

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CRIMINAL JURISDICTION**

**Criminal Case No: HAC 74 of 2013**

**BETWEEN:**

**THE STATE**

**AND:**

**HENRY FISHER**

**Counsel** : Ms P. Low for State  
Ms M. Tarai for Accused

**Dates of Hearing** : 30 June - 2 July 2014

**SUMMING UP**

- [1] Madam 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 State. In our system of justice there is a presumption of innocence in favour of an Accused. The State 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. If you entertain a reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of that 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] 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, as well as the exhibits tendered in court.
- [11] 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.
- [12] 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.
- [13] 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.
- [14] 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.

- [15] 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 State.
- [16] I turn now to deal with what the prosecution must prove. The Accused is charged with two counts of rape. But you must consider each count separately, when you examine the case in your deliberations. You are not obliged to find the Accused guilty either on both counts or not guilty on both. Look at the evidence as it affects each count separately. Your opinions about the charges could differ from one to the other, depending on the view you took on each count and the evidence available on each count.
- [17] The offence of rape is made of certain elements. The first element requires proof of penetration of the complainant's vagina. Penetration can occur either by use of an object, finger or penis. Count 1 alleges that the Accused penetrated the complainant's vagina using his finger. Count 2 alleges that the Accused penetrated the victim's vagina using his penis. The slightest penetration is sufficient. It is not necessary to prove ejaculation.
- [18] The second element of rape is 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 when the alleged incidents were committed, the complainant was 10

years old. She was born on 8 August 2000. Her birth certificate is PE1. So in this case, it is not necessary to prove lack of consent because the complainant was incapable of giving consent due to her tender age.

- [19] On each count, the real issue for you to consider is whether the Accused penetrated the complainant's vagina on the first occasion using his finger and on the second occasion using his penis.
- [20] It is not in dispute that the Accused and the complainant are related. The Accused is married to Susana Vaseva, and they have five children of their own. The couple lived in Vakasa settlement in Yadua Island, Bua. The complainant is Susana's niece. Susana and the complainant's mother are sisters. In the beginning of 2011, the complainant went on to live with Susana and to attend the island school. In relating what happened in the first school term between January and April 2011, the complainant said she was sleeping with her aunty and uncle on the floor when she felt someone was touching her. There was no light in the room. When this person moved closer she identified the Accused from his physical built. The Accused touched her breasts and 'pepe', meaning vagina. She felt pain. She cried. She said the Accused's fingers went inside her 'pepe'. The complainant said her aunty was lying between her and the Accused. The Accused told her not to tell anyone. The complainant did not complain to her aunty. This alleged incident is subject of count one.
- [21] The complainant said before the end of the first school, she could recall going to the beach for a picnic during the day. Her aunty Susana told her to take some food and leave it in the stove for her uncle, the Accused. When she arrived at the home, the Accused undressed her. He undressed himself and inserted his 'polo' meaning penis inside her vagina. The complainant said she did not react because she was afraid.

She did not complain to her aunty because she was afraid her aunty would not believe her. This alleged incident is subject of count two.

- [22] Ms Tarai cross-examined the complainant regarding the inconsistencies in her evidence and the statements she made to the police, to her aunty Susana and to the village headman. The complainant agreed that she told the village headman, Meli Rokobuli that the Accused only used his fingers.
- [23] The complainant agreed that she told the police that when the first incident occurred, the Accused warned her not to complain on the following morning when she woke up. The complainant further agreed that she did not tell the police that the Accused had touched her breasts during the first incident. Under cross examination, the complainant at first disagreed with the suggestion that she told her aunty Susana that the allegations were untrue but then she agreed with the proposition put to her that she told her aunty the allegations were not true.
- [24] As a matter of law, I must direct you that what a witness says on oath are evidence. What a witness says in her previous statement out of court is not evidence. However, previous statements are often used to challenge a witness's credibility and reliability because a previous inconsistent statement may indicate that a witness has told a different story previously and are therefore not reliable. It is for you to judge the extent and importance of any inconsistency. If you conclude the complainant has been inconsistent on an important matter, you should treat both accounts with considerable care. If, however, you are sure that the evidence of the complainant is true in whole or in part, then it is evidence you are entitled to consider when deciding your opinions.

[25] If you accept the complainant's account of the alleged rape 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 on count 1. 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 dark using his physical built. She gave no particulars of the physical built. She was asleep and the events happened quickly. Her aunty was between her and the Accused.

[26] 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 first alleged incident occurred, then you may act upon the identification evidence of the complainant.

[27] The village headman, Meli Rokobuli gave evidence that when he heard rumours he spoke to the complainant and then questioned the Accused and his wife Susana. Rokobuli said the couple told him that they have sorted out the matter within the family. What weight you give to Rokobuli's evidence is a matter for you.

[28] The incidents of the alleged rape are denied by the Accused. His defence is that the allegations were fabricated by the complainant because of village rumours. The defence further says that the complainant made no complaints to her aunty Susana regarding the allegations. The defence case is that when the complainant realized her mistake, she apologised to her aunty Susana. Susana gave evidence that the complainant denied the sexual allegations were true when she questioned her, and then later the complainant apologised to her. Whether the complainant fabricated the sexual allegations and later apologised for her mistake are questions of fact for you to consider. You may ask yourselves whether a 10- year old girl who was not living with her parents in a traditional village setting could have voluntarily complained about the sexual allegations to her aunty Susana or to someone else in the village or the settlement. These are of course matters for you to consider.

[29] I turn now to the medical report of the complainant which is not in dispute. The complainant was examined on 22 June 2011, that is, nearly two months after the second alleged incident. My direction to you is that the medical evidence does not implicate the Accused. The only significant medical finding is that the complainant's hymen was no longer intact. Dr Pio could not determine the age of a tear at 10'oclock position found on the complainant's vagina that could be consistent with penetrative sexual intercourse. What weight you give to this medical finding is entirely a matter for you.

[30] 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 using his fingers on the first occasion and using his penis on the second occasion and that her identification of the Accused on the first occasion is reliable and not mistaken, and accept her explanation for not complaining to anyone, you may express an



opinion that the Accused is guilty of the charges. On count 1, if you disbelieve the complainant or find her identification of the Accused unreliable, then you must find the Accused not guilty. On count 2, if you disbelieve the complainant, then you must find the Accused not guilty.

[31] On each count, your opinions would be 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.

  
Daniel Goundar  
**JUDGE**



At Labasa  
2 July 2014

**Solicitors:**

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