

IN THE HIGH COURT OF FIJI AT LABASA

CASE NO: HAC. 18 of 2019

[CRIMINAL JURISDICTION]

STATE

V

PATERASIO TIMOCI RADUADUA

Counsel : Mr. I. Rakaria for the State
Mr. J. Korotini for the Accused

Hearing on : 16 September 2019

Summing up on : 16 September 2019

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should 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 you agree with that opinion. You are the judges of facts.
2. 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. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room and the admitted facts. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments 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 if you agree with them.
4. 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.
5. 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.
6. 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 when recalling past events.

7. 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.
8. 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, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved 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 proved facts, then you should not draw the adverse inference.
9. 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.
10. 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 an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
11. 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 against the accused has been proved.

12. 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.

13. Let us now look at the Information. The Director of Public Prosecutions has charged the accused with the following offence;

Statement of Offence

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

Particulars of Offence

PATERASIO TIMOCI RADUADUA on 11 March 2019, at Taveuni in the Northern Division, penetrated the vagina of **VIRISINE VASITI** with his penis without her consent.

14. In order to prove that the accused is guilty, the prosecution should prove all the elements of that offence beyond reasonable doubt.

15. To prove the offence of rape in this case, the prosecution should prove the following elements beyond reasonable doubt.

- I. the accused;
- II. penetrated the vagina of the complainant with his penis;
- III. without the consent of the complainant; and
- IV. the accused either;
 - (i) knew or believed that the complaint was not consenting; or
 - (ii) was reckless as to whether or not she was consenting.

16. In this case, the accused admits that he had sexual intercourse with the complainant. Therefore, first and the second elements above are not disputed. You should therefore consider that the first two elements have been proven beyond reasonable doubt.

17. Accordingly, in this case the prosecution is only required to prove the two elements involving consent, the third and the fourth elements. When you

consider the evidence, if you have a reasonable doubt in respect of any one of those two elements, 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.

18. 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.
19. 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.
20. Apart from proving that the complainant did not consent for the accused to insert his penis 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.
21. It is not difficult to understand what is meant by "the accused knew or believed that the complainant was not consenting". But you may wonder as to how you could determine whether the accused was reckless as to whether or not the complainant was consenting. 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.

22. You should also remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
23. The prosecution led the evidence of the complainant and closed the case. 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 an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence on oath.
24. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
25. The complainant said in her evidence that she is 48 years old. She said that on 11/03/19 around 2.00am the accused woke her up when she was lying down on her stomach at her house. She said that the accused lay on her back, closed her mouth, placed a nail on her neck and told her not to shout or else he will kill her. The accused told her that he wants her and she asked the accused why he wants to do this with her as his father had children with her. She said that she was afraid because the accused had a nail pointed towards her. After that she told the accused to 'go easy on her'. She could identify the accused by his voice. Thereafter she turned facing up and the accused removed her pants. Then the accused inserted his penis inside her vagina. She said that she did not agree for the accused to do that to her. She said that she was angry and sad

when the accused removed her pants because his father had a child with her. She said that she did not shout because the accused had threatened her and because he was drunk. She said that the accused told her that he came because he wanted her and that he was waiting to have sex with her. She lodged a complaint with the police the same day.

26. During cross-examination she denied that this was the second time the accused had sexual intercourse with her and the suggestion that she complained to the police because someone else saw them.
27. The accused said in his evidence that he went to the complainant's house that morning to ask for drinks as she used to sell drinks. But when he saw her lying down, he woke her up and asked her if she can have sex with him. He said that the complainant agreed and then they had sexual intercourse. He said that he did not force her. He also said that after having sexual intercourse, he was lying down on the bed and the complainant told him to leave before daybreak as someone will see them. He said that before they had sexual intercourse the complainant went outside to relieve herself and then came back inside the house. He said that it was the second time for them to have sexual intercourse and they first had sexual intercourse with each other with consent in 2015.
28. During cross examination when it was suggested that the complainant was like a stepmother to him, he said that the complainant was not his father's wife and they only had a child together.
29. The defence says that the complainant is not a credible witness. According to the accused this was the second time he had sexual intercourse with the complainant and on both occasions the complainant consented.
30. The defence also argued that, given the complainant's admissions that she had one child from her cousin and another child from the accused's cousin, the character of the complainant is such that she cannot be believed. I am sure that

you would agree that, merely because of the complainant's past history you cannot conclude that the allegation against the accused is false. Therefore, in deciding whether the elements of the offence against the accused are proved, you have to consider the events that took place on 11/03/19 as revealed by the evidence and not the complainant's action in the past.

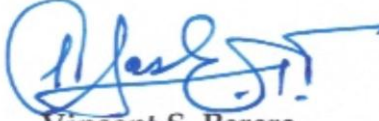
31. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
32. You should also bear in mind that the accused is tried for the offence of rape under the law. Therefore, what you should decide in this case is whether or not the disputed elements have been proven beyond reasonable doubt and not whether the accused is right or wrong according to moral standards. Accordingly, you should decide whether the evidence presented in this case establishes beyond reasonable doubt that the complainant did not consent for the accused to penetrate her vagina and if you find that she did not consent, then, whether the accused knew or believed that she was not consenting or whether the accused was reckless as to whether or not she was consenting.
33. 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 against an accused 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.
34. 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, 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 proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

- 35. Any re-directions?
- 36. 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.
- 37. 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 State
Legal Aid Commission for the Accused**