

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 017 OF 2017LAB

STATE

VS

VILIAME RATUBUKETE

Counsels : Ms. A. Vavadakua for State  
Ms. S. Devi and Ms. R. Boseiwaqa for Accused

Hearings : 22 and 23 November, 2018

Summing Up : 26 November, 2018

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## SUMMING UP

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### 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 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 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 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. 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 1 July and 30 September 2016, at Vanua Levu in the Northern Division, rape the complainant (PW1)?
  - (ii) On count no. 2, did the accused, between 1 and 28 February 2017, at Vanua Levu in the Northern Division, rape the complainant (PW1)?



**E. THE OFFENCE AND IT'S ELEMENT**

9. In count no. 1 and 2, the accused was charged with "rape", contrary to section 207 (1) and (2) (a) of the Crimes Act 2009. It was alleged that, on two separate occasions, in 2016 and 2017, the accused allegedly penetrated the complainant's vagina with his penis, without her consent. It was also alleged that, the accused knew she was not consenting to the above, at the time.
10. For the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused's penis penetrated the complainant's vagina;;
  - (ii) without her consent ; and
  - (iii) he knew she was not consenting to 10 (1) above, at the time..
11. The slightest penetration of the complainant's vagina with the accused's penis (count no. 1 and 2); is sufficient to satisfy element no. 10 (1) above. It is irrelevant whether or not the accused ejaculated.
12. "Consent" is to "agree freely and voluntarily and out of her own freewill". If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself 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.
13. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to 10 (i) above, at the time. You will have to examine the parties' conduct at the time, and the surrounding circumstances, to decide this issue.
14. If you find the elements of the offence or rape, as described in paragraph 10 hereof, satisfied by the prosecution beyond reasonable doubt, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.
15. However, if you find the accused not guilty of the offence of "rape", you are entitled to look at the lesser offence of "defilement", although he was not formally charged with the same. To be guilty of defilement, the prosecution must prove the following elements beyond reasonable doubt:
- (i) The accused's penis penetrated the complainant's vagina; and
  - (ii) The complainant was between 13 and 16 years old.



16. Non-consent to 15 (i) above is not a defence in defilement. However, if the accused prove on the balance of probabilities that, he had reasonable cause to believe and did in fact believe that the complainant was of or above the age of 16 years, he may escape liability for the offence.
17. In any event, there are two counts in the information. You must consider them separately and come to a considered decision on each of them separately, in the light of the total evidence presented at the trial.
18. Counts no. 1 and 2 appear as "representative counts". This meant that the prosecutor was charging the accused for alleged sexual acts committed between two separate dates, involving days or months. This is not unusual, because in most child sex offence cases, the child complainant cannot recall the exact date of the alleged offences, but recall the incident occurring between two dates, thus the "representative counts". A child, in law, is someone under 18 years old. If you find and accept a single sex offence occurring between the two mentioned dates, that will be sufficient to prove the offence on that particular count. The prosecution does not need to prove all the alleged sex offences occurring between the two mentioned dates.

**F. THE PROSECUTION'S CASE**

19. The prosecution's case were as follows. The female complainant (PW1) was born on 18 February 2003. So, on 18 February 2016, she was 13 years 5 months old. On 18 February, 2017, she was 14 years old. So, at the times alleged in count no. 1 and 2, she was still under 18 years old, thus according to law, she was still a child. The accused, at the material time, appeared to be between 22 and 23 years old. He was married to the complainant's elder sister. He was thus the complainant's brother-in-law.
20. According to the prosecution, between 1 July and 30 September 2016, at Seaqaqa in Vanua Levu in the Northern Division, the complainant, her mother, the accused, his wife, her younger brother and others, were involved in cane cutting at Nanu's sugar cane farm at Seaqaqa. They were members of a cane cutting gang. In the night time, the complainant, her mother, the accused, his wife and the complainant's younger brother slept in an open house at Nanu's farm. The other cane cutting gang members were accommodated elsewhere.
21. According to the prosecution, the accused and his wife slept in a corner of the house, the complainant and her mother slept in another corner of the house and her younger brother slept in another part of



the house. According to the prosecution, the accused allegedly came to the complainant, undressed her and inserted his penis into her vagina without her consent. It was at night time, and the lights in the house were turned off. There was only a solar light outside the house. According to the prosecution, the accused allegedly knew she was not consenting to sex, at the time (count no. 1).

22. In 2017, between 1 and 28 February 2017, according to the prosecution, the accused repeated the above episode to the complainant, in Gupau's camp at Lalakoro, Seaqaqa. The complainant, her mother, the accused, his wife and the complainant's younger brother were members of a cane cutting gang at Gupau's sugar cane farm. It appeared they were sharing the same accommodation as before. According to the prosecution, the accused allegedly came to the complainant, took off her clothes forcefully inserted his penis into her vagina, and had sex with her without her consent. According to the prosecution, the accused allegedly knew she was not consenting to sex, at the time (count no. 2). The complainant said the above occurred in daylight, before they had breakfast.

23. The matter was reported to police. An investigation was carried out. The accused was arrested and taken to Labasa Magistrate Court on 27 March 2017, charged with raping the complainant. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged, on both counts. That was the case for the prosecution.

**G. THE ACCUSED'S CASE**

24. On 22 November 2018, in the presence of his counsel, the information was put to the accused. He pleaded not guilty to the two counts. In other words, he denied the rape allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to remain silent and choose not to call any witness. That was his right.

25. Nothing negative whatsoever should be imputed to the accused when he choose to exercise his right to remain silent. This is because the burden to prove his guilt beyond reasonable doubt, remains with the prosecution throughout the trial, and it never shift to the accused, at any stage of the trial. Remember what I told you in paragraph 4 hereof, and I repeat the same here. There is no burden on the accused to prove his innocence, or prove anything at all. He is presumed innocent until he is proven guilty beyond a reasonable doubt. He is entitled, as he had done here, to fold his arms, sit there in the dock, and demand the prosecution prove his guilt beyond a reasonable doubt.



26. He had denied the charges by pleading not guilty to the same. Because of the above, he is asking you, as assessors and judges of fact, to find him not guilty as charged on both counts. That was the case for the defence.

## H. ANALYSIS OF THE EVIDENCE

### (a) Introduction:

27. 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 and judges of fact, 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 State's case against the accused; then the accused's case, and lastly the need to look at all the evidence.

### (b) The State's Case Against the Accused:

28. The State's case against the accused was based wholly and fundamentally on the complainant's verbal evidence given in court on 22 November 2018. She was examined-in-chief, cross-examined and re-examined for the whole day on 22 November 2018. You had watched her give evidence in the courtroom. You had the opportunity to examine how she responded to prosecution's and defence counsel's questions. You examined her demeanour while she was giving evidence in court. I am sure her evidence are still fresh in your minds, and I will not bore you with the details. However, I will summarize the salient points of her evidence, as it related to the elements of the offence of rape.
29. On count no. 1, the complainant said that, the accused came to her at about 3am in the morning. PW1 said, she was sleeping with her mother in a corner of the open house, the accused and his wife were sleeping in another corner, and his younger brother was sleeping in another part of the open house. PW1 said, the accused came to her, took off her underwear, took off his pants, laid ontop of her, inserted his penis into her vagina, had sex with her until he ejaculated. PW1 said, she did not consent to the above. It appeared the accused knew she was not consenting to the above. As to what occurred above, PW1 said, she did not see the face of the person who allegedly raped her that night, as it was dark. The only lights on were the solar lights outside the house. PW1 said, despite her not seeing her attacker's face, at the material time, she knew it was the accused.
30. As to count no. 2, the complainant said, in February 2017, the accused came to her. PW1 said, the accused pulled her pants and shorts down. PW1 said, he took off his pants, laid ontop of her, inserted his penis into her vagina, without her consent, and had sex with her. PW1 said, she told him not to have sex with her as she was a small child, but he ignored her. PW1 said, she had sex with the



accused during daylight, before they had breakfast. When cross-examined on the above incident, PW1 said the above incident occurred at 3am in the morning. She said, at 3am in the morning, she could not see the face of the person who was attacking her. Nevertheless, she said, she knew it was the accused.

31. People were present at the crime scene, while the alleged crime of rape was allegedly committed by the accused against the complainant. But none of them were of any assistance to the prosecution at the material time, because they were all asleep. So, in reality, there was no eye witness present to confirm or otherwise the complainant's allegations. The only way the State could connect the accused to the crime was through the complainant's identification evidence against the accused, at the material time.
32. However, when considering the complainant's identification evidence against the accused, I must direct you, as follows as a matter of law. First, whenever the case against an accused depends wholly or substantially, on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, I am warning you of the special need for caution before convicting the accused in reliance on the correctness of the identification, because an honest and convincing witness may be mistaken. Second, you must closely examine the circumstances in which the identification was made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? Has she any special reason for remembering the accused's face? Was a police identification parade held? Third, are there any specific weaknesses in the identification evidence? If the quality of the identification evidence is good, you may rely on it. If the quality is bad, you must reject it.
33. In this case, the complainant said, on count no. 1 that, she could not see her attacker's face, at the material time. This was because she said, it was dark in the room, as it was 3am in the morning. She said, no lights were turned on in the house. The only lights on were the solar lights outside the house. The complainant did not say how long she was observing the attacker's face. When re-examined, she could not decide the time, because she could not read the same. The attacker was close to her when having sex, but could not see his face, as it was dark. On count no. 1, the major weakness in the complainant's identification evidence against the accused was that she could not see the attacker's face. In my view, the complainant's identification evidence of the accused, at the material time, was very weak as she could not see his face in the dark. If you reject the complainant's identification evidence of the accused on count no. 1, you must find the accused not guilty as charged. If otherwise, you must find him guilty as charged. It is a matter entirely for you.



34. On count no. 2, the complainant said, she had sex with the accused, before breakfast in the daylight in February 2017. They were residing in an open house in Gupau's sugar cane farm. She said, the accused came to her, inserted his penis into her vagina, without her consent, and he knew she was not consenting to sex, at the time. PW1 said, her mother was cooking breakfast at the time. She said, she observed his face for a long time. She said, the accused was very close to him, while they were having sex, and his face was close to her. PW1 said, there was no impediment in the way, when she saw his face. She said, she sees his face every day. PW1 identified the accused in the courtroom. Her identification evidence against the accused appeared strong and to be of a high quality in terms of the direction I gave you in paragraph 32 hereof. However, when cross-examined by the defence, she said the alleged incident in count no. 2 occurred at 3am in the morning, and it was dark. The answer given above, when cross-examined, was inconsistent with the evidence given when examined-in-chief, that is, the incident occurred in daylight. This inconsistency was not cleared up when she was re-examined by prosecution. The end result was that, on count no. 2, the complainant's evidence was not consistent. How you approach her evidence is entirely a matter for you.

**(c) The Defence's Case:**

35. I had outlined the defence's case from paragraphs 24 and 25 hereof. I repeat the same here. If you accept the defence's case, you must find him not guilty as charged. If otherwise and you accept the prosecution's case, you must find him guilty as charged. It is a matter entirely for you.

**(d) The Need to Look at All the Evidence:**

36. Two witnesses were called by the prosecution, that is, the complainant (PW1) and Doctor Ashneel Prasad (PW2). Two Exhibits were tendered by the prosecution, that is, Prosecution Exhibit No. 1, the complainant's birth certificate, and Prosecution Exhibit No. 2, her medical report. The defence gave no evidence. You must consider the above evidence together. If I haven't mention a piece of evidence you consider important, please take it on board in your deliberation. If you consider a witness credible, you are entitled to accept the whole or some of his/her evidence, in your deliberation. If you consider a witness not credible, you are entitled to reject the whole or some of his/her evidence in your deliberation. You are the judges of fact.

**I. SUMMARY**

37. 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.

38. Your possible opinion are as follows:

- |      |             |   |      |   |                      |
|------|-------------|---|------|---|----------------------|
| (i)  | Count No. 1 | : | Rape | - | Guilty or Not Guilty |
| (ii) | Count No. 2 | : | Rape | - | Guilty or Not Guilty |

39. 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 State** : **Office of the Director of Public Prosecution, Labasa**  
**Solicitor for Accused** : **Office of Legal Aid Commission, Labasa**