

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 025 OF 2019S

STATE
vs
EMOSI DABENAISE

Counsels : Ms. U. Tamanikaiyaroi for State
Ms. T. Kean and Ms. M. Cobona for Accused

Hearings : 1 and 2 October, 2019.

Summing Up : 3 October, 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 5 August 2013, at Namosi in the Central Division, penetrate the vagina of AT, a child under the age of 13 years, with his finger?

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 5 August 2013, at Namosi in the Central Division, the accused penetrated the complainant’s vagina with his finger. 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 vagina with his finger;
- (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 vagina by the accused’s finger, 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 vagina being penetrated by a finger. 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 accused is presumed to know in law that she is incapable of giving her consent to her vagina being penetrated by the accused's finger. 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.

F. THE PROSECUTION'S CASE

15. The prosecution's case were as follows. The female complainant (PW1) was born on 29 June 2005. On 5 August 2013, she was 8 years old. The accused was born on 13 July 1997. On 5 August 2013, he was 16 years old. The complainant and the accused resided in the same village in Namosi. They were related to each other. The accused was the complainant's uncle.
16. According to the prosecution, on 5 August 2013, the village's Seventh Day Adventist Church was having their church service in the village hall from 7 pm to 8 pm. The complainant and the accused were also at the church service. According to the prosecution, the complainant (PW1) was returning home after the church service. The prosecution alleged the accused came to the complainant, closed her mouth with his hand and dragged her to a nearby unused store. In the store, the accused allegedly took off the

complainant's underwear, then inserted a finger into her vagina. According to the complainant, the experience was painful.

17. PW1 allegedly said, the accused was standing behind her when he allegedly penetrated her vagina with his finger. 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

18. On 1 October 2019, the information was put to the accused, in the presence of his counsels. 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.
19. 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.
20. Because he pleaded not guilty to the charge of rape, the defence is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

21. 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:**

22. The parties had submitted an "Agreed Facts", dated 30 September 2019. A copy of the same is with you. Please, read it carefully. There are 4 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:**

23. The State's case against the accused rested solely on the verbal evidence of the female child complainant (PW1), given in court on 1 October 2019. You had watched her give evidence. You had listened to her and observed her demeanor, while she was giving evidence in court, on 1 October 2019. You saw and observed her re-actions when examined-in-chief by the prosecution, cross-examined by defence counsel and re-examined by prosecution. I am sure her evidence is still fresh in your mind, and I will not bore you with the details. I will only highlight to you the salient points regarding the issue of whether or not the prosecution had made you sure that the complainant's verbal evidence does satisfy the elements of the offence of rape, as discussed in paragraphs 10, 11, 12 and 13 hereof.

24. Furthermore, as a matter of law, the child complainant's verbal evidence does not need to be supported by other evidence for you to accept the credibility of the same. In law, a crime can be proven beyond reasonable doubt, on the basis of the verbal evidence of one witness, if such evidence supported all the elements of the offence, in this case, the offence of rape. So, in this case, if you accept the complainant's verbal evidence on the allegation of rape against the accused, and you find them credible, you are entitled to find the accused guilty as charged. If otherwise, and you find them not credible, you are entitled to find the accused not guilty as charged. It is a matter entirely for you.
25. In this case, the complainant (PW1) said, that after attending a church service in the village hall on 5 August 2013, between 7 pm and 8 pm, she was walking home. She and the accused resided in a village in Namosi. She said, she and the accused were related, and the accused was her uncle. She said, it was dark, but it appeared there was moonlight outside. She said, as she was walking home, the accused came to her, closed her mouth with his hand and dragged her to a nearby unused store. She said, in the store, the accused removed her underpants. She said, she was wearing a dress. She said, the accused was standing behind her. She said, the accused later inserted his finger into her "beka", which she later clarified as her vagina. She said, it was painful when the accused inserted his finger into her vagina. In paragraph 2 of the "Agreed Facts", it was agreed by the parties that she was 8 years old at the time.
26. She said, they were later disturbed by Vatiseva Tinanikalou (PW2). She said, PW2 and one Jale came to get an engine from the unused store. The engine was used to provide electricity to the village hall which held the church service the complainant and the accused previously attended. The complainant said PW2 told her that her mum was looking for her. She said, she later left the store and went home. The above in a nutshell was the complainant's evidence, and the case for the prosecution. If you accept the complainant's evidence as credible, and you accept the same, you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.

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

27. I had summarized the accused's case to you from paragraphs 18, 19 and 20 hereof. I repeat the same here. Although the accused chose to remain silent and called no witness in support of his case, the defence's case could be gleaned from their counsel's closing submission. Defence counsel submitted that when the complainant was examined-in-chief by the prosecution, she said the accused dragged her to the store, where the alleged rape allegedly occurred. Yet, defence counsel said, when she cross-examined her, the complainant said she did not go to the store with the accused. Defence counsel said, if this was so, then no alleged rape occurred. Defence counsel submitted that the above evidence showed the complainant was inconsistent in her allegation against the accused, and she asked you, to reject her allegation of rape against the accused because it was not credible. Defence counsel asked you to return with a not guilty opinion. However, it must be noted that, when the complainant was re-examined by prosecution, she said the accused grabbed her hand, covered her mouth and took her to the store. How you treat defence counsel's submission is entirely a matter for you.
28. In any event, if you accept defence counsel's closing submission, and you are led to a reasonable doubt, you must find the accused not guilty as charged. If otherwise, and you find the complainant's evidence credible, you must find the accused guilty as charged. It is a matter entirely for you.

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

29. Two witnesses gave evidence for the prosecution:
- (i) Complainant (PW1); and
 - (ii) Ms. Vatisева Tinanikalou (PW2);
- The parties submitted an "Agreed Facts", dated 30 September 2019.

30. 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 her evidence in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of her evidence in your deliberation. You are the judges of fact.

I. SUMMARY

31. 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.

32. Your possible opinions are as follows:

(i) Rape : Accused: - Guilty or Not Guilty

33. 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




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JUDGE

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