

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 122 OF 2012S

STATE

VS

ROKOLUI VUNIGASAU

Counsels : **Mr. M. Vosawale for the State**
Accused in Person
Hearings : **21st and 22nd August, 2013**
Summing Up : **23rd August, 2013**

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 Counsel and the accused have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State Counsel and accused, 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 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 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 questions:
 - (i) Did the accused, on 18th March 2012, at Raiwaqa in the Central Division, rape the complainant?

- (ii) Did the accused, on 19th March 2012, at Raiwaqa in the Central Division, rape the complainant?

E. THE OFFENCE AND ITS ELEMENT

- 9. Count No. 1 and 2 involved the offence of “rape”. For the accused to be found guilty of “rape”, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused had sexual intercourse with the complainant, that is, his penis penetrated the complainant’s vagina;
 - (ii) without the complainant’s consent; and
 - (iii) he knew the complainant was not consenting to sex, at the time.
- 10. In law, the slightest penetration of the complainant’s vagina by the accused’s penis, is sufficient to constitute “sexual intercourse”, and it’s irrelevant whether or not the accused ejaculated.
- 11. Consent is to “agree freely and voluntarily and out of her own free will”. If consent was obtained by force, threat, intimidation or fear of bodily harm to herself, that “consent” is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all.
- 12. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to sex, at the time. You will have to look at the parties’ conduct, at the time, and the surrounding circumstances, to decide this issue.

F. THE PROSECUTION’S CASE

- 13. The prosecution’s case were as follows. The complainant was 19 years old, at the time. She came from Labasa to stay with her aunty (PW2) at Raiwaqa, at the time. She was unemployed. The accused, on the other hand, was 22 years old at the time, and studying carpentry at Australian Pacific Technical College, at Vatuwaqa. He was residing at Bryce Street, Raiwaqa.
- 14. On 16th March, 2012, the female complainant went to their neighbours to drink grog. It was a Friday night. At about 11pm, the complainant and some of her friends decided to further their

entertainment at the Deep Sea Nightclub. They went to the nightclub, met some friends and started consuming beer. The complainant said, she consumed about 10 bottles of long neck Fiji Bitter. She said, she was so drunk, and later left the Nightclub with the accused, in a taxi. According to the prosecution, the two went to the accused's house at Bryce Street, and slept in his bedroom early that morning – now Saturday, the 17th March 2012.

15. According to the prosecution, the accused then sexually forced himself on the complainant on 17th (Saturday), 18th (Sunday) and 19th (early Monday morning) March 2012. According to the prosecution, the accused would forcefully take off the complainant's clothes, closed her mouth with one hand, and then forced his erect penis into her vagina, without her consent. He would then had forceful sexual intercourse with her. According to the prosecution, at the time, the accused well knew that the complainant was not consenting to sex, at the time. The prosecution also said, the accused had the complainant locked up in his room from early Saturday morning to early Monday morning.
16. On Monday morning, the accused took the complainant to a friend's house. On Wednesday (21st March 2012), the accused then took the complainant to her aunty. The matter was reported to police. An investigation was carried out. The complainant was medically examined at CWM Hospital on 21st March 2012. The accused was caution interviewed by police on 22nd March 2012, at Raiwaqa Police Station. He was later charged with two counts of rape. 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

17. On 21st August 2013, the first day of the trial, the information was put to the accused. He previously elected to represent himself, and waived his right to counsel. He pleaded not guilty to the two rape counts. In other words, he denied the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was put to his defence, he choose to remain silent and called no witness, in his defence.

18. As a matter of law, I must direct you that nothing negative whatsoever should be imputed to the accused, when he choose to remain silent, and call no witness. That was, in fact, his right. The burden to prove the accused's guilt beyond reasonable doubt, remained with 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. He is entitled to remain silent, fold his arms, as he did here, and require the prosecution to prove the charges, against him, beyond reasonable doubt. That was his right.
19. However, all is not lost for you, as far as the accused's position in the case, was concerned. He was caution interviewed by DC 2990 Isireli Tora at Raiwaqa Police Station, on 22nd March 2012. He was asked a total of 65 questions, and he gave 65 answers. In his answers, he admitted he had sexual intercourse with the complainant, at the material times. However, he said, it was done with the consent of the complainant. He said, at no time did he ever force the complainant to have sex with him. He said, she came willingly with him from the nightclub, slept willingly in his bedroom from Friday night to early Monday morning, and willingly had sex with him. Because of the above, he is asking you, as assessors and judges of fact, to find him not guilty as charged, and acquit him accordingly. That was the case for the accused.

H. ANALYSIS OF THE EVIDENCE

(i) The Agreed Facts:

20. The parties have submitted an "Agreed Facts". A copy of the same is with you. There are 14 paragraphs of "Agreed Facts". These facts are not disputed by the parties, and you may take it that the prosecution had proven these facts beyond reasonable doubt. You may treat the "Agreed Facts" as established facts. You must study and understand the agreed facts well, especially paragraphs 6, 7, 8, 9, 10 and 11, because it will have a pivotal role in finding out the contested issue of whether or not the complainant consented to sex with the accused, at the material time.

(ii) The Complainant's (PW1) Sworn Evidence:

21. In this case, the complainant said, on 16th March 2012 at 5pm, she asked her aunty (PW2) if she could drink grog with their neighbours. It was Friday, the end of the week. Permission was given to her to drink grog with the neighbours. At 11pm, she said, she and two of her friends decided to

go to the Deep Sea Nightclub. She said, she didn't seek her aunty's permission, because she knew it wouldn't be given. At the Nightclub, she met some friends, and started drinking beer. She was 19 years old at the time. She said, she drank 10 long neck bottles of Fiji Bitter. She said, she met the accused, and the two became acquainted with each other. In the early morning of Saturday (ie. 17th March 2012), the two decided to go to the accused's house in a taxi.

22. When they arrived at the accused's house in Raiwaqa, they both went up to the accused's room, on the second floor. There was no evidence that she was forced up to the bedroom by the accused. In the bedroom, she said, the accused started kissing her. There was no evidence that she resisted the accused's advances. She said, she then "knocked out". When she woke up in the morning, she had no undergarments on, and the accused was lying beside her. The accused later went to school. According to the complainant, the accused locked her in the room.

23. The accused returned at 4 pm. She said, the accused then came and had forceful sex with her without her consent. She said, the accused blocked her mouth with his hand and inserted his penis into her vagina. She said, the accused said if she left, the landlord may see her and he and the others might be evicted from the house. So, she said, she slept there on Saturday night. On Sunday morning (ie. 18th March 2012), she said, she was told that, her aunty and 2 police officers were downstairs looking for her. She said, the accused and a cousin hid her in the wardrobe. At this point, note paragraphs 7, 8, 9, 10 and 11 of the "Agreed Facts". Paragraph 9 said, she hid herself, with the help of others, and she did not yell to attract the policemen's and aunty's attention. She said, when the police officers and her aunty left, the accused forced himself on her again ie. had sexual intercourse with her without her consent. She said, she tried to resist, to no avail. She said, the accused repeated the above to her on 19th March 2012. She said, she did not consent to having sex with the accused, at the material time, and the accused well knew she was not consenting to sex, at the time. She admitted that, at no time, did the accused ever assaulted or talked harshly to her, when she was in his bedroom.

24. The State's case against the accused, stands or falls on whether or not you accept the complainant's evidence. In other words, your decision to accept her evidence will depend on your assessment of whether or not, she's a credible witness. You have watched her give evidence in

court. What was her demeanour like? How did she dress to court, and what was her general behaviour in the witness box? Was she forthright to you, as a witness? Was she evasive, when answering questions? Was she telling the truth? If you find her to be a credible witness, then you will accept her evidence, and find the accused guilty as charged. If you find her not to be a credible witness, then you will reject her evidence, and find the accused not guilty as charged. It is a matter entirely for you.

(iii) The Accused's Police Caution Interview Statements [Prosecution Exhibit No. 2(A) and 2(B)]:

25. Although the accused choose to remain silent in court, his position on the case, are contained in his answers in his police caution interview statements, tendered as Prosecution Exhibit No. 2(A) – hand written version, and 2(B) typed version. As the saying goes, there is always two sides to the coin. You have heard the complainant's version, through her sworn evidence. The accused's version of events is contained in his police caution interview statements. As far as the first element of rape, as described in paragraph 9(i) hereof, the accused admitted he had sexual intercourse with the complainant, at the material times, as described in counts nos. 1 and 2. So, as far as this case was concerned, the first element of rape, is not disputed by the parties.
26. It is the second element of rape, as described in paragraph 9 (ii) hereof, that is disputed by the parties. The complainant said, she did not consent to having sex with the accused, at the material times, as described in counts no. 1 and 2. The accused, on the other hand, in his police caution interview statements said, he asked the complainant for sex, at the material times, and she agreed. We cannot cut open the complainant's head, and dissect her brain to find out whether or not she consented to having sex with the accused, at the material times. But we can draw inferences of fact from what she said, did and the surrounding circumstances, to find out whether or not she consented to sex with the accused, at the time.
27. The accused said, the complainant agreed to having sex with him, at the material times. It was a Friday night. PW1 went willingly to the Deep Sea Night Club. She willingly drank beer with friends, and the accused. She went willingly with the accused in a taxi to his house. She was not forced to go into his bedroom. She didn't resist when accused kissed her. She claimed she was locked in

the accused's bedroom, but according to the accused in his police statement, she could have left if she wanted to. In the "Agreed Facts", she agreed that she was aware the police and her aunty came to the accused's house to look for her, but she did not raise the alarm. She appeared to willingly stay in the accused's bedroom from Friday night to early Monday morning. When she left on Monday morning, she did not immediately report the matter to police, or any close relative. Are the above actions, the actions of a person who was not happy to be with the accused, at the material times? Does her action confirm what the accused said in his police caution interview statements? It is a matter entirely for you.

(iv) The Complainant's Medical Report [Prosecution Exhibit No. 1]:

28. The complainant was medically examined on 21st March 2012, at CWM Hospital, by Doctor Boniface [PW3]. The doctor submitted his medical report as Prosecution Exhibit No. 1. In D(10) of the report, the doctor recorded the history related by the complainant as follows, "**...she accompanied LUI to his flat on Friday 16th March after they met up in the night club. She could not remember how she got to his flat. She had sexual intercourse with LUI Friday, Saturday, Sunday. She returned to her house Wednesday 21st March 2012...**" In D(12) of the report, the doctor recorded his findings as follows, "**...Laceration at the lower opening of vagina. No laceration inside vagina. Whitish plague inside ...**" In D(14) of his report, the doctor said, "**...laceration consistent with history of forced sexual intercourse...**"
29. When cross-examined, the doctor said, "**...I would take out the word "force" in D(14) and D(16) of the report, in that the word "force" was not used in D(10) of the report. Laceration consistent with history of sexual intercourse. Laceration could also be obtained on consensual sexual intercourse...**" When re-examined, the doctor said, the complainant verbally told him it was forced sexual intercourse, but he failed to record the same in D(10) of the report. What you make out of the medical report, is entirely a matter for you.

I. SUMMARY

30. 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.

31. Your possible opinions are as follows:

(i) Count No. 1 : Rape : Accused: Guilty or Not Guilty

(ii) Count No. 2 : Rape : Accused: Guilty or Not Guilty

32. 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.

Salesi Temo

JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva
Solicitor for the Accused : In Person