

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 97 OF 2013

STATE

-v-

VIJAY KUMAR

Counsels : Ms. K. Semisi for the State
Mr. R. Kumar for the accused

Date of Trial : 8 November - 14 November 2013

Date of Summing Up : 14 November 2013

(Name of the victim is suppressed. She is referred to as AS)

SUMMING UP

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me – as the Judge who presided over this trial –to sum up the case to you on law and evidence. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I

express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.

4. In other words you are the Judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the Defence Counsel made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the Defence Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As assessors, you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

12. In accessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.

13. I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinions. That is – as you could hear from evidence – this case involved an alleged incident of rape of a child. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law, to which every one of us is subject to. I will deal with the law as it is applicable to the offence with which the accused-person is charged, in a short while.

14. In this case the prosecution and the defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of court time.

15. The agreed facts of this case are:

AS is the complainant in respect of this matter.

AS was born in Hayward, Alameda, The United States of America on 17 February 2005 to Sujit Kumar Singh (father) and Asha Lata (mother).

Vijay Kumar, who is the accused in this case, is related to the complainant. He is her grandfather.

On 7 April 2013, AS stayed with her maternal grandparents Vijay Kumar (grandfather) and Madhur Lata (grandmother).

AS is a student at Sabeto Sangam School.

Vijay Kumar is also known as Viju.

16. The charge against accused is as follows:

FIRST COUNT
Statement of Offence

RAPE: Contrary to Sections 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

VIJAY KUMAR on the 7th day of April 2013, at Nadi in the Western Division, penetrated the vagina of **AS**, an 8 year old girl, with his finger.

17. I will now deal with the elements of the offence. The offence of rape is defined under Section 207 of the Crimes Decree. Section 207(1) of the Decree makes the offence of rape an offence triable before this court. Section 207 (2) states as follows:

A person rapes another person if:

- (a) The person has carnal knowledge with or of the other person without other person's consent; or
- (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
- (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

18. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man of the vagina of a woman to any extent. So, that is rape under Section 207 (2) (a) of the Crimes Decree.

19. If a person penetrates the vagina to any extent with a part of another's body, which is not the penis of that person, without the consent of the woman, that is rape under Section 207 (2) (b).

20. So, the elements of the offence of Rape in this case are that the accused **penetrated the vagina of victim to some extent with part of other person's body (finger)** which means that the insertion of finger fully into vagina is not necessary.

21. Other parts of the offence are irrelevant to the facts of this case.

22. Consent as defined by Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a woman with a necessary mental capacity to give such consent. A woman under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The girl in this case was only 8 years of age and, therefore, she did not have the capacity under the law to consent. So, the prosecution does not have to prove the absence of consent on the part of the girl because law says that she, in any event, cannot consent.
23. Apart from the elements of the offence, the identity of the person who alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person and connect him to the offence that he alleged to have been committed.
24. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. In this case, for example, the alleged victim was witness who offered direct evidence, if you believe her as to what she saw, heard and felt.
25. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, Medical Report is an example, if you believe that such a record was made. Then you can act on such evidence. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time on the document upon examination of the victim.
26. Expert evidence is also important to borne in mind. Usually, witnesses are not allowed to give opinions. They can give evidence about what they saw, heard or felt through their physical senses only, as described earlier. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions express on a particular fact to aid court and you to decide the issues/s before court on the basis of their learning, skill and experience.
27. The doctor in this case, for example, came before court as an expert witness. The doctor, unlike any other witness, gives evidence and tells us his conclusion or opinion based on examination of the victim. That evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if his reasons are convincing and acceptable to you; and, if such opinion is reached by considering

all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence in the case.

28. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

Test of means of opportunity: That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically crated just out of a case against the other party.

Probability and Improbability: That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

Belatedness: That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

Spontaneity: This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

Consistency: That is whether a witness telling a story on the same lines without variations and contradictions. You must see whether a witness is shown to have given a different version elsewhere. If so, what the witness has told court contradicts with his/her earlier version. You must consider whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of another, for example by a police officer in recording the statement where the witness is alleged to have given that version.

You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.

You must also consider the issue of omission to mention something that was adverted to in evidence on a previous occasion on the same lines. You must consider whether such omission is material to affect credibility and weight of the evidence. If the omission is so grave, you may even consider that to be a contradiction so as to affect the credibility or weight of the evidence or both.

In dealing with consistency, you must see whether there is consistency *per se* and *inter se* that is whether the story is consistent within a witness himself or herself and whether the story is consistent between or among witnesses. In deciding that, you must bear in mind that the evidence comes from human beings. They cannot have photographic or videographic memory. All inherent weaknesses that you and I suffer, in so far as our memory is concerned, the memory of a witness also can be subject to same inherent weaknesses.

Please remember that there is no rule in law that credibility is indivisible. Therefore, you are free to accept one part of a witness's evidence, if you are convinced beyond doubt and reject the rest as being unacceptable.

29. You need to consider all those matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.

30. I will now deal with the summary of evidence in this case.

31. Prosecution called AS, the victim as the first witness. She is 8 years old. At the time of the incident she was staying with her grandparents at Nasoso. She stated that one night she went to sleep around 8 o'clock on a mattress in the sitting room with her grandmother and uncle. She got up feeling someone inserting a finger to her vagina. She was sitting on her grandfather's lap when he put his finger into her vagina. She had started crying. She had pain in her vagina and told grandfather not to do it. The grandfather had told her not to cry. She had stopped crying. Then grandfather had made her wear her pants and put her to sleep. He had switched off the TV and went away. She had told her grandmother about this incident when she woke up next day. She was advised to go and make a complaint to her head teacher. She had informed the head teacher. She had also told this to two female teachers.

32. The teacher had called the Police. When Police came head teacher had asked her to tell everything to Police. She had done so. She was taken to the Nadi hospital where a male doctor examined her in the presence of a female nurse. She had told doctor what happened. Doctor had examined her private parts and medicine was put on her private parts. She was taken to police station and her statement was recorded.
33. Under cross examination, she said that she was sleeping on a small mattress while her grandmother and uncle were sleeping on a big mattress. She also said it was raining and the TV was on when she went to sleep. She said that she screamed a little bit when the grandfather inserted his finger into her vagina. But her grandmother did not hear this. There was Rugby match on the TV. She denied that it was her grandmother who put her finger into her vagina at the time of washing her.
34. You watched her giving evidence in court. What was her demeanour like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of AS beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charge.
35. The second witness for the prosecution was Madur Lata. She is the grandmother of the victim. On the date in question in the morning AS had told her that grandfather put his finger into her vagina before going to school. She had told AS to go and report this to teacher. When she went to bed that night the accused was watching Rugby on TV.
36. She was cross examined in length by the defence. She denied that the victim was sleeping with her on the same mattress that night. According to her, the victim was sleeping separately every night. She admitted calling head teacher twice that day. She said that she told about that in the police statement. However there is no mention of that in her police statement. This was brought to your attention as omission by the defence. You have to decide as a reasonable person making a statement such omissions could occur or this had happened as she is telling something which is not truth. She said that she didn't call Police as she didn't want any fight with the accused. However she admitted that Police will come home after the victim informed the matter to the head teacher. She denied that she had an affair with her daughter's father-in-law who is in USA. She further said that she hasn't seen

him or met him. She further denied that she used her own granddaughter as bait to get all the accused's properties.

37. You saw her giving evidence in Court. She had given prompt answers to questions put to her by the defence counsel. It is up to you to decide whether you could accept her evidence beyond reasonable doubt. If you accept her evidence it corroborates the evidence of the victim AS regarding recent complaint.
38. Prosecution called Doctor Eliko Nanovo as the next witness. He is a doctor with twelve years experience. According to him on 9.4.2013 he had examined the victim AS at the Nadi hospital. She was 8 years old. The victim had given a history that her vagina was penetrated by the grandfather. The victim looked distressed and he found that the hymen was torn. Further there was swelling in the Labia majora. This injury could have been caused by penetration with something. The victim complained of pain in passing the urine. It was a recent incident as the injury was inflammable.
39. Under cross examination he said that victim came alone and she told what happened. He could not say as to who penetrated the vagina. There were no other physical injuries.
40. The doctor is an independent witness. If you believe his evidence there is evidence of penetration to vagina which was result of recent insertion of something into vagina.
41. The last witness for the prosecution was Cpl. Kelera. She is an officer with 26 years experience as police officer. She is the investigating officer of this case. Matter was reported by head teacher of the Sabeto Sangam School on 9.4.2013. She had gone to the school and accompanied the victim to the Nadi hospital. Victim was medically examined. Then victim was accompanied to Namaka police station where her statement was recorded. She had visited the scene and recorded the statements of other witnesses. She had arrested the accused same day. He was interviewed under caution and charged.
42. Under cross examination she said that only one statement was recorded from the grandmother of the victim. Further accused was asked about semen being present in panty as grandmother had told her that the bottom of the panty was hard and dry when she washed it.
43. After the prosecution case was closed you heard me explaining the accused his rights in defence.

44. The Accused elected to give evidence. He said that victim's mother who is in USA got divorced from victim's father and married an American who had three kids from an earlier marriage. The victim and her brothers were fighting, swearing and damaging property of step father's house. Thus his daughter and new husband had fights. Victim's grandmother went to USA for 6 months to look after the kids.
45. On the date of incident he watched 9.30 p.m. news on TV and went to bed with his five year old daughter. At that time the victim was sleeping on a sponge in the sitting room while his wife and son were sleeping on a mattress. He denied the allegation against him. He further said that his wife must have been the cause of that as she wants to take back the kids to USA somehow.
46. His wife is not sleeping with him and always fights with him and telling him that I will put you in jail. The wife wanted to go to USA again but he refused to sign the spouse consent form. But she has multiple visa and she could go to USA if she wants. Wife visited him till 2nd July and now she had obtained a DVRO against him.
47. Under cross examination he admitted that he stated to police that he had a good relationship with the family. But according to him he said so as he thought that fights will grow bigger and family will be ruined. He further said that victim had no problem with him prior to the incident and there is no reason for her to make a false allegation against him.
48. You watched the accused giving evidence in court. What was his demeanour like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? The position taken up by the accused in giving evidence in the court regarding the problems in his family is different from his caution interview statement, and the position taken up by him at the time of cross examination of prosecution witnesses. In other words his version is inconsistent. It is up to you to decide whether you could accept his version and his version is sufficient to establish a reasonable doubt in the prosecution's case. If you accept his version, accused should be discharged. Even if you reject his version still the prosecution should prove it's case beyond reasonable doubt.
49. I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

50. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:

- (i) You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offence.
- (ii) Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.
- (iii) The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offence. The situation then would be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be Guilty.

51. It is up to you to decide whether you could accept the evidence of the accused. The accused does not have to prove anything. If the accused had raised a reasonable doubt then the benefit of that doubt should be given to him and he should be found not guilty.

52. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should be reminded yourselves of all that evidence and form your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.

53. Please remember, there is no rule for you to look for corroboration of the victim's story to bring home an opinion of guilty in a rape case. The case can stand or fall on the testimony of the victim depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the victim's evidence if you think that it is safe to look for such supporting evidence. Corroboration is, therefore, to have some independent evidence to support the victim's story of rape.

54. In dealing with the issue of penetration, medical evidence may be helpful. You may consider the issue of penetration in light of doctor's findings that he saw hymen was torn. Further there was swelling in the Labia majora which is fresh. It is entirely a matter for you to be satisfied that the torn hymen and swelling in labia majora were caused as a result of accused inserting his finger into the vagina of AS. Please remember medical evidence is not essential and/or indispensable for you to come to the finding that the penetration, in fact took place. If you believe the evidence of AS on that point beyond reasonable doubt and

disbelieve the accused that would suffice for you to come to that finding. Medical evidence will be independent corroboration of victim's version in respect of penetration to vagina if you believe that evidence beyond reasonable doubt.

55. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and 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.

56. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of the charge you must find him guilty for the charge. 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.

57. Your possible opinions are as follows:

Charge of Rape

Accused Guilty or Not Guilty

58. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

59. Any re-directions?

Sudharshana De Silva
JUDGE

At Lautoka
14 November 2013

Solicitors : Office of the Director of Public Prosecution
Legal Aid Commission for the Accused