

IN THE HIGH COURT OF FIJI AT LABASA

CASE NO: HAC. 05 of 2018

[CRIMINAL JURISDICTION]

STATE

V

ISIMELI LEVUIMATA

Counsel : Ms. A. Vavadakua for State
Mr. H. Robinson for Accused

Hearing on : 04 - 05 March 2019

Summing up on : 05 March 2019

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.

2. Evidence in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibit tendered. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of his/her the evidence
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.

6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with each inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proven facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proven facts, then you should not draw the adverse inference.
13. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.

14. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
15. In order to prove that the accused is guilty of the offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
16. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.
17. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
18. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

Rape: contrary to section 207(1) and (2)(b) of the Crimes Act 2009.

Particulars of Offence

ISIMELI LEVUIMATA on the 14th day of January 2018, at Nakanacagi Village, in Dreketi in the Northern Division, penetrated the vagina of Motea Batitaukei, with his finger, without her consent.

19. To prove the offence of rape in this case, the prosecution should prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) penetrated the complainant's vagina with his finger;
 - c) without the consent of the complainant; and
 - d) the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not she was consenting.
20. The first element is concerned with the identity of the accused. This element is not in dispute.
21. Second element involves penetration. To establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his finger. A slightest penetration is sufficient to satisfy this element.
22. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent.
23. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;

- a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
24. Apart from proving that the complainant did not consent for the accused to insert his finger inside her vagina, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
25. It is not difficult to understand what is meant by “the accused knew or believed”. But you may wonder as to how you could determine whether the accused was reckless or not. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant’s vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
26. Please remember that knowledge and intention of an accused can only be inferred based on the other proven facts because you will not find direct evidence regarding same.

Prosecution case

27. The complainant said in her evidence that;
- a) *She is 18 years old. On 14/01/18, she saw the accused bathing, on her way to church with Kinisimere who is her sister-in-law. Thereafter she saw the accused following them. The accused was only wearing shorts and was not wearing a T-shirt.*
 - b) *The accused told her that he wants to wet her because of the New Year celebrations. She*

told him that they should just go to the tap which is close by and the accused said 'no' and he wanted to go to the river. She said that the accused was hugging her when he said this. Kinisimere was standing there when this happened.

- c) Then she went with the accused towards the river, and Kinisimere went towards the church. She said the accused was holding her from the time he hugged her and till they reached the river.*
- d) It was high tide. She said they jumped to the river together from a wooden platform and the accused was hugging her when they jumped. The river was deep and her legs did not touch the sand. She said the accused was still hugging her inside the river where he was holding her from her waist. She said she tried to 'rescue herself from the river'. While she was trying to get out of the water she felt that the accused was trying to penetrate her vagina with his finger and then she felt the accused's finger inside her vagina. She said she was almost drowning and 'she never bothered about him trying to penetrate her vagina with his finger'.*
- e) While she was struggling, she managed to get hold of the wooden ladder and then she came out of the water. The accused was still in the water. Then the accused came out and he tried to kiss her. She pushed the accused and left there. She said that no one else was there.*
- f) She said that it did not occur to her that the accused would do something like that when the accused held her and told her that they should go to the river. She said she only thought that the accused would just push her to the river.*
- g) She went home, changed her clothes and went to church. The service was almost over by the time she reached the church. After the service, she went home and waited for her mother to inform her of what happened. When her mother returned from the church, she told her mother what happened.*
- h) During cross-examination she said that after medical examination, the doctor told her that 'he found nothing'.*
- i) She said that she is not close to Kinisimere who is living with her in the same house. She agreed that she said in her police statement that "I told him to leave me. But he didn't. I shouted loud, no body responded because everyone was at church".*

- j) *She denied the suggestion that two people were there who saw her jump into the river with the accused.*
- k) *She said she can 'swim only a little bit'. She agreed that both her arms and the legs were moving up and down when she was struggling in the water.*
- l) *She also agreed that that she told the police that the accused inserted his finger into her vagina and moved it around. She said that was how she felt. She said she was shocked about what happened. When it was suggested that she came back with the accused from the river and there were no signs that she was shocked, she said she did not show anything to the accused.*
- m) *She said she couldn't recall whether the accused was also trying to swim after they jumped into the river.*
- n) *During re-examination she said when she came out of the river, there was no one there for her to complain. She said, she did not want to inform anyone, on her way home.*

28. The second prosecution witness was Mr. Ajay Chand. He said that;

- a) *He is a nurse practitioner. He said nurse practitioners follow a one and a half year diploma whereas doctors are required to obtain a degree which would take six years. He medically examined the complainant. He tendered the medical report as PE 1. He said as a nurse practitioner he would very rarely conduct such examinations.*
- b) *He said penetration can occur without physical injury.*
- c) *During cross-examination he confirmed that what he had written in D16 of the medical report was his professional opinion.*

29. The third prosecution witness was the complainant's mother. She said;

- a) *She went to church on 14/01/18 and the complainant came to church when the service was almost over. After the service, the complainant took the lead and the complainant was already there when she reached home.*
- b) *She said that the complainant told her that the accused took the complainant to the river, they jumped together into the water, and while the complainant was trying to*

surface the accused was holding onto her and the accused was poking her vagina. The complainant then managed to hold onto the steps and climb up.

- c) She said that there is a tradition in the village where they splash water on each other as part of the New Year celebrations.*
- d) During cross-examination she said while at church, she was restless as she did not see the complainant and when she asked Kinisimere, Kinisimere told her that the complainant is in the river.*

30. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence and to call witnesses.

31. The accused said in his evidence that;

- a) Him and the complainant are 'cross-cousins'. He said, on 14/01/18 on his way to go to his uncle's place, he saw the complainant and Kinisimere. He said he was not bathing when he first saw them. He told the complainant that he wants to wet her and the complainant was just laughing when he said this. He said he then got hold of the complainant's hand and the complainant took the lead towards the river. He said he did not forcefully take the complainant to the river.*
- b) When they reached the jetty, they both jumped into the river. He said the river was deep and his legs did not touch the bottom of the river. After they jumped they swam to the steps and climbed up.*
- c) He said he did not insert his finger inside the complainant's vagina. They walked back to the village together after they climbed up to the jetty.*
- d) He said that on their way the complainant went to one of the houses and asked one lady whether she could wash her legs using the water stored in a container outside the house. He said they were talking and laughing when they walked back from the river.*

32. The second witness for the defence was one Alemedi Navolobo. She said;
- a) *On 14/01/18, she saw the accused and the complainant in front of her house around 11.00am. She saw the accused coming from his uncle's house. The accused met the complainant and he held her hand and then they went down towards the river, laughing.*
 - b) *She did not hear the complainant scream or shout. She also saw them when they came back from the river. She said they were laughing. They went past her house and the complainant did not look different.*
33. The third witness for the defence was one Siteri Naivatu. She said;
- a) *On 14/01/18, she saw the accused and the complainant making their way on the track leading to the river. Her house is very close to the track. She also saw them coming back from the river. She said the complainant spoke to her and asked her whether she could wash the feet from the water kept outside her house.*
 - b) *She said they were talking and laughing when they went towards the river and when they were coming back.*
34. The fourth witness for the defence was one Inoke Sogare. He said;
- a) *On 14/01/18, while he was eating pineapple with another, he saw the complainant and the accused come to the river. He said they were laughing. They came together, jumped into the river, climbed up and went back. He said the complainant took the lead when they left and they were laughing.*
 - b) *He said he did not see the complainant struggling to swim.*
 - c) *During cross-examination, he said that the river where the two jumped in, was not that deep and it was up to his chest. He said he did not see anything other than jumping in and coming out.*
35. The fifth witness for the defence was one Serupi Navagani. He said;
- a) *On 14/01/18, while he was eating pineapple with Inoke at the riverbank, he saw the complainant and the accused. They jumped into the river, came back and returned to*

the village. He said they were talking and laughing when they came and when they went back. They were in the water for 1 – 2 minutes.

36. That is a summary of the evidence. Please note that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I have not referred to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
37. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, if there is a delay in making a complaint, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. Therefore, if there is a delay in making a complaint, you should look whether there is a reasonable explanation to that delay. Ultimately your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.
38. The second prosecution witness gave his medical opinion based on what he observed and his experience. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the second prosecution witness. Evaluating his evidence will therefore include a consideration of his expertise, his findings and the quality

of the analysis which supports his opinion. You heard the second prosecution witness who said that there could be penetration even if there were no injuries.

39. The prosecution says that they are relying on recent complaint evidence. You heard in this case that the complainant had made a complaint to her mother, the third prosecution witness after the incident. In this regard you should consider whether that was a prompt complaint regarding the incident and whether the complainant sufficiently complained of the offence the accused is charged with.
40. Such complaint need not specifically disclose all the ingredients of the offence and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. However, please remember that this evidence of recent complaint is not evidence as to what actually happened between the complainant and the accused. The third prosecution witness cannot confirm whether the content of that complaint is true because she was not there. It may only assist you to decide whether the complainant is consistent and whether or not the complainant has told you the truth. In the end you are deciding whether the complainant has given a truthful account of her encounter with the accused.
41. The accused denies the allegation that he penetrated the complainant's vagina with his finger. The defence says that the complainant is lying. Defence points out that the account given by the complainant is not probable.
42. Defence says that if the complainant did shout, someone nearby should have heard that. In her evidence-in-chief the complainant did not say that she shouted. However, during cross-examination, she admitted that she had informed the police that she did shout. The defence also says that it is impossible for the accused to put his finger inside the complainant's vagina if she was struggling hard by moving her arms and the legs in the river as she said in her evidence.

43. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
44. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
45. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, or his witnesses, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.


If you are sure that the prosecution has proven all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

46. Any re-directions?

47. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

48. Your opinion should be whether the accused is guilty or not guilty.




Vinsent S. Perera
JUDGE

Solicitors:

**Office of the Director of Public Prosecutions for the State
Tadrau Legal, Labasa for the Accused**