

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 61 of 2018

STATE

v

FILIPE KOROI

Counsel : Mrs. A. Vavadakua for the State
Mr. J. Koroti with Ms. Tuiloma (L.A.C.) for the
Accused

Dates of Trial : 19 and 20 March 2019

Date of Summing Up : 21 March 2019

SUMMING UP

1. Ladies and Sir assessors. It is now my duty to sum up to you. In doing so, I will direct you on matters of law which you must accept and act on. You must apply the law as I direct you in this case.
2. As far as the facts of this case are concerned, what evidence to accept, what weight to put on certain evidence, which witnesses are reliable, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts, or if I appear to do so it is entirely a matter for you whether you accept what I say or form your own opinions. In other words you are masters and the judges of facts.

3. Counsel for the prosecution and the defence have made submissions to you about how you should find the facts of this case, they have the right to make these comments because it is part of their duties as counsel. However you are not bound by what counsel for either side has told you about the facts of the case. If you think that their comments appeal to your common sense and judgment, you may use them as you think fit. You are the representatives of the community in this trial and it is for you to decide which version of the evidence to accept or reject. I will say however that Mr. Koroti is incorrect when he tells you to consider that there is no independent evidence of this sexual activity. In our law there need not be any independent or confirming evidence.
4. You are quite entitled to make a decision on the evidence of the boy alone. The absence of medical evidence or any other confirming evidence need not concern you.
5. You will not be asked to give reasons for your opinions, but merely your opinions themselves, and you need not be unanimous although it would be desirable if you could agree on them. Your opinions are not binding on me and I can assure you that I will give them great weight when I come to deliver my judgment.
6. On the issue of proof, I must direct you as a matter of law that the onus or burden of proof lies on the prosecution to prove the case against the accused. The burden remains on the prosecution throughout the trial and never shifts. There is no obligation upon the accused to prove his innocence. Under our system of criminal justice an accused person is presumed to be innocent until he or she is proved guilty.

7. The standard of proof is one of proof beyond reasonable doubt. This means that before you can find the accused guilty of the offence charged, you must be satisfied so that you are sure of his guilt. If you have a reasonable doubt about the guilt of the accused, then it is your duty to express an opinion that the accused is not guilty. It is only if you are satisfied so that you feel sure of the guilt of the accused that you can express an opinion that he is guilty.
8. Your opinions must be based only on the evidence you have heard in the courtroom and upon nothing else.
9. The accused faces one charge of rape. In our law and for the purposes of this trial, rape is committed when a person penetrates the anus of another and where the person doing that does not have the consent of the victim. Furthermore the law states that a person under the age of 13 is not able to give that consent.
10. Penetration does not have to be full penetration. It can be partial or slight to be enough for rape.
11. So in this case all you would need to find proved is that Filipe penetrated the anus of Kelevi to some degree and if you find that then you will find him guilty of rape.
12. There are three other matters I must direct you on.
13. You will be aware that the defence is that Kelevi initiated this sexual encounter and that he positioned himself in such a way that forced Filipe to penetrate him. Even if you think this is true or maybe true, it still means that Kelevi has been penetrated and at such a tender age he cannot in law be consenting so if

you find that there has been penetration then it is still rape, no matter who started it.

14. The other consideration for you to take into account is the secondary plank of the defence case which is that there was no penetration. If you think that the evidence leads you to believe that Filipe was **trying** to penetrate the boy, then it is open to you to find the alternative crime of attempt to rape proven.
15. Furthermore as Mrs. Vavadakua has submitted to you a third possibility for you to find is sexual assault. If you find that there was no penetration and if you find that he was not attempting penetration, then the placing of naked genitals on the legs and buttocks of another is sexual assault if you decide that is what happened.
16. I will return to those alternative verdicts at the end of this summing up.
17. It was only yesterday that you heard the evidence in this case and it will be fresh in your minds, however it is my judicial duty to remind you of both the prosecution and the defence evidence.
18. We have heard that on the 18th July 2018, the accused was with Kelevi and his family, when the two of them were left alone. Kelevi went to his bed to sleep and the accused lay beside him.
19. The mother of the boy told us of going into Kelevi's room at 8pm on the evening of 18 July 2018. She switched on the light and saw Filipe lying down with Kelevi. The boy's pants were off and he told his mother (we don't know when) that Filipe had taken them off. As soon as she found them there Filipe got up and left the room. She asked Kelevi what had happened and he said

that Filipe had placed his private part on his backside. The actual quote was “Filipe removed my pants and tried to do something on my backside.”

20. Mother said he was crying and seemed to be afraid. She became aware that one of Kelevi’s teachers learned of the assault and reported it to Police.
21. You will remember the heart-breaking evidence of Kelevi who has his 7th birthday today (21 March), but I must remind you of what I said earlier; you must not judge this case on sympathy but solely on the evidence as it came out in Court.
22. Kelevi told us that he is in Class 2 and he remembers the time that he was in the room with Filipe. He said “he did it on my backside. I felt pain. He inserted it inside. He did it for a short time. The place where to pass out the stool”. Then Mum came and he stood up.
23. I didn’t allow the lady prosecutor to have Kelevi identify Filipe in Court because I thought he had been through enough with his evidence. In any event the mother identified the accused as Filipe and it has never been the defence case that we have the wrong person in the dock.
24. In cross-examination he told Mr. Koroti that Filipe “did something on the outside and he tried to insert it inside”. This seeming contradiction is an issue for you to resolve.
25. Remember putting it inside is rape but **trying**, without it going inside, is attempt to rape.

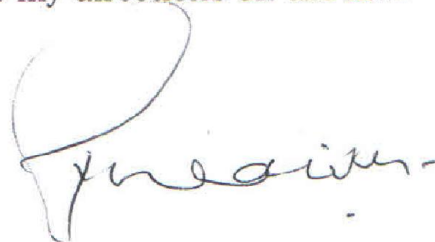
26. The third and final prosecution witness was the Woman Police Constable Merewalesi. She told us that this case was reported to the Police by one of Kelevi's teachers on the 7th August 2018. Mere went to the village and took statements from the witnesses (including Kelevi).
27. She also interviewed Filipe under caution and you have the record of interview before you.
28. If you think that those answers in the interview are the answers given by Filipe, and that they are true and not made up by anybody else, then those answers become evidence in the normal way for you to assess along with the other evidence in this trial.
29. Bear in mind that the defence have never said they are not his answers.
30. The State is asking you to take special note of the questions and answers from Q. 46 to Q.52, in which it is recorded that Filipe admits being on the bed with Kelevi but then goes on to describe how Kelevi touched his (Filipe's) penis and positioned himself to allow the penis to penetrate him.
31. Well Members of the panel, it is a matter for you what to make of that extraordinary admission, but you might well think that it is an admission to penetration. It's another factual matter for you to decide.
32. That was the end of the prosecution case and you heard me explain to the accused what his rights are in defence. He could give evidence and say that the State had not proved the case beyond reasonable doubt or he could give sworn evidence from

the witness stand. In either case he was entitled to call witnesses. You must consider his evidence in the normal way and give it the weight that you think fit. If you don't believe him it doesn't necessarily make him guilty. The prosecution must still prove to you so that you are sure that he committed the crime.

33. Filipe said that he was 18 on the 18th July and he still is. He remembers that on that day he was at Kelevi's house and met the boy on the verandah. Kelevi hugged him before Filipe went into the house. He said that he was lying on the bed playing with his phone and Kelevi came and lay down beside him. He was playing around and touch his private parts. Filipe told him not to do that and turned away. Kelevi jumped over him and told him to lie face up. He undid Filipe's trousers and then told him to wait while he took off his trousers. Kelevi got hold of his penis and was trying to insert it into himself when the mother came and turned on the light. The accused then left the room.
34. You must of course decide what to make of this evidence. I think it is preposterous, ridiculous and absurd but it doesn't matter what I think. You are in charge of the facts and it is what you make of his evidence that is important.
35. Even if you agree with me, and I urge you to form your own opinions, it doesn't make him guilty. If you put his evidence to one side as impossible you must still come to your opinions on the prosecution case. Has the State made you sure beyond reasonable doubt that Kelevi was penetrated by Filipe?
36. I spoke to you earlier about alternative opinions you can find in this case and I suggest the way you should approach your task.

37. First decide whether the State has proved to you so that you are sure that Filipe penetrated the anus of Kelevi. If you are sure then you will find Filipe guilty of rape and go no further. If you think that there was no penetration but Filipe was trying to penetrate him, then you will find him not guilty of rape but guilty of attempted rape. Lastly if you do not think that Filipe was trying to penetrate Kelevi but was just trying to relieve himself sexually by genital to skin contact you will find him not guilty of rape and not guilty of attempted rape but guilty of sexual assault. If you think that there was no contact between Filipe and Kelevi, you will find him not guilty of anything.
38. When you return to Court, my clerk will ask you to give your opinion, first on the rape and if you say not guilty then he will continue to ask you your opinion of the lesser charges.
39. You may now leave us to deliberate. Please let one of my staff know when you are ready and I will reconvene the Court. However just before you go I will ask Counsel if they wish me to alter or add anything to my directions on the law.

40. Counsel?



P. K. Madigan

Judge

At Labasa

21 March 2019