

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 047 OF 2019S

STATE

Vs

PAULIASI TAURA

Counsels : Ms. S. Shameen for State
Ms. S. Daunivesi for Accused
Hearings : 9, 10 and 11 June, 2020.
Summing Up : 12 June, 2020.

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. 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 18 December 2018, at Makoi in the Central Division, rape the complainant (PW1)?

E. THE OFFENCES AND THEIR ELEMENTS

9. For the accused to be found guilty of “rape”, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused’s penis penetrated the complainant’s vagina;
- (ii) without her consent; and
- (iii) he knew she was not consenting to 9 (i) above, at the time.

10. The slightest penetration of the complainant’s vagina with the accused’s penis; is sufficient to satisfy element no. 9 (i) above. It is irrelevant whether or not the accused ejaculated.

11. “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.

12. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to 9 (i) above, at the time. You will have to

examine the parties' conduct at the time, and the surrounding circumstances, to decide this issue.

13. If you find the elements of rape, as described in paragraph 9 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.
14. If you find the accused not guilty of rape, you are entitled in law to consider the lesser offence of "defilement of a young person between 13 and 16 years", contrary to section 215(1) of the Crimes Act 2009. The above is permissible, although he was not formally charged with the same. For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) unlawfully
 - (iii) inserts his penis
 - (iv) into the complainant's vagina,
 - (v) and the complainant was aged between 13 and 16 years.
15. In defilement, consent by the complainant, is not a defence. The only defence available was that the accused, prior to sexual intercourse, had reasonable cause to believe and did in fact believe that the complainant was of or above the age of 16 years. In deciding the above issues, you have to look at both parties actions and the surrounding circumstances, and decide accordingly.

F. THE PROSECUTION'S CASE

16. The prosecution's case were as follows. On the date of the alleged incident, that is, the 18th December 2018, the complainant (PW1) was 15 years old. She was born on 17 July 2003. The accused was 21 years old and was born on 25 May 1997. The complainant

was a Year 9 student at a secondary school in Suva. She was residing with her parents, a brother (20 years old) and a sister (7 years old) at Bayview Heights.

17. On 13 December 2018, according to the prosecution, the complainant and her mother had a disagreement on the issue of whether or not it was appropriate for the complainant to have a boyfriend. The mother ended up disciplining the complainant by hitting her. She decided to leave her parents and go and reside with Pastor Tomasi Batiratu's family at Livaliva Street, Makoi. She was not related to the Pastor's family. Her parents did not know that she had moved to Pastor Tomasi's house. On 13 December 2018, the Pastor introduced his family to PW1.
18. According to the prosecution, Pastor Tomasi's family woke between 3 am and 4 am on 18 December 2018 to have their family devotion. Pastor Tomasi, his wife, his daughter Adi, Adi's children Ethen and Kali, including the complainant shared the devotion. After 4 am the Pastor and his wife left for work. Their daughter Adi left at 4.30 am for work. The complainant, Ethen and Kali went back to sleep. According to the prosecution, between 7 am and 8 am, the complainant made their breakfast and they had the same in the sitting room.
19. According to the prosecution, the accused, who was Pastor Tomasi's stepson appeared. He allegedly dragged PW1 to Adi's bedroom, forced her down on a bed, forcefully took off her clothes, and inserted his penis into her vagina without her consent. PW1 allegedly told him to stop but he allegedly ignored her protest and allegedly threatened her not to resist. According to the prosecution, the accused allegedly knew at the time that she was not consenting to sex with him. The matter was reported to police. An investigation was carried out. The accused was taken to the Nasinu Magistrate Court on 25 January 2019 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 9 June 2020, in the presence of his counsel, the information was put to the accused. He pleaded not guilty to the charge. In other words, he denied the rape allegation against him. When a prima facie case was found against him, at the end of prosecution's case, wherein he was called upon to make his defence, he chose to remain silent and chose not to call any witness. That was his constitutional 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 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.
22. 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.
23. Because he pleaded not guilty to the charge, the accused 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:**

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 5 June 2020. A copy of the same is with you. Please, read it carefully. There are 16 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 complainant (PW1), given in court on 9 and 10 June 2020. 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 had been proven by the prosecution beyond a reasonable doubt.
27. On the first element of the offence of rape as described in paragraphs 9 (i) and 10 hereof, the prosecution and the defence, in their "Agreed Facts" dated 5 June 2020, had agreed that the accused's penis penetrated the complainant's vagina, at the material time. Please,

refer to paragraphs 15 and 16 of the abovementioned Agreed Facts. So, the first element of the offence of rape is an admitted fact by the parties, and as a result, the prosecution had proven the first element of the offence of rape beyond a reasonable doubt.

28. Because of the above, we may now move on to consider and examine the second element of the offence of rape, as described in paragraphs 9 (ii) and 11 hereof. The question now becomes: Did the complainant consent to the accused penetrating her vagina with his penis on 18 December 2018? In answering this question, you must carefully read and understand the concept of the word “consent” as described in paragraph 11 hereof. Was the complainant’s consent to sex given voluntarily and out of her own free will? Was her consent obtained by force, threat, intimidation or by fear of bodily harm to herself?
29. In answering the above questions, you must carefully examine and consider the complainant’s character before, during and after the alleged incident. You must carefully look at what she said or did before, during and after the incident, including the surrounding circumstances. You have to consider her demeanor and how she performed while giving evidence. After considering all the above evidence in its totality, you are entitled to make reasonable inferences of fact from the proven facts. Here we are dealing with a 15 year old who had no regard whatsoever for parental authority. She argued with her mother after a disciplinary process. She moves in with Pastor Tomasi and the family without informing her parents. The whole dispute with her mother was the issue of whether or not it was appropriate for her to have a boyfriend at the age of 15 years and still a Year 9 student at a Suva secondary school. The complainant said she had only known about Pastor Tomasi’s family on 13 December 2018 when she moved in with them.
30. On the day of the alleged incident, that is, 18 December 2018, she said the accused came into the house between 7 am and 8 am and pulled her to his sister’s bedroom. She said, he made her sit on his sister’s bed. She said, he pushed her down forcefully. She said, she pushed him away. She said, he removed her clothes and inserted his penis into her

vagina without her consent. She said, she asked him to stop but he ignored her. In cross-examination by defence, she admitted she didn't kick or punch the accused to show him she is not consenting. She admitted, she did not raise the alarm by shouting or yelling, as his nephews were having breakfast in the sitting room. She admitted, the accused was not armed with a weapon designed to subdue her. She admitted, she didn't run out of the bedroom when the accused was taking off his clothes. She admitted her hand and legs were not tied together. She admitted she did not cry while they were having sex. She said after the sex, the accused and her put on their clothes and went their ways. She said, after sex, she prepared lunch for Ethen and Kali, Pastor Tomasi's grandchildren. When Pastor Tomasi's wife came back from work, she did not report the incident to her. When Pastor Tomasi returned from work, she admitted under cross-examination that she did not ask him to take her to the police station, despite admitting that she told him about the incident at 8 pm. How you answer the consent issue, is a matter entirely for you, after taking into account the whole evidence.

31. If you accept the complainant's version that she did not consent to sex with the accused at the material time, then the prosecution had satisfied the second element of rape beyond reasonable doubt, and this entitles you to consider the last and final element of rape, as described in paragraphs 9 (iii) and 12 hereof. If you reject the complainant's version on the issue of consent, or you are not sure of her version, you must then find the accused not guilty of rape.
32. If you accept the complainant's version on the issue of consent, the next question becomes: Did the accused know that the complainant was not consenting to sex with him, at the material time? In answering this question, you must carefully examine and consider the matters mentioned in paragraph 12 hereof. You had heard the complainant's version of events on the consent issue, and if you accept that, then the accused would have known that the complainant was not consenting to sex with him, at the material time, and this would mean that the prosecution had proven beyond reasonable doubt the third and final

element of the offence of rape. On the other hand, you had also heard the complainant's answers to the cross-examination questions thrown at her by defence counsel. As highlighted by defence counsel she did not shout or yell to raise the alarm, neither did she kick or punch or flee the crime scene while he was taking off his clothes, and she didn't report the matter to police soon after the alleged incident. If you reject the complainant's version or are unsure on the same, then you must find the accused not guilty as charged. It is a matter entirely for you.

33. If you accept the complainant's evidence on the allegation as credible, 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:**

34. I had summarized the accused's case to you from paragraphs 20 to 23 hereof. I repeat the same here. If you reject the complainant's evidence, you must find the accused not guilty as charged.

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

35. The prosecution called two witnesses:

- (i) Complainant (PW1); and
- (ii) Doctor Shelvin Kapoor (PW2).

The prosecution submitted one exhibit:

- (i) Prosecution Exhibit No. 1 – PW1's Medical Report.

The defence called no evidence.

36. You will have to consider the above evidence together. Compare them and analyze them together. If I haven'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

37. 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.
38. Your possible opinions are as follows:
- (i) Rape: Accused: Guilty or Not Guilty
39. 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.



Solicitor for the State
Solicitor for the Accused

: **Office of the Director of Public Prosecution, Suva.**
: **Legal Aid Commission, Suva.**



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JUDGE