

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 322 OF 2017S

STATE
vs
SELESTINO DOROKA NO. 4

Counsels : Ms. L. Bogitini and Ms. S. Shameen for State
Ms. L. Ratidara and Ms. L. Filipe for Accused

Hearings : 1, 2 and 3 July, 2019.

Summing Up : 4 July, 2019.

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 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, and I will now read the same to you:

“... [read from the information]...”

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:
- (i) Did the accused, on 3 October 2017, at Namosi in the Central Division, penetrate the vulva of MM, a child under the age of 13 years, with his tongue?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was charged with “rape”, contrary to section 207 (1), (2) (b) and (3) of the Crimes Act 2009. It was alleged that, on 3 October 2017, at Namosi in the Central Division, the accused penetrated the complainant’s vulva with his tongue. The complainant (PW1) was under the age of 13 years, at the time.
10. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused;
- (ii) penetrated the complainant’s vulva with his tongue;
- (iii) without her consent; and
- (iv) he knew she was not consenting to 10 (ii) above, at the time.
11. Crucial to the above offence is the meaning of the verb “penetrate”. In the **Oxford Advanced Learner’s Dictionary**, 6th edition, Oxford University Press, 2002, the word “penetrate” means “to go into or through something”. The slightest penetration of the complainant’s vulva by the accused’s tongue, is sufficient to satisfy element 10 (ii) above.
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. In this case however, we are dealing with a female complainant, who was under 13 years old at the time. In law, a person under 13

years old is incapable of giving her consent to her vulva being penetrated by a tongue. So, for a child under 13 years old, the prosecution does not need to prove non-consent by the child complainant. It is already a presumption in law.

13. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting, at the time. You will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue. However, for a child complainant who was under 13 years old at the time, an adult accused is presumed to know in law that she is incapable of giving her consent to her vulva being penetrated by the accused's tongue. This policy was put there to protect children.
14. If you find the above elements of rape proven 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. In any event, if you find the accused not guilty of rape, you are entitled to consider the lesser offences of "sexual assault" or "indecent assault", although he was not formally charged with the same. Sexual assault is an aggravated form of "indecent assault". The elements of the offences are as follows:
 - (i) the accused
 - (ii) unlawfully and indecently
 - (iii) assaults
 - (iv) the complainant.
16. The prosecution must prove the above elements against the accused beyond reasonable doubt. "Assault" is really to apply unlawful force to the person of another without his or her consent. The "assault" must be considered "indecent" by right thinking members of society. If you find the above elements proven by the prosecution beyond reasonable doubt against the accused, you may find him guilty of sexual assault or indecent assault. If otherwise, you must find him not guilty of the same. It is a matter entirely for you.

F. THE PROSECUTION'S CASE

17. The prosecution's case were as follows. The female complainant (PW1) was born on 4 October 2005. On 3 October 2017, she was approximately 12 years old. The accused was 18 years old at the time. The complainant and the accused lived in the same village and are related. On 3 October 2017 (Tuesday), the complainant visited her friend at the accused's house to study. She was a primary school student at the time.
18. According to the prosecution, she went outside the house after a while to urinate. The accused allegedly came to her and took her to the back of their house. He then allegedly made her lie on the ground on her back, facing up. He then allegedly took off her underpants, pulled up her skirt and licked her vulva. According to the prosecution, the two were disturbed when a fellow relative, Mr. Ilikimi Baidrau (PW3) shone a torch on them. It was dark at the time.
19. The matter was later reported to police. An investigation was carried out. On 16 October 2017, the accused was brought before the Navua Magistrate Court, 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. That was the case for the prosecution.

G. THE ACCUSED'S CASE

20. On 1 July 2019, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation 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 chose to remain silent and called no witness. That was his right.
21. Nothing negative whatsoever should be imputed to the accused when he chose 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.

22. However, the gist of the accused's case could be obtained from his counsel's closing submission. His counsel, Ms. L. Ratidara, submitted that the prosecution has not proven its case against the accused beyond a reasonable doubt. She said, the complainant, while being examined in chief by the prosecution said, the accused's tongue penetrated her vagina, that is, her vulva. When cross-examined by the defence, she said, the accused's tongue did not penetrate her vagina, that is, vulva. Defence counsel put to her, her police statement, dated 22 March 2018, which was tendered as Defence Exhibit No. 1, wherein she told police the accused's tongue did not go inside her vagina, that is, vulva. She said, accused's tongue "was just licking around on the outside". When questioned by defence counsel, she said, the above statement to police was the truth. When re-examined by the prosecutor, the complainant, at first said, the accused's tongue went into her vagina, and later said, it did not go into her vagina. Defence counsel submitted the complainant's evidence was full of inconsistencies, so as to create a reasonable doubt in the prosecution's case. She asks you to find the accused not guilty as charged.
23. Because of the above, the defence is asking you, as assessors and judges of fact, to find the accused not guilty as charged. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

24. In analyzing 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 analyzing the evidence, we will first discuss the Agreed Facts, then the State's case against the accused. Then, we will discuss the Accused's case. Then we will consider the need to look at all the evidence.

(b) **The Agreed Facts:**

25. The parties had submitted an "Agreed Facts", dated 12 February, 2019. A copy of the same is with you. Please, read it carefully. There are 5 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.

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

26. The State's case against the accused rested solely on the verbal evidence of the child female complainant (PW1), given in court, on 1 and 2 July 2019. However, before we discuss the complainant's evidence, it will be necessary for us to discuss the evidence of Doctor Elvira Ongbit (PW2). The reason for this was that, under the Crimes Act 2009, there are various types of rape offences. The most common type of rape was the unlawful penetration of a person's vagina by someone's penis; then the unlawful penetration of a person's anus by someone's penis; then the unlawful penetration of someone's mouth with someone's penis and then the unlawful penetration of someone's vagina or anus with something other than a penis.
27. In this case, we are dealing with the alleged unlawful penetration of the complainant's vulva by the accused's tongue. You had heard the evidence of Doctor Ongbit (PW2) on what constitute a person's vulva. Obviously, it only applies to females. She had tendered Prosecution Exhibits No. 4 and 5 on the drawings describing a female's vulva. Please, consider the two exhibits carefully. The one that assist the most is Prosecution Exhibit No. 5, which described the inner part of the vulva starting from where the clitoris is, the urethral opening, the inner and outer lips of the vagina, the vaginal opening to the posterior

fourchette. She said, if a person's tongue touches the area described above, it would amount to penetrating the vulva. Likewise, if the tongue doesn't touch the above area, it would not amount to penetrating the vulva.

28. We now come to the complainant's verbal evidence. You heard her evidence in court on 1 and 2 July 2019. You watched her give evidence in court, and her demeanor while giving evidence in court. I am sure her evidence is still fresh in your minds, and I will not bore you with the details. I will only cover the salient points touching on the elements of the offence, to assist us come to a decision on this case. It was obvious that we are dealing with a female child complainant, whose knowledge and experience about the world was and is still developing.
29. When examined in chief by the prosecution, the complainant (PW1), said "He then licked my vagina, i.e. the women's private part. He licked around my female private part. I was lying on the grass on my back, with my legs open. The person's face was facing my vagina, and he was lying down on his stomach. He was licking my vagina slowly....He stopped when my brother, Ilikimi shine a torch at us." When cross-examined by defence counsel, PW1 said, "He only licked the surface of my vagina. His tongue penetrated the lips of my vagina." At this point, defence counsel confronted the complainant with her 22 March 2018 statement to the police, which was tendered as Defence Exhibit No. 1. In line 11 to 13 of the statement, the complainant told the police the following, "His tongue was rubbing up and down my vagina but did not went inside my vagina. He was just licking around on the outside." When confronted by defence counsel when cross-examined, the complainant said, the above statements were the truth. When re-examined by prosecution, she appear to give two inconsistent statement to the prosecutor. At first, she said, "His tongue went into the lips of my vagina", then later said, "Accused's tongue did not go into my vagina. I don't know the inside of the vagina."

30. The sum total of the complainant's above evidence creates uncertainty and confusion. It creates a reasonable doubt. In any event, how you treat the sum total of the above evidence is entirely a matter for you.

(d) **The Accused's Case:**

31. I had summarized the accused's case to you from paragraphs 20 to 23 hereof. I repeat the same here. If you accept the accused's version of events, as highlighted in their closing submission, you must find the accused not guilty as charged. However, if you reject the same, you must nevertheless examine the strength of the prosecution's case and decide accordingly. It is a matter entirely for you.

(e) **The Need To Consider All the Evidence:**

32. Four witnesses gave evidence for the prosecution:

- (i) Complainant (PW1); and
- (ii) Doctor Elvira Ongbit (PW2);
- (iii) Mr. Ilikimi Baidrau (PW3); and
- (iv) Corporal 2742 Koruvesi (PW4).

33. The following exhibits were tendered:

- (i) Prosecution Exhibit No. 1: PW1's Birth Certificate
- (ii) Prosecution Exhibit No. 2: PW2's Curriculum Vitae
- (iii) Prosecution Exhibit No.3: PW1's Medical Report
- (iv) Prosecution Exhibit No. 4: Diagram 1 of Vulva
- (v) Prosecution Exhibit No. 5: Diagram 2 of Vulva
- (vi) Prosecution Exhibit No. 6: Sketch Plan of Crime Scene
- (vii) Defence Exhibit 1: PW1'S Police Statement, dated 22 March 2018.

34. You must consider the above evidence together. Compare and analyze them together. If I hadn't mentioned a piece of evidence you consider important, please take it on board in

your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his/her evidence in your deliberation. If you find 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

35. 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.

36. Your possible opinions are as follows:

- (i) Rape : Accused: - Guilty or Not Guilty
- (ii) If Not Guilty of Rape, alternative of Sexual Assault: - Guilty or Not Guilty
- (iii) If Not Guilty of Sexual Assault, alternative of Indecent Assault - Guilty or Not Guilty

37. 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 the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : Legal Aid Commission, Suva.