

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No: HAC 24 of 2013

BETWEEN:

THE STATE

AND:

MELIKI NAMATEA

Counsel: Mr. S. Vodokisolomone for State
Ms M. Tarai for Accused

Date of Hearing: 14-16 July 2014

SUMMING UP

- [1] Madam Assessor 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 the charge.
- [6] The Accused elected to give evidence. I must remind you that when an accused gives evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. If you believe him or do not feel sure of his guilt, then your opinion must be not guilty. If you reject his evidence as being untrue; that does not mean that he is automatically guilty of the offence. The situation would then be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be guilty.
- [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' 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] I turn now to deal with what the prosecution must prove. The Accused is charged with one count of rape.

- [16] To prove the charge of rape, the prosecution must satisfy three elements. First, it must be proved beyond reasonable doubt that the Accused had unlawful carnal knowledge, that is, unlawful sexual intercourse with the complainant, Atelina Vakare on 21 August 2011. I shall refer to Atelina throughout as the complainant. The physical act of intercourse must be proved, that is that the Accused's penis penetrated the complainant's vagina. The slightest penetration is sufficient. It is not necessary to prove ejaculation.
- [17] Second, it must be proved that when the Accused had unlawful sexual intercourse with the complainant, he did so without her consent. This includes where intercourse is consented to by the complainant but who only consents because she is forced to do so or is threatened or intimidated to submit to the act, for fear of bodily injury.
- [18] Thirdly, it must be proved that the Accused either knew that she did not consent or was reckless as to whether she consented.
- [19] All three elements of rape are in dispute in this case. So on count 1, you will have to decide whether the Accused had sexual intercourse with the complainant without her consent and he knew she did not consent.
- [20] It is not in dispute that the complainant was residing with the Accused and his family in Naa at the time of the alleged rape. The complainant was born on 18 September 1993. On 21 August 2011, she was nearly 18 years old and a Form 6 student.
- [21] In relating what happened on 21 August 2011, the complainant said after study she went off to sleep at around 11pm. When she went to sleep no one else was at home. All the other members of the household including the Accused had gone to attend a church service. While she was asleep she felt something being forced in her face. She woke up and saw her uncle, the Accused on top of her. The Accused was trying to smother her face with a pillow using one hand while trying to rip her shirt with the other hand. The complainant said the Accused forcefully removed her clothes and penetrated her vagina with his penis. The whole episode lasted for five minutes. She

felt weak and lost consciousness. When she woke up she saw her clothes folded and left beside her.

- [22] The following morning the complainant said when she was washing her clothes the Accused threatened to kill her if she complained to anyone. She did not complain until 22 October 2011, when she told her mother that the Accused had raped her. She said her mother did not believe her and asked her to return to the Accused's house.
- [23] The complainant's mother, Akesa Buna confirmed that during the school break her daughter came home and told her that the Accused had raped her. Akesa said she did not believe the complainant because the Accused was like a fatherly figure to her daughter and he was also a church pastor.
- [24] In a case of sexual offence, recent complaint evidence is led to show consistency on the part of the complainant. In this case the complaint was although volunteered, was not recent. The complaint was made two months after the alleged rape. The complainant told the court that she did not complain immediately to anyone because she feared she was not going to be believed and that she was afraid of the Accused. The defence says that the complainant had ample opportunity to complain to others but chose not to complain until she knew in October 2011 that she was pregnant from her boyfriend and if her mother came to know about the pregnancy her mother would have been disappointed with her. While the complaint evidence is before you, very little assistance however can be derived from this particular evidence for the reasons I have given.
- [25] Ms Tarai cross-examined the complainant regarding an inconsistent statement that she made to the police. In the police statement, the complainant said she was a virgin when the Accused raped her. In her evidence, the complainant said she had sexual intercourse with her boyfriend in June 2011. The complainant's explanation for the inconsistency is that she told the police that she was not a virgin at the time of the alleged rape and that she had a sexual relationship with her boyfriend.
- [26] 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 witnesses' credibility and reliability because a previous inconsistent statement may indicate that a witness has told a different story previously and are therefore not reliable. You may think that the previous sexual history of an alleged rape victim is not an important matter. So even if the complainant had told the police that she was a virgin at the time of the alleged rape, you may think that the inconsistency is irrelevant. It is for you to judge the extent and importance of any inconsistency. If you conclude the complainant have 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.

- [27] The incident of alleged rape is denied by the Accused. The Accused in his evidence admitted that he had sexual intercourse with the complainant with her consent in a cassava plantation in the afternoon of 21 August 2011. He denies that he had forceful sexual intercourse with the complainant inside his house at 11pm on 21 August 2011 as alleged by the complainant. The Accused said at 11 pm he was in his house with all other members of the household.
- [28] I must direct you that the Accused's admission of the sexual relationship with the complainant does not mean he is guilty of the charge. If you have formed a moral opinion on the conduct alleged in this case, or the Accused's admission of the sexual relationship he had with the complainant, 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.
- [29] For you to find the Accused guilty, you must feel sure that the Accused forcefully had sexual intercourse with the complainant without her consent and that the Accused knew she had not consented.

- [30] The prosecution's case wholly rests on the complainant's evidence. If you believe the complainant is telling you the truth about being forced by the Accused to have sexual intercourse with him on 21 August 2011 at 11pm inside his house, and accept her explanation for not immediately complaining to anyone, you may express an opinion that the Accused is guilty of the charge. If you disbelieve the complainant, then you must find the Accused not guilty of the charge. Similarly if you have a reasonable doubt you must find the Accused not guilty.
- [31] 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
16 July 2014

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