

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 119 OF 2009S

STATE

vs

RUSIATE VULAONO

Counsel	:	Ms. M. Khan and Ms. M. Konarote for State
		Mr. A. Naco for Accused
Hearings	:	6, 7 and 8 June, 2016
Summing Up	:	10 June, 2016

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 appears 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 proven 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 ISSUES

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:
- (i) On Count No. 1, did the accused, between 3 July and 30 November 2006, at Suva in the Central Division, rape the complainant?
 - (ii) On Count No. 2, did the accused, on 22 March 2007, at Suva in the Central Division, rape the complainant?
 - (iii) On Count No. 3, did the accused, on an unknown date in 2008, at Suva in the Central Division, commit an unnatural offence on the complainant?
 - (iv) On Count No. 4, did the accused, on an unknown date in September 2009, at Suva in the Central Division, rape the complainant?
 - (v) On Count No. 5, did the accused, on 17 September 2009, at Suva in the Central Division, assault the complainant?

E. THE OFFENCES AND THEIR ELEMENTS

9. Count No. 1, 2 and 4 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 inserted his penis into the complainant's vagina;
 - (ii) without her consent; and
 - (iii) he knew the complainant was not consenting to 9(i) above, at the time.
10. In law, the slightest penetration of the complainant's vagina by the accused's penis, is sufficient to satisfy element no. 9(i) above, 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", and she must have the necessary mental capacity to give her consent. If consent was obtained by force, threat, intimidation or fear of bodily harm 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. If the consent was induced by fear, it is no consent at all.
12. Note that the complainant's date of birth was 5 November 1995. In Count No. 1, she turned 11 years on 5 November 2006. The time of the alleged offence was between 3 July and 30

November 2006. So, she was aged 10 years and 11 years old at the time. Count No. 1 is a representative count. This meant that the prosecution was alleging that the accused committed multiple acts of rape between 3 July and 30 November 2006. The prosecution need only prove one incident of rape to satisfy the allegation in Count No. 1. It does not need to prove all incidents of rape during that time. In Count No. 2, she was still 11 years old on 22 March 2007. In Count No. 3, she was 12 and 13 years old in 2008. In Count No. 4, she was 13 years old in September 2009. In Count No. 3 and 4, unknown dates in 2008 and September 2009 were alleged by the prosecution in those counts. This was not unusual in the case of child rape complainants, because most often forget or could not recall the exact date of the incident. Nevertheless, this does not make the count invalid. The important fact is whether or not the alleged offences did in fact occur.

13. Under Section 2 of the Juvenile Act, Chapter 56, a "child" is a person who had not attained the age of 14 years. Under the law, a child does not have the mental capacity to consent to element no. 1 of rape as described in paragraph 9(i) above. This was the policy of the law to protect children. So, in Counts No. 1, 2 and 4, the complainant was a child at the time, and it would appear, she did not have the mental capacity to consent to element no. 1 of rape, as described in paragraph 9(i) hereof. Once the prosecution proved element no. 1 of rape, as described above, the non-consent by the child complainant was already presumed in law.
14. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to element no. 1 of rape as described in paragraph 9 (i) hereof. You will have to look at the parties' conduct, at the time, and the surrounding circumstances to decide this issue. On this issue, since the complainant was a child at the material time, a person is presumed in law, to know that a child is incapable of consenting to element no. 1 of rape, at the time. Once the prosecution proved element no. 1 of rape, as described above, knowledge on this issue by the accused is presumed, as a matter of law.
15. Count No. 3 involved the offence of "unnatural offence". For the accused to be guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused inserted his penis into the complainant's anus;
 - (ii) without her consent; and
 - (iii) he knew, she was not consenting to 15 (i) above, at the time.

16. Like the offence of rape, the slightest penetration of the complainant's anus by the accused's penis, is sufficient to satisfy element no. 15 (i) above, and it is irrelevant whether or not the accused ejaculated.
17. On the consent issue, the directions I gave you in paragraphs 11, 12 and 13 hereof on rape, also applied to "unnatural offences".
18. On the accused's knowledge that the complainant was consenting to element no. 15 (i) above, at the time, you must also take on board the directions I gave you in paragraphs 14, but amend the offence from "rape" to "unnatural offence".
19. Count No. 5 involved "common assault". The least touching of another in anger is an assault. So, if someone punches or slaps someone on the face, that is an assault, because the person had applied unlawful
20. force to the person of another in anger.
21. Remember, there are five counts in this case. You must consider each count separately, and come to a separate considered decision on each count, in the light of the total evidence given.

F. THE PROSECUTION'S CASE

22. The prosecution's case were as follows. In 2006, the accused was 67 years old. The complainant was 10 years old, until she turned 11 years old on 5 November 2006. According to the prosecution, the complainant's father was the accused's eldest son. The son was married and the couple had six children. In 2002, the son committed suicide as a result of marital difficulties. The children's mother couldn't look after the children, so the accused, as their grandfather took them on. He took the children to Vatuwaqa and cared for them.
23. They lived in Wailea Settlement. Their house had one bedroom, a sitting room, kitchen, bathroom and toilet. The complainant was thus the accused's grand-daughter. The accused was married, and he and his wife looked after the complainant from 2006 to 2009. They also looked after the complainant's other siblings. The grandmother was a market vendor at Suva Market, and worked there from Monday to Saturday, between 6 am and 6 pm.

24. The raising of the children was often left to the accused, who operated a small canteen at home. The complainant was attending school, and was at school from 7.30 am in the morning to 3.30 pm in the afternoon. When she returned home, she does some house chores and attend to her school work. According to the prosecution, sometimes between 3 July to 30 November 2006, the complainant (PW1) returned from school. According to the prosecution, the accused closed the house doors, and forced PW1 to the bedroom. He took off her clothes and took his clothes off. He put her on the bed, and forcefully inserted his penis into her vagina, and had sex with her for a while. According to the prosecution, the accused repeated the above to the complainant in August, September, October and November 2006 (Count No. 1).
25. According to the prosecution, the accused repeated the above to the complainant on 22 March 2007. She had just returned from school. The accused locked the house doors, took PW1 to the bedroom, took off her clothes and had sex with her for a while (Count No. 2). In 2008, according to the prosecution, the accused again force himself on the complainant. On this occasion, he inserted his penis into her anus, in their bedroom. This was again after school between 3.00 pm and 3.30 pm (Count No. 3). In September 2009, the accused again forced himself on the complainant by inserting his penis into her vagina. This was again done after school (Count No. 4).
26. According to the prosecution, the accused and the complainant had an argument on 17 September 2009, wherein the accused punched the complainant on the face (Count No. 5). The above was later reported to police. An investigation was carried out. The accused was interviewed by police. He was later taken to the Suva Magistrate Court on 21 September 2009 charged with raping and sodomising the complainant. According to the prosecution, the accused committed the offences alleged in the information, and they ask you, as assessors and judges of fact, to find him guilty as charged on all counts. That was the case for the prosecution.

G. THE ACCUSED'S CASE

27. On 7 June 2016, the first day of the trial proper, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to Count No. 1, 2, 3 and 4, but guilty to Count No. 5. In other words, he denied the rape and sodomy allegations against him, but admitted the assault charge against him. Before the prosecution closed its case, the information was

amended by the prosecution, and re-put to the accused. He pleaded not guilty to three rape counts (ie. Counts No. 1, 2 and 4), one "Unnatural offence" (Count No. 3), and guilty to the assault charge (Count No. 5).

28. A prima facie case was found against the accused on Count No. 1, 2, 3 and 4, and he was put to his defence. He choose to give sworn evidence. He called no witness. That was his right. His defence was very simple. He denied all the allegations against him on oath. In other words, he denied ever raping his grand-daughter as alleged in the information. He denied sodomising her as alleged. He said, he did not punch PW1 in the face, but only slapped her on her face. As a result of the above, I am overturning his guilty plea on Count No. 5, and putting the same to you, to decide.
29. It would appear on the accused's sworn evidence, that he denied all the allegations against him, and consequently, he asks you, as assessors and judges of fact, to find him not guilty on all counts. That was the case for the accused.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

30. In analysing 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, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discuss the "Agreed Facts", then we will consider the State's case against the Accused, which will include a discussion on the complainant's (PW1) and the doctor's (PW2) evidence. Then we will discuss the accused's case, and the need to look at all the evidence.

(b) The Agreed Facts:

31. The parties had submitted an "Agreed Facts". A copy of the same is with you. There are 10 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 significance of the "Agreed Facts" was that if confirmed the surrounding circumstances prior to the alleged offences, the relationship between the accused (DW1) and the complainant (PW1), the crime scene (ie. the family dwelling house), the whereabouts of the

complainant's grandmother at the material time, including the whereabouts of the accused and the fact that the complainant's allegations had reached the authorities.

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

32. The State's case against the accused stands or falls, on whether or not you accept the complainant's sworn evidence. On oath, she recalled what allegedly happened to her in 2006, when she was aged 10 years and 11 years old. On Count No. 1, she recalled coming back from school between 3 pm and 3.30 pm on an afternoon in July 2006. She said, her grandfather (DW1) was in the house, while her grandmother was at the Suva market. She said, she changed her school uniform and did some household chores.
33. She said, she saw her grandfather closed the door of their house and locked it. He then drew the curtains and took her to their bedroom. She said, he placed her on the bed and took her clothes off. She said, she was scared and tried to scream. She said, her grandfather smacked her on the mouth, and threatened her not to raise the alarm. She said, he then tied a piece of cloth around her mouth to stop her from raising the alarm. She said, he then took off his clothes. She said, he laid ontop of her and inserted his penis into her vagina and had sex with her for a while. She said, she was scared and didn't know what to do. She said, he later ejaculated. She said, she was lost and did not know what to do. She said, he repeated the above to her in July, August, September, October and November 2006.
34. On Count No. 2, she said, her grandfather repeated the above episode to her on 22 March 2007. She said, his modus operandi was similar to the above. On Count No. 3, she said, her grandfather told her to bend down in his bedroom near his bed sometime in 2008. She said, he then inserted his penis into her anus. This was also after school between 3 pm and 3.30 pm. She said, it was painful to her. She said, she couldn't do anything as he was physically stronger than her.
35. On Count No. 4, she said, her grandfather also inserted his penis into her vagina sometimes in September 2009. She said, his modus operandi were similar to those in Count No. 1 and 2. She said, he did the above to her while her grandmother was at the market, and when she came back from school. She said, she could not recall the exact date of the incidents in Count No. 3 and 4. On Count No. 5, she said, her grandfather punched her on 17 September 2009. She said, when her grandmother returned from the market, she told her everything. The matter

later came to the police's attention, and thus the present criminal proceeding. If you accept the complainant's evidence, then you must find the accused's guilty as charged on all counts. It is a matter entirely for you.

(d) The Doctor's Evidence:

36. The prosecution called Doctor Maryanne Koraai (PW2) to give evidence. She medically examined the complainant at CWM Hospital on 18 September 2009. She submitted her medical report as Prosecution Exhibit No. 2. In the report, she noted down the result of her medically examining the complainant. In D(10) of the report, she recorded the complainant's history. In D(12) of the report and in her diagram at Appendix No. 1, she recorded her medical findings. She said, she examined the complainant's vagina and anus. She said, her vaginal examination suggested there had been previous penetration, but she could not say by what. She also said, her examination of the complainant's anus, does not rule out penetration.

37. What you make of the doctor's medical report is a matter entirely for you. Remember, for a rape complaint, as a matter of law, there was no need for it to be corroborated by independent evidence. There is also, as a matter of law, no need for it to be corroborated by medical evidence. In fact, if you accept the complainant's sworn evidence on her allegations, that in itself, would be sufficient to ground a possible conviction. In any event, it is a matter entirely for you.

(e) The Accused's Evidence:

38. The accused's case was simple. He, on oath, denied raping or sodomising the complainant at any time whatsoever. He said, he did not punch the complainant, but only slapped her face. He appeared to say that these allegations were nothing but a fabrication by the complainant against him.

(f) Looking at All the Evidence Together:

39. In this case, there were two witnesses for the prosecution, that is, the complainant (PW1) and the doctor (PW2). There was one witness for the defence, that is, the accused (DW1) himself. So, altogether, there were three witnesses in total. There is the Agreed Facts, and the complainant's birth certificate (Prosecution Exhibit No. 1) and her medical report (Prosecution Exhibit NO. 2). You must consider all the evidence together and compare them. You must analyse them together. You have heard and seen all the three witnesses give evidence. You had observed their demeanour in the courtroom. Who do you think was the credible witness?

Who do you think was forthright as a witness? Who do you consider to be the evasive witness? Who do you think, from your point of view, was telling the truth? If you think the complainant was a credible witness and you accept her evidence, then you must find the accused guilty as charged on all counts. If otherwise, then you must find the accused not guilty as charged on all counts. It is a matter entirely for you.

I. **SUMMARY**

40. 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.

41. Your possible opinions are as follows:

(i)	Count No. 1	:	Rape	:	Guilty or Not Guilty
(ii)	Count No. 2	:	Rape	:	Guilty or Not Guilty
(iii)	Count No. 3	:	Unnatural Offence:		Guilty or Not Guilty
(iv)	Count No. 4	:	Rape	:	Guilty or Not Guilty
(v)	Count No. 5	:	Common Assault:		Guilty or Not Guilty

42. 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 the same.




Salesi Temo
JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for Accused : **Mr. A. Naco, Barrister and Solicitor, Suva.**