

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

High Court Criminal Case No. HAC 019 of 2020

BETWEEN : STATE

AND : VAKANANUMI VUNIVESI

Counsel : Ms W. Elo for the State
Mr. K. Verebalavu and Mr E Veibataki for the Accused

Dates of Hearing : 18 & 19 January 2021

Closing Speeches : 19 January 2021

Date of Summing up: 21 January 2021

(The name of the Complainant is suppressed and she will be referred to as FN)

SUMMING UP

Madam and gentlemen assessors,

1. I must now sum up the case to you. You must then retire to consider your opinions. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You are to decide the facts of the case,

based on the evidence that has been led before this court. You will then apply those directions to the facts and give me your opinions as to whether the Accused person is guilty or not guilty in respect of each count.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going through evidence. If you do not agree with that opinion you will ignore it and form your own opinions with that evidence.
3. In this case only the Complainant gave evidence. You must base your opinions only and only on the evidence given by the Complainant. A few things that you heard in this court are not evidence. Opening submission, closing submissions, comments made by the counsel and this summing up are not evidence. A suggestion put to a witness is not evidence unless it is admitted by the witness. I must say that the purpose of the closing speech is to outline the evidence that each party rely on to fall in line with their respective arguments. It is not an exercise to introduce new evidence or to give evidence from bar table. If you heard any new information which you did not hear in the evidence, you must disregard such information.
4. You may act only upon the evidence given by the Complainant in this case and nothing else. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so is entirely a matter for you.
5. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinions. You will also not let any sympathy or prejudice sway your opinions. Emotions have no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only

have to consider the evidence adduced in respect of each element of the offences. You must not form your opinions based on the emotions, sympathies, prejudices, speculations and morality. As I said before you only have to consider the evidence given by the Complainant in this case and nothing else to form your opinions.

6. I will give you only a summary of evidence. I will not go through every word uttered by the Complainant in this case, and if I leave out something that seems to be important, nothing stops you from taking that into account. Because you decide the facts.
7. After this summing up, you may give your individual opinions as the representatives of the community. Your opinions need not be unanimous. And you need not give reasons for your opinions.
8. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Madam and gentlemen assessors,

9. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of the Complainant, accept the entirety or even accept only a part of the Complainant's evidence and may reject the rest. You have to decide whether the complaint has spoken the truth or correctly recalled the facts and narrated them.
10. You have seen the demeanour of the Complainant and how she gave evidence in court. You have seen whether she was forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good

memory, some may not remember every detail. You have to use your common sense in assessing the reliability and credibility of a witness. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.

11. Generally, Complainants of sexual offences react differently when they got to narrate the traumatic experience they have gone through. Some may display obvious signs of distress, anxiety and restlessness, but some may not. Every witness has their own way of expressions when they give evidence about an experience, specially a traumatic one. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
12. Subsequent conduct of Complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may react instantly and report because of their education level, social status, financial independency and for other similar reasons. Some may not complain at once due to lack of education, social status, financial dependency or sometimes even to save relationships. There could be others, who react with shame, fear, shock or confusion, may not complain at once. A complainant's reluctance to report an incident could be due to many reasons. It could be social stigma which follows such incidents or cultural taboos in her society. Some may not even complain at all due to the fear that it may damage family ties. A Complainant may not be comfortable to report a matter to close family members due to the respect, fear, or due to the reluctance to openly discuss matters relating to sex with elders.
13. A late complaint does not necessarily signify a false complaint. Similarly, an immediate complaint does not necessarily demonstrate a true complaint. It is a

matter for you to decide what weight should be attached to the promptness or the lateness of the complaint.

14. Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next, about the same matter is called into question.

15. In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Credibility concerns honesty. Reliability may be different. A witness may be honest enough but have a poor memory or otherwise be mistaken.

16. According to the law the Prosecution must prove its case beyond reasonable doubt. For the Prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the Prosecution throughout the trial. For this purpose, the Prosecution must prove every element of the offences beyond reasonable doubt.

17. The Accused need not prove his innocence. The fact that the Accused did not give evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence. The burden is on the Prosecution to prove the guilt of the Accused. That means you must be satisfied that the State has proved every element of the offences beyond reasonable doubt. That doubt

should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the Prosecution proved every element of the offences, you must find him guilty.

18. You would have observed that on top of the second count of rape stated in the Information a phrase is noted as “representative count”. A representative count is a count by which the Prosecution alleges that several offences as described in the statement of offence were committed during the time period specified in the count. To prove a representative count, the law only requires the Prosecution to prove that at least one such offence was committed between the dates specified in the count. It simply means that if you are sure that at least on one occasion the Accused entered his penis into the vagina of the Complainant without her consent, during that period, you must find the Accused guilty to the representative count of rape.

Madam and gentlemen assessors,

19. We will now look at the offences that the Accused is indicted for. There are three counts of rape in the Information filed by the Director of Public Prosecutions as follows;

First Count

Statement of Offence

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

Particulars of Offence

Vakananumi Vunivesi between the 23rd day of November 2017 to the 13th day of January 2017 at Vunisei village in the Eastern Division had carnal knowledge of FN without her consent.

Second Count

Representative count *Statement of Offence*

Rape : Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Vakananumi Vunivesi Between the first day of January 2018 to the 31st day of December 2018 at Vunisei village in the Eastern Division had carnal knowledge of FN without her consent.

Third Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Vakananumi Vunivesi the 15th day of November 2019 at Vunisei village in the Eastern Division had carnal knowledge of FN without her consent.

20. You should consider each count separately. You must not assume that the Accused is guilty of the other counts just because you find him guilty to one count.

21. I will first explain what matters you must take into consideration to determine whether the offence of rape is proved by the Prosecution. The Prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vagina of the Complainant with his penis;
- c. without the consent of the Complainant; and

d. the Accused knew or believed that the Complainant was not consenting; or the Accused was reckless as to whether or not she was consenting.

22. The first element is concerned with the identity of the person who committed the offence. The Prosecution should prove beyond reasonable doubt that the Accused and no one else committed the offences. In this case the identity of the Accused is not disputed.

23. The second element involves the penetration of the Complainant's vagina with the penis. The law states that even the slightest penetration of the vagina is sufficient to constitute the offence of rape. Therefore, it is not necessary to have evidence of full penetration or ejaculation. The Prosecution must prove beyond reasonable doubt that the Accused penetrated the vagina of the Complainant with his penis to any extent.

24. The third and the fourth elements are based on the issue of consent. 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.

25. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. For the offence of rape, the Complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. Consent obtained through force, threat or intimidation, fear of bodily harm, or by use of authority is not considered as consent given freely and voluntarily. Submission without physical resistance by the Complainant alone, to the act of the other person will not constitute consent.

26. The Complainant must have the freedom to make the choice. It means she must not have pressured or forced to make that choice. The Complainant must have mental and physical capacity to make that choice. Further, the consent

given by the Complainant may have been limited to a particular sexual activity and not for another sexual activity. Also, the consent can be withdrawn at any time. It is an ongoing state of mind its revocable once given. Consent of a person for sexual intercourse cannot be assumed.

27. In addition to proving that the Complainant did not consent to the Accused to insert his penis into 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.

28. The Accused was reckless, if the Accused realised there was a risk that she was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the vagina, you may find that the Accused was reckless as to whether or not the Complainant was consenting. In other words, you have to see whether the Accused did not care whether the Complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the Prosecution who must prove it beyond any reasonable doubt.

29. If you believe that the Prosecution proved the relevant elements in respect of each offence you may find the Accused guilty of that offence or offences. Likewise, if you believe that the Prosecution failed to prove the relevant elements of any offence you must find the Accused not guilty for that offence or offences.

30. The parties in this case have agreed to certain facts. These facts are contained in a document before you titled as amended final admitted facts. These facts are not disputed by the parties and you can consider them as facts already proven beyond reasonable doubt. Those admitted facts are;

- i. That the Complainant in this matter is FN who is currently 17 years old student.

- ii. That Vakananumi Vunivesi is 36 years old, farmer.
- iii. That the Complainant and Vakananumi Vunivesi are known to each other as Vakananumi Vunivesi is the stepfather of the Complainant.
- iv. That during the time of the alleged offence stipulated in counts two and three of the Information, Vakananumi Vunivesi resided with the Complainant at Vunisei village in Rewa.
- v. That Vakananumi Vunivesi had sexual intercourse with the victim on the 15th day of November 2019.

Madam and gentlemen assessors,

31. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions.

32. The Complainant gave evidence that she was in Form 4 in 2019. She said that she is 18 years now. She said she had been living with her mother, stepfather, and her siblings in Vunisei from term 3 in 2017 until 2019. Her stepfather is Vakananumi Vunivesi and she identified the Accused as her stepfather.

33. The Complainant gave evidence about a few incidents. For clarity I will summarize evidence separately in respect of each count.

34. The Complainant gave evidence that during the third term in 2017 she moved to Vunisei to live with her mother, stepfather and the siblings. The Complainant said that during the school holidays in the third term of 2017 her stepfather started having sexual intercourse with her. According to her evidence the school holidays were in November and December. She gave evidence that one day during the school holidays they returned from farm and her stepfather told her to go inside the house and told her siblings to stay outside. She said her mother had gone to the market. She said that she was

told by her stepfather to take off her clothes and to lie down. According to her evidence he had told her to take off clothes like an order in a harsh way. She said she was scared and thought that he would whack her or do something else to her. When she took off her clothes, she said he inserted his penis into her vagina. The Complainant said it was hurting but she had to bear the pain.

35. The Complainant said that she was scared to tell her mother about this incident. She said that her mother would get upset and he would do something to them if her mother confronts him. She repeatedly said that she did not tell her mother as she thought her stepfather would get angry and he would do something to her and to her mother. She further said that she was not very close to her mother as it was her grandmother who brought her up.

36. That's the evidence given by the Complainant regarding the first count.

37. The Complainant gave evidence that her stepfather continued to have sexual intercourse with her during the year 2018. But she said that she could not recall any specific date. She said he inserted his penis into her vagina during the year 2018. She gave evidence that her stepfather used to do that most of the times when she came back home after school and when her mother was at work. She said that's she did not consent for her stepfather to have sexual intercourse, but she had to do it. She said she was scared and if she did not do it, he would threaten her. She said that she did not tell her mother as she was scared.

38. That was the Complainant's evidence in respect of the second count.

39. During the latter part of her examination in chief, the Complainant gave evidence regarding an incident that happened on a Monday. Although she initially said that it was a Monday in the year of 2018, she later corrected it by saying that it was a Monday in November 2019.

40. The Complainant testified that after she came from school on that day, she was alone at home. She said her stepfather came home and closed the door and told her to take off her clothes. She said that she took off her clothes as the stepfather could get angry if she did not do that. She gave evidence that her siblings were outside feeding the pigs, but she did not call for help as she was scared that the stepfather would do something to them. She said that her stepfather was harsh on the siblings and he would growl at them and smack them when he is angry.
41. The Complainant said that she was told to lay down and when she laid down the stepfather inserted his penis into her vagina and had sexual intercourse with her. The Complainant said that she did not do anything, as if she had done something, he would forcefully do it to her. The Complainant further said that after having sexual intercourse her stepfather told her that he would have sexual intercourse with her again on Friday. She said she felt angry and made up her mind that she would not have sexual intercourse with him on Friday. She said when her mother came back from work, she was scared to tell her mother. She said when she went to school on Friday she did not come back home and went to Nakini with her friends.
42. According to the evidence given by the Complainant she had gone to Nakini with her friends for a swim on 07 November 2019. She said that her friends came back after the swim and she stayed back with a friend named, Sainimili. The Complainant said that Sainimili's brother told her that he admires her, and he placed a love bite on her neck. She said she stayed at Nakini from Friday till Monday and she went to Mokani. She said that her mother came to Mokani as she left home on Friday without telling her mother. The Complainant said that although her mother told her to go back home, she was scared to go back, and she went to Nakini again. She had stayed at Nakini from Monday to Thursday and on Thursday, 14 November 2019 her mother had come and taken her home.

43. The Complainant testified that when she woke up the next day, 15 November 2019, her stepfather saw the faded love bite on her neck. She said he was angry and started punching her. The Complainant gave evidence that her mother then stopped him punching her and her mother left for work.
44. She said after her mother left, she was having her tea when the stepfather came and told her to go into the living room. She said the stepfather told her to go inside in an angry tone. According to the Complainant's evidence they had one room inside the living room which is partitioned by a curtain. She said that she was told to draw the curtains of that room and to lie down. She said she was scared. She further said that the stepfather told her to undress and at the same time he took off her clothes. She gave evidence that she was told to lie down, and the stepfather then came on top of her. She further said that he inserted his penis into her vagina and had sex with her. The Complainant said that she was crying but he kept on doing that. Then he had stood up and gone to the farm.
45. The Complainant gave evidence that she was still lying down as she had a swollen face and body pains. She testified that her body pains were due to the punches she received on her face and on her ribs. She also said that she was having pains in her vagina too. She said that she did not give him consent to have sexual intercourse with her. She said that since the stepfather punched her, she did not give consent for him to have sexual intercourse. She further said that he hurt her by punching her and she hated him for having sexual intercourse with her. She further said that he should not be having sexual intercourse with her as he was her stepfather.
46. The Complainant said that her mother had reported the assault incident to the Police, and she came back with the Police. The Complainant said that she made a statement to the Police about the assault by her stepfather. After reporting the assault on her to the Police the Complainant had left for Mokani with her mother and the siblings.

47. The Complainant said that when she went to Mokani she informed her mother that her stepfather was always having sexual intercourse with her. She said that she wanted to explain it to her mother before reporting to the Police as he was her husband, and she did not want her mother to get hurt by knowing what she did was wrong. She further said that she did not want her mother to think that she was having an affair with her stepfather. She said that she had so much on her plate, and she had to think about the house and her siblings and that was why she waited to go home to tell the mother first.
48. The Complainant said that she told her mother that the stepfather had sexual intercourse with her after punching her. She also said that she told her mother that she did not consent to the sexual intercourse. She said then her mother took her to the Police Station again to report about her stepfather having sexual intercourse with her.
49. That's the evidence given by the Complainant in respect of the third count.
50. During the cross examination the Complainant said that she was not close enough with her mother to share personal details with her mother. She said that she would not be able to share the allegation against her stepfather with her mother. She said during cross examination that her stepfather assaulted her as he was feeling jealous after seeing the love bite.
51. When it was suggested to the Complainant that she was in a mutual relationship with the step father and that was the reason why she did not complain to the Police, she denied the suggestion. However, she admitted that she was worried about her mother's opinion and that was why she did not report to the Police in the first instance. During the cross examination the Complainant confirmed that she was scared of her stepfather. The Complainant admitted that she made the statement to the Police on 16 November 2019.

52. The Complainant denied that she came to stay with her mother at Vunisei in the first term of 2018. She said that it was in 2017 that she came to live in Vunisei. During the cross examination the Complainant said that she denied having a relationship with her stepfather when her mother asked about it.

53. During the reexamination the Complainant said that her stepfather was smacking her as if she was his wife. She said her stepfather was jealous and she told her mother that the reason for smacking her like that was because he was having sexual intercourse with her. She said that she did not straightaway report to the Police as she did not want her mother to think bad of her. She also said that there were previous instances where her mother used to ask her whether she was having a relationship with the stepfather for the manner in which he used to treat her. She finally said "Because she (her mother) was just asking me on the day I reported to her because of the bruises, she was asking me, that is not the way he should smack and teach you. Tell me the truth, so I told her that he was having sexual intercourse with me."

54. After the closure of the Prosecution case the Accused was explained his rights. You must bear in mind that although those options were given, still the burden is on the Prosecution to prove the guilt of the Accused and he need not prove his innocence. The Accused opted to remain silent and no witnesses were called for the defence.

Madam and gentlemen assessors,

55. It should be noted that in our law no corroboration is needed to prove a sexual offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, the Prosecution can solely rely on the evidence of the Complainant only without any supporting evidence whatsoever in sexual

offences. It is for you to decide how credible and consistent is the evidence of the Complainant.

56. It is the prerogative of the Prosecution to decide, what witnesses will be called to give evidence and what evidence they will rely upon. You should make your opinion on the evidence adduced in this court room and you are not to speculate about what would have been said by a person who was not called as a witness. In this case the Prosecution called only the Complainant. That is the right of the Prosecution and you must not make any adverse inferences by the fact that the Prosecution did not call any other witnesses.

57. The Prosecution case was that the Accused started having sexual intercourse with the Complainant without her consent during the third term school vacation in the year 2017. Further the Prosecution alleges that in one or more occasions in 2018 the Accused continued to have sexual intercourse with the Complainant without her consent. Lastly the Prosecution alleges that the Accused had sexual intercourse with the Complainant without her consent on 15 November 2019.

58. As per the admitted facts the Accused admits that he had sexual intercourse with the Complainant on 15 November 2019. Therefore, the only issue that you have to consider in respect of the third count is whether the Complainant consented or not. For that you must consider whether the Prosecution proved the element of “without the consent of the Complainant” beyond reasonable doubt.

59. In view of the line of cross examination the Defence denies the other alleged incidents relating to the first and second counts. In respect of the first and second counts the Prosecution has to prove that the Accused had sexual intercourse with the Complainant and he did so without her consent beyond reasonable doubt.

60. The Complainant explained the reasons for the delay in reporting the matter. Also, I have explained to you before what consent means. It is for you to decide whether the Complainant's evidence is reliable and credible.

61. The Accused opted to remain silent. I must remind you that you must not draw any adverse inference from the fact that the Accused remained silent. It is his right.

62. As it was said before, it is the duty of the Prosecution to prove the elements of each offence against the Accused. The Accused need not prove his innocence.

63. I have now given you the directions of law and summarized the evidence adduced in this case. Before I conclude my summing up let me remind you some points again.

64. If you believe that the Prosecution has proved beyond reasonable doubt the elements of rape in respect of the first, second and third counts you may find the Accused guilty to respective counts.

65. If not, you must find the Accused not guilty to those respective counts.

66. Finding the Accused guilty to one or a few counts does not automatically make him guilty for the other count or counts. You must consider relevant evidence separately for each count when arriving at your opinions.

67. Your possible opinions are;

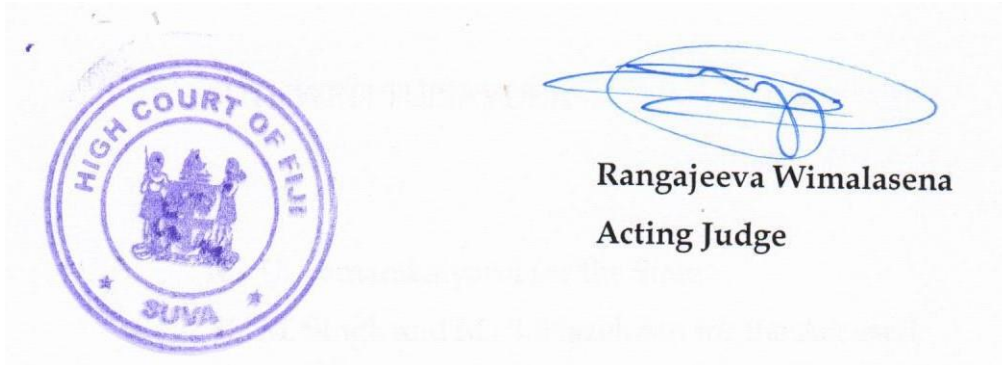
Count 1: rape- guilty or not guilty

Count 2: rape - guilty or not guilty

Count 3: rape- guilty or not guilty

68. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

69. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



At Suva

21 January 2021

Solicitors

Solicitors for the State: Office of the Director of Public Prosecutions

Solicitors for the Accused: Office of the Legal Aid Commission