

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 125 OF 2018S

STATE

Vs

APETE CAMAIBAU

Counsels : Ms. S. Sharma for State
Ms. V. Narara for Accused

Hearings : 11, 14 and 15 October, 2019.

Summing Up : 16 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 their 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. There are two counts. You must disregard count no. 2, as the accused had been found not guilty and acquitted of the same, at the end of the prosecution's case. I will only read to you count no. 1, which is as follows:

“... [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) On count no. 1, did the accused, on 22 March 2018, at Vatuwaqa in the Central Division, rape the complainant (PW1)?

E. THE OFFENCE AND IT'S ELEMENTS

9. On count no.1, the accused was charged with “rape”, contrary to section 207 (1) and 2 (b) of the Crimes Act 2009. It was alleged that on 22 March 2018, at Vatuwaqa in the Central Division, the accused penetrated the complainant's vagina with his fingers, without her consent.
10. For the accused to be found guilty of “rape”, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused's finger/fingers penetrated the complainant's vagina;
- (ii) without her consent; and
- (iii) he knew she was not consenting to 10 (i) above, at the time.
11. The slightest penetration of the complainant's vagina with the accused's finger/fingers; is sufficient to satisfy element no. 10 (i) 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. If the consent was induced by fear, it is no consent at all.
13. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to 10 (i) above, at the time. You will have to examine the parties' conduct at the time, and the surrounding circumstances, to decide this issue.
14. If you find the elements of rape, as described in paragraph 10 hereof, satisfied 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. On 22 March 2018, the female complainant (PW1) was 29 years old. She resided with her parents in a settlement in Vatuwaqa. She also lived with two brothers and her two children, a son and daughter. The accused was approximately in his 40's and also lived in the same settlement.
16. According to the prosecution, the complainant and her family were fast asleep in their house in the early morning of 22 March 2018 (Thursday). PW1 was awoken by mosquito bites at about 3 am, and she decided to go to the shop to buy some mosquito coils. From their residence to the shop, the distance was somewhat like from the High Court No. 1 witness box to the main road at Victoria Parade. According to the prosecution, PW1 walked alone to the shop, bought the mosquito coil and returned home. On her way home, PW1 met a friend, Taraivini Senirewa, in front of the settlement's Methodist Church.

17. At this point, we will refer to the crime scene sketch plan, drawn by PW1, and submitted as Defence Exhibit No. 1. According to the prosecution, the accused allegedly arrived in a taxi, went to Taraivini to talk, and then came to the complainant. According to the prosecution, the accused allegedly grabbed her right hand and took her to a maroon house beside the church. The man allegedly stood behind PW1, and with his right hand tightly held PW1's front chest. With his left hand, the man allegedly took off PW1's shorts and panty. PW1 resisted the above to no avail. The man then allegedly forced PW1 to bend down.
18. According to the prosecution, the man then allegedly inserted all his left fingers into the complainant's vagina, without her consent. According to the prosecution, the accused knew she was not consenting to the same. 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

19. On 11 October 2019, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charges. In other words, he denied the allegations against him. At the end of the prosecution's case, he was found not guilty of count no. 2 (attempted rape) and acquitted accordingly. On counts no. 1 (rape), a prima facie case was found against him, and he was called upon to make his defence. He chose to remain silent and called no witness. That was his right.
20. 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 shifts 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.

21. So, in this case, you will have to carefully examine the prosecution's case and decide whether or not the accused was guilty as charged. The prosecution's case was based fundamentally on the verbal evidence of the complainant, and you will have to decide whether what she alleged against the accused had made you sure of the accused's guilt. If you are sure of his guilt, you must find him guilty as charged. If otherwise, you will have to find him not guilty as charged. It is a matter entirely for you.
22. Because he pleaded not guilty to the charges, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged on count no. 1. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

23. 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:**

24. The parties had submitted an "Agreed Facts", dated 4 October 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:

25. The State's case against the accused rested solely on the verbal evidence of the complainant (PW1), given in court on 11 and 14 October 2019. You had watched her give evidence, you had observed her demeanor and you had observed her reactions to the questions thrown at her by the prosecution and defence counsels. I am sure that the details of her evidence are still fresh in your minds. However, in this case, I will not bore you with the details of her evidence, but will concentrate on the salient points on the evidence, and whether or not the elements of the charge in count no. 1 had been proven by the prosecution beyond a reasonable doubt.

26. On count no. 1, the complainant (PW1) said, at the material time, the man came to her after talking to Taraivini Senirewa, grabbed her right hand and took her to a maroon house, on the right side of the Methodist Church. Please, refer to PW1's sketch plan of the crime scene, submitted via Defence Exhibit No. 1. PW1 said, the man was behind her, with his right arm tightly holding the front part of her chest. PW1 said, with his left hand, he forcefully took her pants and panty off. At this point, PW1 said she was only wearing her black t-shirt, and was naked from waist down. PW1 said, the man then forced her to bend forward. PW1 said, she tried to struggle to free herself, but it was to no avail, as the man was stronger than her. PW1 said, the man then inserted his left five fingers into her vagina, without her consent. PW1 said, it was painful and felt blood coming out of her vagina. PW1 said, she was very weak.

27. During the trial PW1 presented the clothes she was wearing at the time in court as Prosecution Exhibit 1 (a) – black t-shirt; Prosecution Exhibit 1 (b) – her trousers and Prosecution Exhibit 1 (c) – her panty. There were blood stains on her trousers and panty. The prosecution also called Doctor Elvira Ongbit (PW3), who medically examined PW1 on 22 March 2018 at 11.30 am at the Medical Services Pacific (MSP) Clinic. The doctor tendered in evidence PW1's medical report as Prosecution Exhibit No. 2. In D (12) of the

report, the doctor saw and noted “fresh superficial abrasions and bruises noted on the vaginal wall close to the vaginal opening.” She drew a diagram of the same in Appendix 1 of the report. Please, read PW1’s medical report carefully. Although the complainant’s verbal allegation against the accused does not need to be supported by independent evidence as a matter of law, her blood stained trousers and panty, including PW3’s medical finding in D (12) of her medical report, does lend credibility to her evidence that a man inserted his fingers into her vagina, at the material time. In my respectful view, the complainant’s evidence on the above point appears credible, and you are entitled to accept the same, if you agree with it. If otherwise, you are entitled to reject it. It is a matter entirely for you.

28. In this case, the State’s case against the accused stands or falls on whether or not the complainant correctly identified the accused, at the material time. In other words, did the complainant correctly identify the accused, as the man who inserted his fingers into her vagina, without her consent, at the material time? Before we consider the complainant’s evidence, I must direct you as follows as a matter of law. First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, I must warn you of the special need for caution before convicting the accused in reliance on the correctness of the identification, because an honest and convincing witness or witnesses might be mistaken. Secondly, you must carefully examine the circumstances in which the identification by the witness was made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had she any special reason for remembering the accused? Was a police identification parade held? Thirdly, are there any specific weakness in the identification evidence? The answers to the above questions will determine the quality of the identification evidence. If the quality is good, you may use it against the accused. If it’s otherwise, you must reject it.

29. The only witness called by the State to identify the accused at the crime scene was the complainant (PW1) herself. There was no other witness. Even Taraivini Senirewa, who the complainant saw talking to the man when he got out of the taxi, at the material time, was not called as an additional identification witness. So the State's case will stand or fall on how good the complainant's identification evidence was. How long did PW1 had the accused under observation? Remember, the identification was made sometime after 3.20 am on 22 March 2018. It was early morning on a Thursday. According to PW1, it took 15 minutes for the man to take her from the front of the church and when they went to the maroon house. PW1 said, when he got out of the taxi and was talking to Taraivini, she observed the man for about 5 minutes. At what distance? PW1 said, when the man was talking to Taraivini, he was 6 footsteps away. When he took her from the front of the church to the maroon house, PW1 said, he was right at her back. In what light? In PW1's sketch plan of the crime scene (Defence Exhibit No. 1), the only light lighting up the area came from the house in front of the church. PW1 said, it was a 4 feet tube light, and it shone through drawn curtains and some gaps in the same from the house mentioned above. PW1 said, the light was 18 footsteps away from where the man and Taraivini were standing, and 20 footsteps away from where she was standing. PW1 said, the light was not that bright. PW1 said there was no light from the church nor at the maroon house.
30. At first, PW1 said, she could see the man's face clearly. Later, she said, she could not see the man's face properly, and that she only saw his face "a little bit." Was PW1's observation impeded in any way? It would appear that PW1's observation were impeded by poor lighting at the front of the church, and no lighting at all when the alleged offence was committed near the maroon house. Had the complainant seen the man before? On this issue, the complainant's answer was mixed. When she reported the alleged offence to her father (PW2) in the early morning at 7 am on 22 March 2018, she told her father she didn't know the person that allegedly raped her. When she was medically examined by Doctor Ongbit (PW3) on 22 March 2018 at 11.30 am, she told the doctor a stranger allegedly raped her. While giving evidence in court, and while being cross-examined, PW1 said in

the 8 years he had lived in the settlement, she had only seen the man 3 times. The sum total of the above answers appear to show that PW1 was not sure of the identity of the person she saw that morning. PW1 said, she had no special reasons for remembering the man's face. PW1 also said, she did not attend a police identification parade.

31. Lastly, are there any specific weakness in the complainant's identification evidence? In my view, there was no doubt that the complainant was raped that morning, that is, someone put his fingers into her vagina without her consent, and the person knew she was not consenting to the same. However, the prosecution's case was handicapped by the weaknesses inherent in the complainant's identification evidence. First of all, the offence occurred after 3.20 am on 22 March 2018, and the complainant agreed it was dark at the crime scene. There was no light coming from the church. There was no light near the maroon house where the offence occurred. The only light came from a house in front of the church. PW1 said, the light was from a 4 feet tube light and the house's curtains were drawn. PW1 said the light came through the curtain and some gaps in the same. PW1 said the light was not bright. PW1 said, with this light she identified the man as the accused. In timing her observation of the man, PW1 said she did not have a watch and she was guessing the time. The distance used in observing the man was compromised by the poor lighting. PW1 did not give consistent answers in whether or not she had seen the man before. PW1 said she did not attend a police identification parade to test the veracity of her identification. In my view, after considering the above, the complainant's identification evidence of the accused, at the material time, was of a low quality that it would be unsafe to rely on it. Furthermore, the prosecution provided no other evidence to provide additional support to such weak identification evidence, for example, a confession that he was at the crime scene at the material time. However, how you decide the above is entirely a matter for you.

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

32. I had summarized the accused's case to you from paragraphs 19 to 22 hereof. I repeat the same here. If the prosecution had made you sure of the accused's guilt on counts no.1, you must find him guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.

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

33. Three witnesses gave evidence for the prosecution:

- (i) Complainant (PW1);
- (ii) Mr. Iosefo Baleinatuvu (PW2); and
- (ii) Doctor Elvira Ongbit (PW3).

The prosecution tendered the following exhibits:

- (i) Prosecution Exhibit No. 1 (A)– Black t-shirt.
- (ii) Prosecution Exhibit No. 1 (B)– Trousers
- (iii) Prosecution Exhibit No. 1 (C)– Panty;
- (iv) Prosecution Exhibit No. 2 – PW1's Medical Report.

The defence tendered the following exhibit:

- (i) Defence Exhibit 1 – PW1's sketch plan.

34. You must consider the above evidence together. You must compare them and analyze them together. If I had not mentioned a piece of evidence you consider important, please take it onboard 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) Count No. 1: Rape: - 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.**