned her.
- [23] The complainant's mother gave evidence that she came to know about the river incident after she returned home one day and found the Accused acting strangely. When the Accused left home, the mother questioned the complainant and after some prodding the complainant revealed about the incident in the river.
- [24] There is a further direction that I wish to give 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 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. While the complaint was made by the complainant to her mother, the complaint was not recent or voluntary but prodded out of her by her mother. The mother has given evidence why the complainant was reluctant to report the alleged incident to her. She said they were afraid of the Accused. It is matter for you to decide whether any assistance can be derived from the complaint made to the mother in assessing whether the complainant was consistent and therefore is believable.
- [25] Let me remind you that you must disregard any evidence that came out of cross examination of the prosecution witnesses suggesting that the Accused may have been

involved in other form of assaults involving the complainant. You must focus on the charge before you and nothing else.

- [26] The prosecution's case wholly rests on the complainant's evidence. If you believe the complainant is telling you the truth that the Accused penetrated her vagina with his finger and if you feel sure of the Accused's guilt, then you may express an opinion that the Accused is guilty. If you disbelieve the complainant or if you are not sure of guilt, then you must find the Accused not guilty. Remember the Accused does not have to prove anything. The prosecution must prove guilt beyond reasonable doubt.
- [27] Your possible opinions are 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 State

Office of the Director of Legal Aid Commission for Accused