

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

Criminal Case No: HAC 41 of 2019

BETWEEN : THE STATE

AND : JOSAI TAGUDU

Counsel: Ms A Vavadakua for the State
Ms K Boseiwaqa and Ms R Raj for the Accused

Date of Hearing: 20 - 21 July 2020

Date of Summing Up: 21 July 2020

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 State 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 of the charge. If you entertain a reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of the charge.
- [6] 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.
- [7] You must decide this case upon the evidence presented to you. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [8] 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.
- [9] 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.

- [10] 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. Neither speculation nor theories of one's own constitute evidence. Media coverage, idle talk, or gossips 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.
- [11] 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.
- [12] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness' answer is evidence. If he or she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [13] 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.
- [14] 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.
- [15] I turn now to deal with what the prosecution must prove. The Accused is charged with digital rape of a child under the age of 13 years. The offence of digital rape is made of certain elements. The first element requires proof of penetration of the complainant's vagina. Penetration can occur by use of any object such as a finger. The slightest penetration is sufficient. The prosecution alleges that the Accused penetrated the complainant's vagina with his finger. This element is in dispute and it is matter for

you to consider whether the Accused penetrated the complainant's vagina with his finger.

[16] The second element is that the complainant was a child under the age of 13 years. The law is that a child under the age of 13 years is incapable of giving consent to any form of sexual penetration. The prosecution is not required to prove lack of consent when the complainant is under the age of 13 years at the time of the alleged incident. The complainant told the court that she is 8 years of age and is in year two. The defence has not disputed the age of the complainant and therefore you may accept that the complainant was a child under the age of 13 years.

[17] The real issue for you to consider is whether the Accused penetrated the complainant's vagina using his finger.

[18] In relating to the alleged incident the complainant said she was asleep in her bedroom on a mattress on the floor next to her aunty Sera and John (another child) when the Accused kissed her and touched her 'pepe'. She said aunty Sera and John were asleep. She said her 'pepe' was between her legs. She said the Accused touched inside her pepe. She said she was frightened and stood up. She said she saw the Accused going to the room opposite her room. She said she was able to see the Accused's face using the kitchen light. She said she was roaming inside the house until aunty Kalisi called her and told her to lie beside her in the living room.

[19] If you accept the complainant's account that the Accused kissed and touched inside her private parts as true, then I must warn you of the special need for caution before relying on her evidence of identification alone as the basis for a conviction. A witness who is convinced in her own mind may as a result be a convincing witness, but may nevertheless be mistaken. Bear in mind that we all make mistakes in thinking that we recognize people even those we know well. That is not to say that you cannot rely on identification evidence. Of course you may, but you need to be careful in deciding whether the evidence is good enough to be relied upon. You should therefore examine carefully the circumstances in which the identification of the Accused by the complainant was made. In assessing the evidence you must consider the following: For how long did she have the person she says was the Accused under observation?

At what distance? In what light? Did anything interfere with the observation? The complainant told us that she identified the Accused in the dark using the light from kitchen which was about 8-10 meters away. If, after careful consideration of evidence and bearing in mind my direction on identification, you are convinced that the complainant positively identified the Accused on the night the alleged incident occurred, then you may act upon the identification evidence of the complainant.

[20] The second witness for the prosecution was Cpl Salote Railala. She conducted the caution interview of the Accused. The record of interview contains certain admissions by the Accused that the prosecution is relying upon. The Accused admitted that he kissed and touched the complainant's female parts while he was sleeping over at her home in July 2019. The defence case is that the incriminating questions were never put to the Accused during the interview and the admissions of the Accused were fabricated by Cpl Railala. Cpl Railala has rejected the suggestion that she fabricated the admissions of the Accused. I must give you a further direction in relation to the admissions of the Accused. You may rely upon the admissions if you feel sure of two things: first, that the admissions were made by the Accused, second, that the admissions are true. If you not sure whether the admissions were made by the Accused or whether the admissions are true, then you must not rely upon them but consider other evidence led by the prosecution.

[21] The third and the final witness for the prosecution was Kalesi Naigulevu. She is the aunt of the complainant who saw the complainant disturbed and roaming in the living room at around 2am on 5 July 2019. She invited the complainant to come and sleep beside her in the living room. While the complainant was lying beside her she saw the Accused put a blanket over the complainant. The complainant got up and went inside her bedroom. She said there was light that came from the kitchen into the living room and the complainant's bedroom. She said the Accused was the only adult male inside the house on that night.

[22] That was a summary of the prosecution case.

[23] The Accused elected not to give evidence or call any witness. That is perfectly his right. You must not assume that he is guilty because he has not given evidence. The

fact the he has not given evidence proves nothing, one way or the other. You will have to decide whether, on the prosecution's evidence, you are sure of his guilt. It is for you to decide whether the prosecution evidence is credible and reliable.

[24] You must consider and evaluate all the evidence and all the submissions in coming to your decision in this case. In considering the evidence you must treat the agreed facts as true. Consider whether the complainant told the truth in court when she said the Accused touched inside her vagina? Is she accurate in her identification of the Accused or is she mistaken? Are the admissions of the Accused in his caution interview made by him and are those admissions true? Does aunt Kalesi's evidence make sense and support the evidence of the complainant. These are matters for you to consider along with all my directions before you arrive at your opinions.

[25] If you find that the complainant is not mistaken but accurate about her identification of the Accused and if you believe the complainant is telling you the truth that the Accused touched inside her vagina with his finger and that you feel sure that there was penetration of the complainant's vagina no matter how slight, then you may express an opinion that the Accused is guilty. But if you do not believe the complainant or accept her identification reliable or if you feel unsure that the Accused penetrated the complainant's vagina with his finger, you must express an opinion of not guilty. Your possible opinions are either guilty or not guilty.

[26] You may retire now and when you are ready, the Court will reconvene to receive your opinions.



Hon. Mr Justice Daniel Goundar



Solicitors:

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

