

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

High Court Criminal Case No. HAC 34 of 2019

BETWEEN : STATE

AND : SUTUWETI TUISAVURA

Counsel : Ms U. Tamanikaiyaroi for the State
Ms M. Singh and Ms S. Hazelman for the Accused

Date of Hearing : 14,15 & 16 October 2020

Closing Speeches : 16 October 2020

Date of Summing up: 19 October 2020

(The name of the complainant is suppressed and will be referred to as "TS")

SUMMING UP

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinions. You are to decide the facts of the case, based on the evidence that was led before this court. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You will then apply those

directions to the facts and give me your opinions as to whether the Accused person is guilty or not guilty in respect of each count.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed during the trial. If you do not agree with that opinion you will ignore it and form your own opinions with the evidence in this case.
3. You must base your opinions only and only on the evidence adduced in this case. But a few things that you heard in this court are not evidence. A suggestion put to a witness is not evidence unless it is admitted by the witness. Opening submission, closing submissions, arguments and comments made by the counsel and this summing up are not evidence. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so, is entirely a matter for you.
4. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinions. Emotions have no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of each element of the offences. You must also not form your opinions based on speculations. As I said before you only have to consider the evidence given by the witnesses in this case and nothing else to form your opinions.
5. I will only give a brief outline of the evidence given by the witnesses. I will not go through every word uttered by the witnesses, and if I leave out something that seems to be important, nothing stops you from taking that into account. Because you decide the facts.

6. After this summing up, you may give your individual opinions as the representatives of the community. You may reject or accept any evidence in forming your opinion. Your opinions need not be unanimous. And you need not give reasons for your opinions.
7. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Ladies and gentleman assessors,

8. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth.
9. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail. Witnesses may most often forget chronology of events or they may not remember every detail of an incident due to lapse of time. You have to use your common sense in assessing the reliability and credibility of witnesses. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.
10. Generally, complainants of sexual offences react differently when they got to narrate traumatic experiences they have gone through. Some may display obvious signs of distress, anxiety and restlessness, but some may not. Every witness has their own ways of expression when they give evidence about an

experience, specially a traumatic one. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.

11. Subsequent conduct of complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may react instantly and report because of their maturity, education level, social status, and for other similar reasons. Some may not complain at once due to immaturity, lack of education, social stigma or for fear. A complainant's reluctance to report an incident could be due to many reasons. It could be social stigma which follows such incidents or cultural taboos in her society. Some may not even complain at all due to the fear that it may damage family ties. A complainant may not be comfortable to report a matter to close family members due to the respect, fear, or due to the reluctance to openly discuss matters relating to sex with elders.
12. A late complaint does not necessarily signify a false complaint. Similarly, an immediate complaint does not necessarily demonstrate a true complaint. If there is delay in making a prompt complain you should look whether there is a reasonable explanation for the delay. It is a matter for you to decide what weight should be attached to the promptness or the lateness of the complaint.
13. Also, it must be noted that according to the law sexual offences do not require other evidence to corroborate the evidence of the complainant. Which means you can even solely rely on the evidence of the complainant only, without any other evidence to support it.
14. When you consider the evidence given by the witnesses, you have to see whether their evidence is reliable and credible. It is, as I have said, up to you

how you assess the evidence and what weight, if any, you give to a witness's testimony.

15. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the prosecution must prove every element of the offences beyond reasonable doubt.

16. The Accused need not prove his innocence. The fact that the Accused gave evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence. The burden is on the prosecution to prove the guilt of the Accused. That means you must be satisfied that the state has proved every element of the offences beyond reasonable doubt. That doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of each offence, you must find him guilty to those offences.

Ladies and gentleman assessors,

17. We will now look at the offences that the Accused is indicted for. There are two counts of rape and one count of sexual assault in the Information filed by the Director of Public Prosecutions as follows;

Count one

Statement of Offence

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

Particulars of Offence

Sutuweti Tuisavura on the 17th day of June 2016, at Moala in the Central Division, penetrated the vagina of TS, with his finger without her consent.

Count two

Statement of Offence

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

Particulars of Offence

Sutuweti Tuisavura on the 17th day of June 2016, at Moala in the Central Division, penetrated the vagina of TS, with his penis without her consent.

Count three

Statement of Offence

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

Particulars of Offence

Sutuweti Tuisavura on the 17th day of June 2016, at Moala in the Central Division, unlawfully and indecently assaulted TS, by touching her breast.

18. Now I will explain what matters you must take into consideration to determine whether the first count is proved by the prosecution. The prosecution must prove the following elements beyond reasonable doubt in respect of the first count;

- a. the Accused;
- b. penetrated the vagina of the complainant with his finger;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complaint was not consenting; or the Accused was reckless as to whether or not she was consenting.

19. In respect of the second count the prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;

- b. penetrated the vagina of the complainant with his penis;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complaint was not consenting;
or the Accused was reckless as to whether or not she was consenting.

20. Before discussing about the third count I will discuss a little bit more about the elements of the first and second counts as the elements are almost the same for both counts.

21. The first element of rape is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the Accused and no one else committed the offence.

22. The second element involves the penetration of the complainant's vulva or vagina. The law states that even the slightest penetration of the vulva or vagina is sufficient to constitute the offence of rape. The vulva includes the rounded fleshy protuberance situated over the pubic bones that is covered with pubic hair, outer lips, inner lips, clitoris and the external openings of urethra and vagina. The vagina, also known as the birth canal is inside the body. Only the opening of the vagina can be seen from outside. Therefore, one has to necessarily enter the vulva before penetrating the vagina. Any kind of intrusive violation of the complainant's sexual organ, may it be vulva or vagina constitute the offence of rape.

23. As per the first count in this case, the penetration is not by a penis. The offence is constituted by penetration of the vagina with a thing or a part of the body of the Accused that is not a penis. Therefore, the prosecution must prove beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his finger to any extent.

24. In respect of the second count the alleged penetration is by penis. The law states that even the slightest penetration of the vagina is sufficient to constitute the

offence of rape. Therefore, it is not necessary to have evidence of full penetration or ejaculation. The prosecution must prove beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his penis to any extent.

25. The third and fourth elements of the first and second counts 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 the complainant's vagina without her consent.
26. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. For the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. Consent obtained through force, threat, intimidation, fear of bodily harm, or by use of authority is not considered as consent given freely and voluntarily. Submission without physical resistance by the complainant alone, to the act of the other person will not constitute consent.
27. Further, the consent given by the complainant may have been limited to a particular sexual activity and not for another sexual activity. Also, the consent can be withdrawn at any time. It is an ongoing state of mind and it is revocable once given. Consent of a person cannot be assumed.
28. In addition to proving that the complainant did not consent to the Accused to insert his finger or penis into her vagina, the prosecution should also prove that, either the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape in respect of the first and second counts.
29. The Accused was reckless, if the Accused realised there was a risk that she was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the vagina, you may find

that the Accused was reckless as to whether or not the complainant was consenting. In other words, you have to see whether the Accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

30. I will now discuss about the third count. The main elements of the offence of Sexual Assault are that:

- (i) The Accused,
- (ii) Unlawfully and Indecently,
- (iii) Assaulted the complainant.

31. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if a right-minded person would consider the act as indecent. It is your duty as assessors to consider and decide whether the accused unlawfully and indecently touched the complainant’s breasts.

Ladies and gentleman assessors,

32. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions.

33. The complainant, TS gave evidence that in 2016 she was living with her grandparents and her aunt, Elenoa in Naroi village in Moala. She had been 15 years at that time, and she had been in Form 5 at Moala College. The complainant said that she was living with her grandparents and her aunt, Elenoa since she was 5 years old. Her mother had been residing at the school compound at that time according to her evidence. The complainant said her aunt was the closest to her out of all.

34. The complainant said on 17 June 2016 at about 5pm she was watching movies at her neighbour, Arieta Kaci's house. She stated that there was one Sireli and Sutuweti amongst those who were watching movies. According to the complainant Sutuweti is her mother's cousin brother and she said that she calls him uncle. She said that she had known him since she was young.
35. After watching movies, the complainant had left with some of her cousins and Sireli. She said that she was in a relationship with Sireli at that time. The complainant stated that she went to the village public convenience with Sireli once her cousins left. When the complainant and Sireli were talking inside the public convenience Sutuweti had showed up with a torch. The complainant said that Sutuweti told her that he is going to take her to her grandparents as they were caught by him.
36. The complainant said that Sireli was asked to go home by Sutuweti. She said that Sutuweti held her by her wrist and took her to a vacant house. She said that Sutuweti told her to be quite and did not let her run away. She also stated that on their way to the vacant home some women went pass them from a distance and Sutuweti told her to stand still and be quite until they go pass them.
37. The complainant said that Sutuweti made her sit on a settee and offered her a cigarette. She had told him that she does not smoke. She further stated that Sutuweti then started touching her. The complainant gave evidence that when she stood up to jump out of a window Sutuweti held her hand. She said that she was afraid that he will do something to her.
38. The complainant testified that Sutuweti put his hands inside her T shirt and touched her breasts with his both hands. She stated that said she was crying when Sutuweti was touching her breasts. She said she was frightened, and she did not agree for Sutuweti to touch her breasts.

39. The complainant also said that Sutuweti asked her to pull down her pants. When she did not want to pull down her pants Sutuweti had removed her sulu and her pants. She said then Sutuweti took off his clothes and started touching her vagina. She gave evidence that Sutuweti inserted his pointing finger into her vagina and she felt pain. She stated that Sutuweti inserted his finger two times and he was moving it inside. The complainant said then she pushed his hand away. She also stated that she was frightened as the house was far from the village. The complainant said that she did not agree for Sutuweti to insert his finger into her vagina.
40. The complainant further gave evidence that Sutuweti laid on top of her and inserted his penis into her vagina. She said Sutuweti was moving up and down and he inserted his penis two times into her vagina. The complainant stated that she wanted to run away but she could not do that as Sutuweti was lying on top of her. She gave evidence that she did not agree for him to insert his penis into her vagina.
41. According to the complainant's evidence she had then pushed Sutuweti away and had started putting her clothes on. She gave evidence that Sutuweti told her not to tell anyone about what happened. She also said that Sutuweti told her that he will do something that she has never seen if she tells anyone about the incident.
42. The complainant gave evidence that she did not tell anyone after she came home as she was scared that Sutuweti would do something to her again. She said that she felt scared when Sutuweti went pass her house at times. The complainant stated that on 24th August 2018 she finally told her aunt about the incident. The complainant said that when Sutuweti started coming to her place everyday to build her uncle's house, she got scared and decided to tell her aunt about the incident.
43. The complainant identified the Accused in this case as Sutuweti.

44. During cross examination the complainant stated that the Accused is closely related to her from her grandmother's side. She admitted that the Accused's daughter was of her same age. She said that she will visit the house of the Accused only if she is asked to go and bring something. She also admitted that she would sometimes hangout with the daughter of the Accused. However, she denied that she borrows clothes from the daughter and the wife of the Accused. However, when it was suggested to her that she continued to visit the house of the Accused, during 2016, 2017 and 2018 the complainant denied that she visited his house during those years.
45. Under cross examination she admitted that when Sutuweti came to the public convenience he told her that he would take her to her grandfather. However, she denied that she left the public convenience with Sireli. The complainant denied that there were talks about her and Sireli in the village. However, she admitted during cross examination that if her grandfather heard about Sireli, he would have punished her. But she denied that she made a false allegation against Sutuweti.
46. The prosecution witness, Isireli Taukeinikoro Vulawalu gave evidence that in 2016 he was residing in Naroi village, Moala. He said that the complainant was also studying at his school and they had a relationship. The witness said that on 17 June 2016 after watching a movie he went to the village public convenience with the complainant. He stated that when he was talking with the complainant inside the public convenience, Sutuweti shone a torch on them. According to the witness Sutuweti had told him to go home. The witness said that he was scared, and he left the public convenience to go home. He further gave evidence that when he turned back, he saw Sutuweti was pulling the complainant's hand. The witness identified the Accused as Sutuweti.
47. During cross examination the witness was asked whether they were shocked to see Sutuweti as they were doing something they were not supposed to be

doing. The witness denied the suggestion. The witness said that he could not recall the complainant's reaction that night. He stated that he did not hear the complainant requesting Sutuweti not to tell her grandfather about them being caught. The witness denied that they both left together to return to their homes. The witness said under cross examination that when he turned back, he saw Sutuweti was still with the complainant. The witness admitted that there were stories about him and the complainant around August 2018.

48. During re-examination the witness was asked about the stories he heard about him and the complainant. The witness said that the children were spoiling him about the incident where they were caught in the public convenience.

49. The last prosecution witness was Elenoa Salaiwalu. She gave evidence that in 2016 the complainant was living with her in Naroï village, Moala. The witness said that on 24 August 2018 Sutuweti came to work as a labourer at her husband's younger brother's house which was under construction. The witness said that she told the complainant to prepare afternoon tea for them. The witness gave evidence that after preparing tea the complainant came and informed her about what Sutuweti did to the complainant in 2016.

50. At this point I must explain to you what a recent complaint is. The complainant said that she informed about the alleged incident almost two years later to her aunt. Her aunt, Elenoa gave evidence in this case about what she was told by the complainant. In cases of sexual offences, the evidence given by a witness of what he or she was told by a complainant is generally considered as recent complaint evidence. The evidence of recent complaint is not adduced to corroborate the details of the alleged incident by the Accused, nor it is evidence of facts complained of. It only goes to the consistency of the conduct of the complainant with her evidence given at the trial. It is not evidence that proves what has happened between the Accused and the complainant. But it only enhances the credibility of the complainant and you can use it to decide whether the complainant gave credible evidence.

51. Further it should be noted that recent complaint evidence is not hearsay evidence. Generally, witnesses are only allowed to give evidence on what they saw, heard or felt by their physical senses only. They are not allowed to speak of a story told by a third person who is not called as a witness. Such evidence is called hearsay evidence. However, evidence of recent complaint is not hearsay. Therefore, evidence of recent complaint is considered as admissible evidence.

52. After the closure of the prosecution case the Accused was explained his rights. The Accused decided to give evidence. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused and he need not prove his innocence.

53. The Accused gave evidence that on 17 June 2016 he went to drink grog and was returning home at around 10.30 pm. He said when he was going pass the public convenience, he heard a noise like someone rubbing a flip flop on a concrete surface. He stated then he turned on the flash in his phone to check who was inside the public convenience. The Accused gave evidence that he was surprised to see the complainant and Sireli inside the public convenience.

54. He further stated that the complainant started crying and asked him if she could wear her sulu. He also said that the complainant pleaded him not to take her to her grandfather saying that the grandfather would beat her to death. According to the Accused he had then told the complainant and Sireli to go home. He further said that when the complainant and Sireli left, he also went home.

55. Further the Accused gave evidence that the complainant continued to visit his house even after 17 June 2016 to borrow clothes from his wife for her to wear to school. He further said that until 2018 the complainant used to visit his house to meet his daughter. The Accused stated that he mentioned about the incident

he saw at the public convenience to Police wives when they visited the island for an operation. The Accused denied all the allegations against him.

56. During cross examination the Accused stated that he is related to the complainant from her father's side and she calls him "momo". He admitted that the complainant would trust him as he was her uncle. He further admitted that the complainant would listen to him if he tells her to do something. However, he said that the complainant would not listen to her grandfather. The Accused denied that he was watching TV on 17 June 2016 at Arieta's house.

57. Under cross examination the Accused admitted that the complainant and Sireli were sitting down when he shone the light on them. He further admitted that he lied to the complainant that he would take her to her grandfather. However, he denied that he pulled her through the village to a vacant house.

58. That was the case for the defence.

59. Also, at this point I would like to draw your attention to the admitted facts. You must consider these admitted facts as proven facts beyond reasonable doubt. Accordingly, the parties have agreed that;

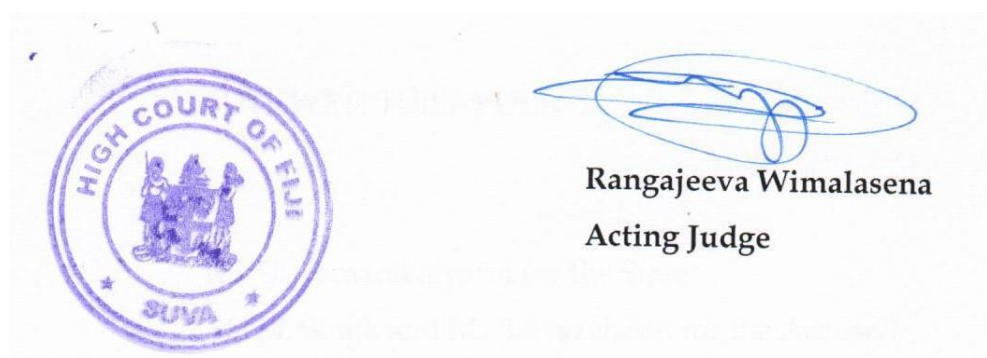
- I. TS is the complainant who in the year 2016, was a Form 05 student of Moala College and at the material time, during the school's second term was living with her grandparents at Naroi village, Moala island.
- II. Sutuweti Tuisavura is the Accused, who in the year 2016, resided at Naroi village, Moala island.
- III. The complainant and the Accused are related to each other.
- IV. The Accused met the complainant and Sireli Vulawalu on a Friday night during the school second term on 17 June 2016 at the public convenience, situated near the playground at Naroi village, Moala.

Ladies and gentleman assessors,

60. It should be noted that in our law no corroboration is needed to prove sexual offences. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, the prosecution can solely rely on the evidence of the complainant only, without any supporting evidence whatsoever in sexual offences. It is for you to decide how credible and consistent is the evidence of the complainant.
61. The prosecution case was that the Accused penetrated the vagina of the complainant with his finger in respect of the first count. In respect of the second count the prosecution submits that the Accused penetrated the vagina of the complainant with his penis. The prosecution case in respect of the third count is that the Accused unlawfully and indecently touched the complainant's breasts.
62. You would have noted that the complainant had reported about the alleged incidents almost after two years. However, she gave an explanation for the delay by saying that she was scared that the Accused would do something bad to her. She also explained the reason as to why she finally decided to inform her aunt about the alleged incidents.
63. It must be noted that there is no rule or legal requirement for a victim of a sexual offence to immediately report the incident to the police or to another person. There are many reasons that could prevent a victim from reporting a sexual offence to another as I have mentioned earlier. The delay in reporting does not mean consent to sexual intercourse. It is for you to decide whether the explanation given by the complainant is reliable and consistent.
64. In this case the Accused denies all three allegations.

65. As it was said before, it is the duty of the prosecution to prove the elements the offence against the Accused. The Accused need not prove his innocence.
66. You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the Accused not guilty of the charges. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether with that truthful and reliable evidence, the prosecution has proved the elements of each offence, beyond any reasonable doubt.
67. It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, when you are assessing the evidence given by the Accused. You must consider his evidence also for its consistency and also the probability of his version. If you find the evidence of the Accused is truthful and reliable, then you must find the Accused not guilty of the charges.
68. However, I must caution you that even if you reject the evidence of the Accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. You must still consider whether the evidence adduced by the prosecution proved all the elements in respect of each offence, beyond reasonable doubt.
69. If you believe that the prosecution proved all the elements of the first count of rape beyond reasonable doubt, you must find the Accused guilty to the offence of rape as per count one. If you are not satisfied that the prosecution proved the offence or if you have a reasonable doubt that the Accused committed the offence of rape you must then find the Accused not guilty to the first count.

70. If you believe that the prosecution proved all the elements of the second count of rape beyond reasonable doubt, you must find the Accused guilty to the offence of rape as per the second count. If you are not satisfied that the prosecution proved the offence or if you have a reasonable doubt that the Accused committed the offence of rape you must then find the Accused not guilty to the second count.
71. If you believe that the prosecution proved all the elements of the third count of sexual assault you must find the Accused guilty to the offence of sexual assault as the third count. If you are not satisfied that the prosecution proved the offence or if you have a reasonable doubt that the Accused committed the offence of sexual assault you must then find the Accused not guilty to the third count.
72. I have now given you the directions of law and summarized the evidence adduced in this case.
73. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?
74. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



At Suva

19 October 2020

Solicitors for the State: Office of the Director of Public Prosecutions

Solicitors for the Accused: Office of the Legal Aid Commission

