

IN THE HIGH COURT OF FIJI
AT LABASA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO.: HAC 14 OF 2019

BETWEEN : STATE

AND : ANASA LULU VATEITEI

Counsel : Ms A. Vavadakua for the State
Ms S. Devi and Ms M. Besetimoala for the Accused

Dates of Hearing : 22 - 23 June 2020

Date of Summing Up: 24 June 2020

SUMMING UP

- [1] Madam Assessors, it is now my duty to sum up the case to you. We have differing roles in this trial. I have to give you directions on the law and you must accept those directions. You are to decide the facts applying those directions and to give me your opinions as to the Accused's guilt or innocence.
- [2] In going through the evidence I may express an opinion. If you do not agree with that opinion, you are free to ignore it and to form another view of that piece of evidence. I may omit some evidence which you think significant. Nonetheless you may give that evidence such weight as you consider appropriate. You are free to form your own opinions.
- [3] At the end of this summing up, and after you have given your individual opinions, the final decision on the facts rests with me. I am not bound to conform to your opinions. However in arriving at my judgment I shall place much reliance upon your opinions.
- [4] The burden of proof rests throughout the trial upon the prosecution. In our system of justice there is a presumption of innocence in favour of an Accused. The prosecution

brings the charge against the Accused. Therefore it is for the prosecution to prove the charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.

- [5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty. If you entertain a reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of the charge.
- [6] You must decide this case upon the evidence presented to you. If a witness was not called you must not speculate the reasons why the witness was not called. You must only consider evidence which were led in the trial. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [7] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state her individual opinions orally on the charge against the Accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.
- [8] However it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions.
- [9] Those opinions must be based solely upon the evidence. Evidence consists of sworn testimony of the witnesses, what each witness has told the court in the witness box.
- [10] Neither speculation nor theories of one's own constitute evidence. Media coverage, idle talk, or gossip, are similarly not evidence. Put out of your mind when considering your opinions, anything you may have heard about this case outside the courtroom. Focus solely on the evidence which you have seen, heard, or examined in this court.

- [11] This summing up is not evidence either, nor are counsel's opening or closing addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [12] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness's answer is evidence. If he or she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [13] In arriving at your opinions, use the common sense you bring to bear in your daily lives, at home and at work. Observe and assess the witnesses' evidence and demeanour together with all of the evidence in the case. You can accept part of a witness's testimony and reject other parts. A witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and be wide of the mark about another.
- [14] If you have formed a moral opinion on the conduct alleged in this case, put that to one side. Consistent with your oath, you should put away both prejudice and sympathy. Approach your assessment of the evidence dispassionately. Bring a cool detachment to your task of examining whether the case against the Accused has been proved before you, proved with evidence led by the prosecution.
- [15] Both sides have agreed to the following facts, which you must accept as true:
1. **THAT** Anasa had sexual intercourse with Fane Lako on the 10th day of February 2019, at Bucalevu Taveuni.
 2. **THAT** prior to 10th February 2019, Anasa knew Fane Lako and her family. He would go to Fane Lako's house to have his meals at times.
 3. **THAT** before staying in Taveuni, Anasa knew Fane Lako from when they used to stay together in the Island of Gau.
 4. **THAT** Anasa knew that Fane Lako also lived with her older sister, Selina who suffered from intellectual disability and was handicapped.
 5. **THAT** Anasa knew that Fane Lako and her older sister Selina are living with their mother.
 6. **THAT** on the 10th day of February 2019, Anasa was drinking grog or kava at one Una's house.

7. **THAT** after Anasa drank grog/kava at Una's house, he went into Fane Lako's house and saw that only Fane Lako and her handicapped and intellectually disabled older sister, Selina were present at home.
8. **THAT** on the above date, 10/2/19, after seeing Fane Lako and his sister Selina inside house, Anasa then approached Fane Lako and had sex with Fane Lako by penetrating his penis into Fane Lako's vagina.

[16] I turn now to deal with what the prosecution must prove.

[17] The Accused is charged with one count of rape. To prove rape, the prosecution must prove three elements.

[18] Firstly, it must be proved beyond reasonable doubt that on the said date and location the Accused had unlawful carnal knowledge, that is, unlawful sexual intercourse with the complainant, Fane Lako. The physical act of intercourse must be proved, that is that the Accused's penis penetrated the complainant's vagina. The Accused does not dispute this element. He admits having sexual intercourse with the complainant on 10 February 2019 at Bocalevu, Taveuni.

[19] Secondly, it must be proved that when the Accused had unlawful sexual intercourse with the complainant he did so without her consent. A valid consent to sexual intercourse is one that is freely and voluntarily given by the complainant with the necessary mental capacity to give the consent. The prosecution case is that the complainant was mentally impaired to freely and voluntarily give consent to sexual intercourse. The defence case is that the complainant consented to sexual intercourse and that she had the mental capacity to freely and voluntarily consent to sexual intercourse. This element is in dispute and therefore it is matter for you to decide whether the complainant consented to sexual intercourse and wehe she had the mental capacity to freely and voluntarily consent to sexual intercourse.

[20] Thirdly, it must be proved that the Accused either knew that the complainant did not consent or was reckless as to whether she consented. The Accused was reckless as to whether the complainant consented to sexual intercourse if you are sure that he realised there was a risk that she was not consenting and carried on anyway when in the circumstances known to him it was unreasonable to do so. The resolution of this

element is dependent upon whether you accept the complainant freely or voluntarily consented to sexual intercourse and whether she had the mental capacity to give that consent.

[21] I turn now to summarise the evidence. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

[22] The first prosecution witness was the investigating officer, DC Tomasi Tomu. He interviewed the Accused under caution following his arrest. The record of interview was tendered in evidence and is marked prosecution exhibit 1. The record of interview contains mixed statements from the Accused. He admits having sexual intercourse with the complainant on the said date and location but says she consented to it. He also told the police that he knew the complainant was suffering from intellectual disability when he had sex with her.

[23] The second prosecution witness was the complainant's mother, Emily Koti. She told the court that the complainant suffered from a mental disability since birth. The complainant is now 27 years of age and under her care. Ms Koti said the complainant started school but dropped out because she could not cope due to her mental disability. She said the complainant is able to understand simple instructions but otherwise she is depended on her for care. Ms Koti said that the Accused was a regular visitor to her home as they were neighbours and that the Accused knew about the complainant's mental disability. Ms Koti said that as a mother she knew the complainant was sexually attracted to opposite sex but she was also of the opinion that the complainant did not have the capacity to freely and voluntarily engage in sexual intercourse. She said the complainant was vulnerable due to her mental disability because she could be easily swayed and be persuaded by a man who is willing to have sexual intercourse with her. What weight you attach to Ms Koti's evidence is a matter for you.

[24] The third witness was the complainant. You will recall she gave illogical answers to many questions. She either said yes or no to the propositions put to her in questions by counsel. For example,

Q: You know Anasa?

A: Yes

Q: On the day that he came to your home, he asked you that he wanted to have sex with you?

A: Yes

Q: And you said yes when he asks you this?

A: Yes

Q: Did you like what Anasa did to you?

A: No

Q: Did you tell him that you didn't like what he did?

A: No

Q: Do you like Anasa?

A: No

[25] In order to understand the complainant's mental capacity, the prosecution led expert evidence from Dr Fatima, a medical officer for psychiatry at Labasa Hospital. On 7 May 2019 she carried out a psychiatric assessment of the complainant at Labasa Hospital and recorded her findings in a Report tendered by consent of both parties and is marked prosecution exhibit 2. You are to disregard the history as related by the sister of the complainant and is recorded in Part D(10) of the Report. That part of the report is hearsay and cannot be relied upon as the truth when you deliberate on the charge. So you must disregard the history.

[26] But you may rely on Dr Fatima's medical findings, observations and opinion. According to Dr Fatima the complainant has marked cognitive impairment since childhood. The complainant is unable to converse relevantly or give an account of the alleged event. She has poor intellectual functioning and judgment. Like the mother of the complainant, Dr Fatima is of the opinion that the complainant lacked the capacity to understand consensual sexual relationship or to give consent to sexual intercourse. In cross examination, Dr Fatima said that intellectual disabilities does not preclude someone from having sexual urges but they have may not have the cognitive ability to

reason the consequences of saying yes to sexual intercourse. Dr Fatima was further cross examined on the complainant's capacity to consent for the psychiatric assessment but the doctor explained that it was a catch twenty-two situation as she could not have carried out the medical assessment without her consent.

[27] I need to give you a further direction on law regarding Dr Fatima's evidence. Expert evidence is permitted in a criminal trial to provide you with scientific information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to one particular aspect of the case, namely whether the complainant had the mental capacity to give a free and voluntary consent to sexual intercourse with the Accused.

[28] Dr Fatima as an expert and Ms Koti as the mother and carer of the complainant are entitled to express an opinion in respect of the mental capacity of the complainant to give a free or voluntary consent to sexual intercourse and you are entitled and would no doubt wish to have regard to this evidence and to the opinions when coming to your own conclusions about this aspect of the case. You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of Dr Fatima or Ms Koti, you do not have to act upon it. It is for you to decide whose evidence, and whose opinions you accept, if any. You should remember that this evidence relates only to part of the case, and that whilst it may be of assistance to you in reaching an opinion, you must reach your opinion having considered all the evidence.

[29] That was a summary of the prosecution case.

[30] The Accused gave evidence and called a witness. The Accused was not obliged to give evidence. He was not obliged to call any witnesses. He does not have to prove his innocence. He does not have to prove anything.

[31] However, he has chosen to give evidence and to call a witness on his behalf. You must take what he and his witness have said into account when considering the issues of fact which you have to determine.

- [32] It is for you to decide whether you believe the evidence of the Accused and his witness or whether it may be true. If the account given by the Accused put forward by the defence is or may be true, then the Accused must be acquitted.
- [33] But even if you entirely reject the account given by the Accused put forward by the defence, that would not relieve the prosecution of its burden of making you sure by evidence of the Accused's guilt in respect of the charge which you have to consider.
- [34] The Accused in his evidence said that on 10 February 2019 he drank grog at one Una's house and then went to the complainant's place to eat. When he arrived there he saw the complainant and her sister alone at home. He requested the complainant for sex and she said yes. He said he asked her if he could remove her pants and she said yes. They then had sex and he said that from her actions he gauged that she wanted it. When questioned why he asked her for sex knowing she had a history of mental impairment he answered – "I was trying to test if I can get her consent, but when she said yes, then we had sex". In cross examination the Accused accepted that given the complainant's mental condition there was a risk that she could not have understood what he had said to her on that day.
- [35] The second witness for the defence was Dr Raibili who medically examined the complainant at Taveuni Hospital on 11 February 2019. During that examination Dr Raibili found the complainant to be intellectually slow but was able to respond appropriately to instructions and understand everything that was explained to her for the purpose of physical examination of her body. In cross examination the doctor explained that her observations relating to the complainant were made for the purpose of physical examination and not for the purpose of determining the extent of the complainant's intellectual disability.
- [36] That was a summary of the evidence for the defence.
- [37] When you deliberate on the charge, you may accept that sexual intercourse has been proven beyond reasonable doubt as that element is not disputed by the Accused. On the element of lack of consent, the issue for you to consider is whether or not the complainant had the capacity to give a free and voluntary consent to sexual intercourse due to her cognitive impairment. If she lacked that capacity then you are

to consider whether the Accused knew that she did not have that capacity at the time of the act or was reckless as to whether she consented due to her mental impairment. If you feel sure that the complainant did not have the mental capacity to give a free and voluntary consent to sexual intercourse due to her cognitive impairment at the time of the act and that the Accused either knew that she did not have that capacity or was reckless as to whether she had consented due to her cognitive impairment, then you may find the Accused guilty of rape. But if you are unsure of these two elements or the guilt of the Accused, then you must find the Accused not guilty.

[38] The defence has invited you to consider a lesser offence of defilement of intellectually impaired person. The Accused is guilty of this offence if he had sexual intercourse with the complainant under circumstances which do not amount to rape but he knew that the complainant was suffering from a mental sub-normality at the time he had sexual intercourse with her. You may only consider this lesser offence if you reach an opinion that the sexual intercourse with the complainant do not amount to rape.

[39] You must consider all the evidence when deciding whether the Accused is guilty or innocent of the charge. Your possible opinion is either guilty or not guilty. You will only be asked for an opinion on the lesser charge, if you find the Accused not guilty of rape. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them. You may now retire to deliberate on your opinions.



A handwritten signature in blue ink, appearing to be 'D. Goundar', is written above a horizontal dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for State

Office of the Director of Legal Aid Commission for Accused