

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 305 OF 2018S

STATE

vs

SAIRUSI MOROCI

Counsels : Mr. S. Komaibaba and Ms. N. Ali for State
Ms. M. Ratidara and Ms. L. Manulevu for Accused

Hearings : 14, 15 and 16 September, 2020.

Summing Up : 17 September, 2020.

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my 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 fact.
2. State and Defence Counsels 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 Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:

“... [read from the information]....”

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, between 1 June 2017 and 11 July 2018, at Coloi Village Naitasiri in the Eastern Division, rape the child complainant (PW1)?

E. THE OFFENCE AND IT'S ELEMENT

9. The accused was charged with “raping” the child complainant (PW1), contrary to section 207 (1), (2) (b) and (3) of the Crimes Act 2009. It was alleged that, between 1 June 2017 and 11 July 2018, at Naitasiri, the accused allegedly penetrated the child complainant’s vagina with his finger. At the time, the child complainant (PW1) was under 13 years old.
10. For the accused to be found guilty of rape, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused;
 - (ii) penetrated the complainant’s vagina with his finger;
 - (iii) without her consent; and
 - (iv) he knew she was not consenting to 10 (ii) above, at the time.
11. Crucial to the above offence is the meaning of the verb “penetrate”. In the **Oxford Advanced Learner’s Dictionary**, 6th edition, Oxford University Press, 2002, the word “penetrate” means “to go into or through something”. The slightest penetration of the complainant’s vagina by the accused’s finger, is sufficient to satisfy element 10 (ii) above.
12. “Consent” is to agree freely and voluntarily and out of her own freewill. If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, that “consent” is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. In this case however, we are dealing with a female complainant, who was under 13 years old at the time. In law, a person under 13 years old is incapable of giving her consent to her vagina being penetrated by a finger. So, for a child under 13 years old, the prosecution does not need to prove non-consent by the child complainant. It is already a presumption in law.

13. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting, at the time. You will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue. However, for a child complainant who was under 13 years old at the time, an adult accused is presumed to know in law that she is incapable of giving her consent to her vagina being penetrated by the accused's finger. This policy was put there to protect children.
14. The charge in the information was drafted as a "representative" count. This meant that the alleged incident of rape occurred between two dates, that is, in this case, between 1 June 2017 and 11 July 2018, a period of about one year one month 10 days. The alleged incident could happen multiple times between the above period, but if you are sure one incident of the alleged rape occurred within that period, that was enough to find the charge proved beyond reasonable doubt. The above is often done because in most cases children often forget the actual date of the alleged offence. It was not unusual.
15. If you find the above elements of rape proven by the prosecution beyond reasonable doubt, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.

F. THE PROSECUTION'S CASE

16. The prosecution's case were as follows. At the time of the alleged incident, that is, between 1 June 2017 and 11 July 2018, the accused (DW1) was 42 years Old. The female complainant (PW1) was 12 years old at the time. The accused was the complainant's step-father. He was married to the complainant's mother and they had twin daughters aged 10 years old. The complainant was the accused's wife's child from a previous relationship. The complainant's biological father had previously passed away.
17. At the material time, according to the prosecution, the accused, his wife, the complainant (PW1) and her twin sisters resided at a settlement in Naitasiri. The accused supported his

family through farming, and the complainant attended a nearby primary school. In 2017, the accused's wife attended to domestic chores, but in 2018, she helped out in a hair salon in Sigatoka for 2 weeks and then returned home for a week.

18. According to the prosecution, when the complainant's mother was away in Sigatoka, at the material time, the accused allegedly used to come to her at night after 10 pm, after drinking grog. According to the prosecution, he allegedly got into the complainant's bed, lay on top of her and inserted his index and middle fingers into her vagina. The complainant later reported the matter to her teacher (PW2) on 17 July 2018. The matter was reported to police. The complainant was medically examined on 21 July 2018. On 24 July 2018, the accused was brought before Nausori Magistrate Court charged with raping the complainant.
19. Because of the above, the prosecution is asking you as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

20. On 14 September 2020, the information was put to the accused, in the presence of his counsels. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he chose to give sworn evidence and called no supporting witness. That was his constitutional right.
21. The accused's case was very simple. On oath, he denied the complainant's allegation against him and denied inserting his index and middle fingers into her vagina, as alleged. He said, he was the complainant's stepfather and looked after her and her schooling. He said, he often disciplined her if she fell out of line, or was found stealing or lying. He said, the only time he touched her vagina was when she had a boil on the left vaginal lip, which caused her pain and made her unable to sleep in the middle of the night, on a particular

occasion. He said, he asked the complainant's permission, boiled some water, soaked a piece of clean cloth on the same and pressed the same on the complainant's boil. That stopped the pain, enabling the complainant to sleep that night.

22. Sometime in July 2018, the complainant had another boil on the same place, that is, on the left vaginal lip. According to the accused, he told the complainant to advise the teacher of the same, so that they could take her for medical examination. However, the accused said the complainant then lied to the teachers about the allegation. The teachers then allegedly reported the matter to police. He strongly denied the rape allegation against him.
23. Because of the above, he is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

24. In analyzing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the Agreed Facts, then the State's case against the accused. Then, we will discuss the Accused's case. Then we will consider the need to look at all the evidence.

(b) **The Agreed Facts:**

25. The parties had submitted an "Agreed Facts", dated 29 November 2018. A copy of the same is with you. Please, read it carefully. There are 9 paragraphs of "Agreed Facts". Because the parties are not disputing the same, you may treat the same as established facts, and that the prosecution had proven those facts beyond a reasonable doubt. The importance of the "Agreed Facts" was that it sets out the scene for the allegation. This was

a rape allegation occurring within a family between a stepdaughter and the stepfather. The family is obviously in turmoil. The accused is married to the stepdaughter's mother, and they had twin daughters aged 10 years old. Loyalties and trust in this family is being obviously tested, and you must look at the allegation objectively and not been swayed by emotion.

(c) **The State's Case Against the Accused:**

26. The State's case against the accused was based fundamentally on the verbal evidence of the child female complainant (PW1), given in court before you on 14 and 15 September 2020. You had watched her give evidence in court, and had assessed her demeanor while she was responding to the questions thrown at her by the prosecutor and defence counsel. At the time of the alleged offences, she was approximately 12 years old. She is now 15 years old. She was trying to recall what allegedly occurred 2 to 3 years ago. I am sure her evidence are still fresh in your minds, and I do not wish to bore you with the details. However, in our discussion, I will concentrate on the salient points in the evidence, and the issue of whether or not the prosecution had proven all the elements of the offence alleged beyond reasonable doubt.

27. Mindful that this case involved an alleged rape of a child by the accused, we have to take on board our discussion in paragraphs 10, 11, 12, 13 and 14 hereof. On the elements of the offence of rape as discussed in paragraph 10 hereof, it was essential that the prosecution proved beyond reasonable doubt that "the accused penetrated the complainant's vagina with his finger", that is, paragraph 10 (1) and 10 (ii). The most direct evidence that the prosecution provided to prove the above elements of the offence of rape was the complainant's verbal evidence. She said the accused often comes home after drinking grog after 10 pm, pretend to tuck her mosquito net in, went into her bed, lay on top of her and then inserted his index and middle fingers into her vagina. So it would appear from her evidence, that the alleged offence was committed after 10 pm at night, between 1 June 2017 and 11 July 2018.

28. If you accept the above evidence on its own, then you must find the accused guilty as charged. The above evidence is really one of identification evidence, that is, the stepdaughter identifying her stepfather allegedly committing the offence. Because the alleged offence was committed at night, that is, after 10 pm, it was essential that I direct you as follows, as a matter of law. Firstly, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleged to be mistaken, I must warn you of the special need for caution before convicting in reliance on the correctness of the identification, because an honest and convincing witness could be mistaken. Even when purportedly recognizing relatives and friends, it could also be mistaken. Secondly, you must examine closely the circumstances in which the complainant identified the accused. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Has the witness seen the accused before? How often? Are there any special reasons for remembering the accused's face? Thirdly, was there any specific weakness in the complainant's identification evidence? The answers to the above questions will determine the quality of the complainant's identification evidence, especially so when the identification evidence was done after 10 pm at night. If the quality of the identification evidence were high, you may rely on it. If it was otherwise, you must reject it. It is a matter entirely for you.
29. You must also consider Ms. Vitinia Caginitoba's (PW2) evidence. You have heard her evidence. She said, the complainant complained to her that her stepfather used to come to her after drinking grog and touched her. She said, she told her, her stepfather would lay on her and insert two fingers into vagina. The above evidence is often called evidence of recent complaint. It does not prove the truth of what is stated, but only the consistency in the complainant's conduct in testifying to what was allegedly done to her. PW2 said the complainant's mouth and hands were shaking and she was crying when she said the above to her.

30. You must also consider Doctor Kesaia Rakai's (PW3) evidence. She is a doctor and she medically examined the complainant on 21 July 2018. She recorded her findings in a medical report, which she tendered as Prosecution Exhibit No. 2. Please, read the same carefully. She recorded her medical findings in D (12) and the diagram in Appendix 1. It says the hymen was not intact and there was a healing laceration on left lip of the complainant's vagina. You have heard her evidence. How you use her evidence in deciding on the allegation is entirely a matter for you.
31. If you find the prosecution's three witnesses' evidence credible, and you accept their version of events, you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.

(d) **The Accused's Case:**

32. I had summarized the accused's case to you from paragraphs 20 to 23 hereof. I repeat the same here. If you accept the accused's sworn denials against the complainant's allegation, then you must find him not guilty as charged. However, if you reject his sworn denials, you must still assess the strength of the prosecution's case in general, and decide accordingly. It is a matter entirely for you.

(e) **The Need to Consider All the Evidence:**

33. Three witnesses gave evidence for the prosecution:

- (i) Child Complainant (PW1);
- (ii) Ms. Vitinia Talei Caginitoba (PW2); and
- (iii) Doctor Kesaia Rakai (PW3).

One witness gave evidence for the defence:

- (i) Accused (DW1).

Prosecution submitted the following exhibits:

- (i) Complainant's Birth Certificate – Prosecution Exhibit No. 1.
- (ii) Complainant's Medical Report – Prosecution Exhibit No. 2.

34. You must consider the above evidence together. Compare and analyze them together. If I hadn't mentioned a piece of evidence you consider important, please take it on board in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his/her evidence in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his/her evidence in your deliberation. You are the judges of fact.

I. **SUMMARY**

35. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

36. Your possible opinions are as follows:

(i) Rape : Accused: Guilty or Not Guilty

37. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions



Solicitor for the State

Solicitor for the Accused

:

Office of the Director of Public Prosecution, Suva.

:

Legal Aid Commission, Suva.

A handwritten signature in blue ink, appearing to read "Salesi Temo".

Salesi Temo
JUDGE