

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

High Court Criminal Case No. HAC 149 of 2014

BETWEEN : STATE

AND : PENISONI LAGILAGI

Counsel : Mr Seruvatu for the State
Ms Vulimainadave for the Accused

Dates of Hearing : 25 & 27 June 2019

Closing Speeches : 27 June 2019

Date of Summing up: 28 June 2019

(The complainant will be referred to as RT)

SUMMING UP

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. 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 opinion with that evidence.
3. You must base your opinion only and only on the evidence given by the witnesses. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence. A suggestion put to a witness is not evidence. 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 given by the witnesses in this case, you must disregard such information.
4. You may act only upon the evidence given by the witnesses 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 opinion. You will also not let any sympathy or prejudice sway your opinions. Emotions has 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 opinion based on the emotions, sympathies, prejudices, speculations and morality. As I said before you only have to consider the evidence given by the witnesses in this case and nothing else to form your opinion.

6. I will give you only a summary of evidence. I will not go through every word uttered by the witnesses 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. You may reject or accept any evidence in forming your opinion. 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.

Ladies and gentleman 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 a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated them.
10. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were 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 and it is also likely that some may perceive the same incident differently and narrate differently. You have

to use your common sense in assessing the reliability and credibility of witnesses. 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 maturity, education level, social status, financial independency and for other similar reasons. Some may not complain at once due to immaturity, lack of education, social status and financial dependency. A complainant's reluctance to report an incident could be due to many reasons. 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; Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem

to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.

15. It must be noted that according to the law sexual offences do not require other evidence to corroborate the evidence of the complainant. Which means you can even solely rely on the evidence of the complainant without any other evidence to support it.
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 offence 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 first and second counts 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.

Ladies and gentleman assessors,

19. We will now look at the offences that the Accused is indicted for. There are two representative counts of indecent assault and one count of rape in the Information filed by the Director of Public Prosecutions as follows;

First Count (representative count)

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Act 44 of 2009.

Particulars of Offence

Penisoni Lagilagi between the 28th day of April, 2014 and 2nd day of May, 2014 at Ra in the Western Division, unlawfully and indecently, assaulted RT.

Second Count (representative count)

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Act 44 of 2009.

Particulars of Offence

Penisoni Lagilagi between the 12th day of May, 2014 and 31st day of October 2014 at Nadi in the Western Division, unlawfully and indecently assaulted R T.

Third Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 44 of 2009.

Particulars of Offence

Penisoni Lagilagi on the 01st day of November 2014, at Nadi in the Western Division, penetrated the vagina of R T, a 9 years old girl, with his finger.

25. 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.
20. The first and the second counts are indecent assault. To prove the offence of indecent assault, the prosecution must prove the following elements beyond reasonable doubt;
- a) the Accused;
 - b) unlawfully assaulted the complainant; and
 - c) the said assault was indecent.
21. The first element involves the identity of the Accused who committed the offence. The prosecution should prove beyond reasonable doubt that it was the Accused who committed each offence. The identity of the Accused is not disputed. It is admitted that the Accused in this case is Penisoni Lagilagi.
22. Assault is the use of unlawful force. A touch constitutes an assault if it is done without a lawful excuse. The word “unlawfully” simply means without lawful excuse.
23. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent.
24. As I mentioned before first and second counts are representative counts and if any of the incidents related to by the complainant falls within the period stated in the offence and the evidence relating to at least one such incident proves the elements of the offence of indecent assault you can find the Accused guilty for that offence. Likewise, if you believe that the prosecution failed to prove the

elements of indecent assault with the evidence of any such incident during the relevant period you must find the Accused not guilty for that offence or offences.

26. Now I will 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 finger;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complaint was not consenting; or the Accused was reckless as to whether or not she was consenting.

27. 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 offence. The identity of the Accused is not in dispute in this case.

28. The second element involves the penetration of the complainant's vagina with his finger. The law states that even the slightest penetration of the vagina is sufficient to constitute the offence of rape. For the offence that the Accused charged with in this case the penetration is not by a penis. The offence is constituted by penetration of the vagina with a thing or a part of the body of the Accused that is not a penis. Therefore, the prosecution must prove beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his finger to any extent.

29. The third and the fourth elements are based on the issue of consent. However, the law says that a child under the age of 13 years is incapable of giving consent. You will see in the amended admitted facts that the parties have admitted that the complainant was 9 years old at the time of the alleged offence. Therefore,

the Prosecution does not have to prove whether the complainant consented or not, because consent is not relevant to the charge of rape in this case. So, you don't have to consider the issue of consent in the third and fourth elements that I just mentioned to you.

25. If you believe that the prosecution proved the relevant elements of rape you may find the Accused guilty for the third count. Likewise, if you believe that the prosecution failed to prove the relevant elements of rape you must find the Accused not guilty to the third count.

Ladies and gentleman assessors,

26. 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. The prosecution called three witnesses to prove the case against the Accused.

27. The complainant gave evidence that between 28 April 2014 to 2 May 2014 she was staying in Nukulu, Ra with her parents. The complainant said that one day when her parents were not at home, her grandfather called her to fetch some water. After a while Penisoni Lagilagi had called her to scratch his back. She said when she was scratching his back, Penisoni Lagilagi started touching her legs. She said that he touched her on top of her clothes. The complainant had quickly scratched his back so that he can release her to go back home. She said that she was a little bit afraid. She had not told her parents about it as she thought that they would think she is lying and would hit her.

28. The complainant gave evidence about another incident happened on 02 May 2014. She said when she was on her way to the church Penisoni Lagilagi was beside an empty house and he called her. She said when she went to him he knelt down and started touching her. She also said that he touched her from her feet and went up to her hips. She said that he touched her under her clothes but did not touch her vagina. The complainant said that when the church bell

started ringing she told him to let her go. Then he had released her. She said that she was scared and confused. She further stated that she was confused as she was his niece.

29. The complainant gave evidence that between 12 May 2014 and 31 October 2014 she was staying at her aunt's place in Nadi. She said that Penisoni Lagilagi also came to stay at her aunt's place to cut sugar cane. The complainant said that once during that period when she was in her study room Penisoni Lagilagi came and started touching her. She said that he was kneeling down and he touched her under her clothes. She also said that he touched her vagina. She had told him not to do that to her. The complainant said then her aunt called her to fetch some water.

30. She gave evidence about another incident which happened in one morning. She said that Penisoni Lagilagi called her into his room. She was wearing a skirt and a T shirt. When she went to him he had pulled down her clothes up to her knee. The complainant said that he touched her from down and was coming upwards. She said then he massaged her vagina. She said that he touched her vagina inside her panty. She also said that she was scared and she did not tell her aunt as she was not sure whether her aunt would believe her.

31. The complainant gave evidence regarding another incident that happened when her aunt and her little sister were watching a video. She said then Penisoni Lagilagi called her to his room and started touching her. He had pulled down her panty and had touched her vagina. The complainant said she did not call her aunt as she was afraid. The complainant said that they were just families and they might not believe her.

32. The complainant said that the indecent relating to the third count happened on 01 November 2014. She had been staying at her aunt's place at that time. The complainant said that was sleeping in a room with her Aunty Mere and her little sister. When her little sister went to brush her teeth Penisoni Lagilagi had

come and had lied beside her. She said her aunty was a bit away sleeping on another mattress. The complainant said that Penisoni went down up to her hips and pulled down her pants. She said that he put his hand inside her panty and massaged her vagina. Then he had put his finger into her vagina according to the complainant. She said it was his little finger as she saw some jelly like thing on his finger after he took it out. The complainant said that it was painful when he put his finger into her vagina.

33. She also said that Aunty Mere woke up and just got off the bed. Her aunt had gone outside the room and had called her. She said that she was afraid to go outside and then her aunt had taken her out of the room. The complainant said that she did not tell aunty Mere when she was asked about what happened. She said she was scared to tell her. The complainant said only when her other aunt, Talumeci came and asked about it she told her about what Penisoni Lagilagi did to her.

34. The complainant identified the Accused as Penisoni Lagilagi. She also said that the Accused is her uncle and she is ashamed of what he did to her.

35. During the cross examination it was suggested that none of the incidents happened. However, the complainant confirmed that all the incidents that she mentioned had actually happened. It was also suggested to the complainant that her aunt, Mere was having an affair with the Accused. The complainant said she is unaware of such thing. It must be noted that a mere suggestion is not evidence unless it is accepted by the witness.

36. The second prosecution witness was Mere Lewanakovu. She said that the complainant is her niece. The witness identified the Accused as her cousin. She referred to him as Miqu. She said that on 01 November 2014 she was sleeping in the same room with the complainant and her other niece. The witness said that she did not know how the Accused came to the room, but she heard the complainant and the Accused were making noises on a mattress about 15 feet

away from her. According to the witness the complainant and the Accused were laughing out loud and after a while she had not heard any noise. She said then she saw that the Accused was facing the complainant and his head was leveled with her waist. The witness further said that the hands of the Accused were placed on the sides of the pubic area of the complainant. She showed the court by placing her hands on the sides of pubic area. The witness said that when she saw it she went out of the room and called the complainant to come out. When the complainant did not come out the witness had gone inside the room again and had brought the complainant out. She also said that she was angry and informed her sister Talumeci.

37. Under cross examination she said that she only saw the Accused's hand on the sides of the complainant's private part. She denied that she was in an affair with the Accused.

38. The prosecution called the doctor who medical examined the complainant. Dr Shareen Shanilta Prasad tendered the medical report of the complainant as Prosecution Exhibit 1. She said that the hymen of the complainant was not intact, and she did not observe any lacerations or abrasions. She explained that the hymen is a thin membrane in the vagina and strenuous physical activities or any form of penetration of the vagina, could lead to hymen not being present. She did not rule out that a finger can cause the hymen being not intact and she said that it would depend on the size of the finger, the amount of force and also the amount of resistance by the victim. She said that she examined the complainant about 9 days after the alleged incident and by that time lacerations or abrasions could have been healed.

39. Under cross examination the witness said that she can only say that the hymen was not intact, and she cannot make a conclusion about what caused it.

40. That was the case for the prosecution.

41. 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. I must remind you that you must not draw any adverse inference from the fact that the Accused remained silent. It is his right.

Ladies and gentleman assessors,

42. 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.

43. The prosecution case was that the Accused indecently assaulted the complainant in several occasions and he penetrated the vagina of the complainant with his finger in another occasion.

44. As per the line of cross examination the Accused denies all the allegations.

45. 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.

46. 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.

47. If you believe that the prosecution has proved beyond reasonable doubt the elements of indecent assault in respect of the first and second counts and the

elements of rape in respect of the third count, you may find the Accused guilty to respective counts.

48. If not, you must find the Accused not guilty.

49. 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.

50. If you have a reasonable doubt in respect of any count, then you must find the Accused not guilty to that count or counts.

51. Your possible opinions are;

Count 1 indecent assault-	guilty or not guilty
Count 2 indecent assault-	guilty or not guilty
Count 3 rape-	guilty or not guilty

52. 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?

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




Rangajeewa Wimalasena
Acting Judge

Solicitors

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

Solicitors for the Accused: Office of the Legal Aid Commission