

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

CRIMINAL CASE NO. 166 OF 2019

STATE

V

CHAD BEN EVERS

Counsel: Ms S Shameem for the State
Accused in Person

Date of Hearing: 25 – 26 January 2021

Date of Summing Up: 26 January 2021

SUMMING UP

- [1] Ladies and Gentleman 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 reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of that charge.
- [6] The Accused has decided to represent himself. He is entitled to do this. The fact that the Accused is representing himself has no bearing on your opinion and you must not hold that against him.
- [7] The Accused has chosen to give evidence. The Accused was not obliged to give evidence. He does not have to prove his innocence. He does not have to prove anything. However, he has chosen to give evidence. You must take what he has said into account when considering the issues of fact which you have to determine. It is for you to decide whether you believe the evidence of the Accused or whether it may be true. If the account given by the Accused is or may be true, then the Accused must be acquitted of the charges. But even if you entirely reject the account given by the Accused, 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.

- [8] 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.
- [9] 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 his or her individual opinions orally on the charges against the Accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.
- [10] 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. Those opinions must be based solely upon the evidence, that is, the sworn testimony of the witnesses that was called at the trial.
- [11] 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 read in the newspapers about this case. Focus solely on the evidence which you have seen, heard, or examined in this court.
- [12] This summing up is not evidence. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [13] 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.
- [14] 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 witness's evidence and demeanour. You can accept part of the witness's testimony and reject other parts. The witness may have told

the truth about one matter and lie about another; or he or she may be accurate in saying one thing and be wide of the mark about another.

- [15] 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.
- [16] I turn now to deal with what the prosecution must prove. The Accused is charged with two counts. But you must consider each count separately, when you examine the case in your deliberations. Look at the evidence as it affects each count separately. Your opinions about the charges could differ from one to the other, depending on the view you took on each count and the evidence available on each count.
- [17] On both counts the Accused is charged with the offence of sexual assault. On count one the prosecution alleges that on the said date and place the Accused unlawfully and indecently assaulted the complainant, a child under the age of 13 years by rubbing his penis against her buttocks. On count two the prosecution alleges that on the said date and place the Accused licked the vagina of the complainant a child under the age of 13 years with his tongue.
- [18] An assault in law means intentional touching or application of force or threat of touching or application of force without the consent of the complainant. For the Accused to be guilty of sexual assault, the prosecution must prove beyond reasonable doubt that the Accused unlawfully and indecently assaulted the complainant on the two alleged occasions. The word "unlawfully" means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. In this case, the complainant was under the age of 13 years, and therefore, she did not have the capacity to give consent to any sexual acts.
- [19] So the issues for you to consider on each count are:

1. Whether the Accused intentionally did an act to the complainant?
2. That the act was unlawful, that is, without lawful excuse?
3. Would the right-minded persons consider the said act to be indecent?

[20] I turn now to summarize the evidence. In doing this it would be tedious and impractical for me to go through the evidence in detail and repeat every submission made by counsel or the Accused. I will summarize the salient features. If I do not mention a particular piece of evidence or a particular submission 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.

[21] You must accept the admitted facts as true and accurate when you consider the charges in this case. In summary the following facts are not in dispute. The Accused is the stepfather of the complainant. The complainant lived with her mother and her stepfather at Delainavesi, Lami in October 2018. The complainant lived with her mother and her stepfather at Balabala Crescent, Newtown between November 2018 and March 2019.

[22] The first prosecution witness was the child complainant. Her birth certificate is marked PE 1. She was born on 31st August 2009. She is 11 years of age. She gave evidence behind a screen. The giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness give. The fact that the evidence had been given by the complainant using a screen must not in any way be considered by you as prejudicial to the Accused.

[23] In relating to the first alleged incident the complainant said that she was asleep on a mattress in the sitting room of her home when the Accused rubbed his ‘balls’ on her buttocks over her clothes. She said she recognized the Accused by his voice when he asked her to touch his balls which she refused. She said when the incident occurred her mum was asleep and one other relative was outside on the porch drinking kava. She said the incident happened at night when she staying at Delainavesi.

- [24] In relating to the second alleged incident the complainant said she was playing with the Accused in the sitting room after waking up early in the morning when he leaped to her and licked her vagina over her underwear. She said when the incident occurred it was still dark and her mother was outside. She said she did not report the incident to anyone because she was shy and was afraid of the Accused.
- [25] At this stage I must give you a direction on identification. This is a trial where the case against the Accused depends substantially on the correctness of identification of him at night without lights. To avoid the risk of any injustice in this case, such as has happened in some cases in the past I must therefore warn you of the special need for caution before finding the Accused guilty in reliance on the evidence of identification alone to convict the Accused. A witness who is convinced in her own mind may, as a result, be a convincing witness, but may nevertheless be mistaken. Mistake can also be made in the recognition of someone known to a witness, even of a close friend or relative. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.
- [26] You should therefore examine carefully the circumstances in which the identification by the complainant was made. How long did she have the person she says was the Accused under observation? At what distance? In what light? Did anything interfere with the observation?
- [27] The complainant is a child. Her account of how she identified the Accused is not very clear. She said that she recognized the Accused by his voice because he spoke to her on both occasions during the incidents. She said she was playing with the Accused immediately before the second alleged incident occurred. You may take all these matters into account in determining whether the complainant is accurate and not mistaken in identifying or recognizing the Accused as the person who did the alleged acts to her.
- [28] The next witness was the complainant's mother. Her evidence was that she was not aware of the alleged incident until 11 March 2019 when she returned home from a prayer meeting, she saw the Accused touching the complainant's buttocks and the complainant was saying don't. The complainant was unwell that day and she had sponged her before

leaving her at home with the Accused to go to a prayer meeting. She said she confronted the Accused about what she witnessed that night and reported the incident to police.

[29] I need to give a further direction on the mother's evidence. The incident referred by the mother in her evidence is an uncharged act, that is, not subject of the charges. There was also some evidence led from the complainants of acts that are uncharged acts. It is important that I explain to you the relevance of this evidence. The relevance of the uncharged acts is to place the evidence of the charged acts into a true and realistic context. It is confined, in other words, to making the circumstances of the particular offences charged more intelligible. Otherwise, you may wonder about the likelihood of apparently isolated acts occurring suddenly without any apparent reason or how the allegations came to light.

[30] However, I must give you certain important warnings with regard to this evidence of uncharged acts, which can be referred to as context evidence. You must not use this evidence of other acts as establishing a tendency on the part of the Accused to commit offences of the type charged, and, therefore, it cannot be used as an element in the chain of proof of the offences charged. You must not substitute the evidence of the other acts for the evidence of the specific offences charged. You must not reason that, because the Accused may have done something wrong to the complainant on another occasion, he must have done so on the occasion charged. The only use you can make of this evidence if you accept it to be true is to place the charged acts into a realistic context.

[31] That is a summary of the evidence of the prosecution witnesses.

[32] The Accused in his evidence denies the allegations against him. The defence case is one of denial of the charges and that the allegations of sexual assault are fabricated by the complainant with the help of her mother with whom he had constant domestic arguments.

[33] Ladies and Gentleman Assessors, the resolution of the charges are depended upon whether you believe the account of the complainant as true and her identification of the Accused as accurate. On each count of sexual assault, if you believe the account of the complainant as credible and her identification of the Accused as reliable, and if you feel

sure that the Accused committed the alleged sexual act on the complainant then you may advise me that he is guilty. But if you do not believe the account of the complainant, or if you are not sure of her identification of the Accused or if you have a reasonable doubt as to the guilt of the Accused, then you must find the Accused not guilty in respect to that charge. Remember to consider each count separately.

[34] On each count, your opinions would be either guilty or not guilty. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them.

[35] Please now retire to deliberate on your opinions.

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Hon. Mr Justice Daniel Goundar

Solicitors:
Office of the Director of Public Prosecutions for the State
Accused in Person