

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: 014 OF 2011

STATE

-v-

1. JALE LAGANIKORO
2. KOLAIA BUCALEVU

Counsels : Mr. F Lacanivalu for the State

Both Accused in Person

Date of Trial : 22 July – 26 July 2013

Date of Summing Up : 26 July 2013

(Name of the Victim suppressed. He is referred to as IN)

SUMMING UP

Madam Assessor and Gentlemen Assessors:

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 persons.
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 two accused made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the two accused. 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 are innocent until they are proved guilty. The burden of proving their 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 their guilt. If you have any reasonable doubt as to their guilt, you must find them 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. The charge against each accused is a charge of Rape under Section 207(1) (2) (a) of the Crimes Decree No. 44 of 2009. The particulars of the offence, as alleged by the prosecution, are:

Count 1
Statement of Offence

RAPE: *Contrary to Section 207 (1) (2) (a) of the Crimes Decree No. 44, 2009.*

Particulars of Offence

KOLAIA BUCALEVU on the 15th day of November, 2010 at Nadi in the Western Division penetrated the anus of **IN** with his penis, without the consent of the said **IN**.

Count 2
Statement of Offence

RAPE: *Contrary to Section 207 (1) (2) (a) of the Crimes Decree No. 44, 2009.*

Particulars of Offence

JALE LAGANIKORO on the 15th day of November, 2010 at Nadi in the Western Division penetrated the anus of **IN** with his penis, without the consent of the said **IN**.

14. I will now deal with the elements of the offences. 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.

15. According to Section 206 (5) of the Crimes decree Carnal knowledge includes sodomy. Thus, penetration by the penis of a man to any extent to anus of a man is carnal knowledge. So, that is rape under Section 207 (2) (a) of the Crimes Decree.

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

17. Consent as defined by Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a woman or man with a necessary mental capacity to give such consent.

18. So, the elements of the offence in this case are that

- (1) Each accused **penetrated the anus of victim to some extent with penis,**
- (2) Without victim's consent,
- (3) Each accused knew or believed that victim was not consenting or didn't care if the victim was consenting.

19. 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-persons and connect them to the offence that they alleged to have been committed.

20. 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 him as to what he saw, heard and felt.

21. 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.

22. Expert evidence is also important to be borne in mind. Usually, witnesses are not allowed to give opinions. They are allowed to give evidence on what they have seen, heard or felt by 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 expressed 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.
23. 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 her conclusion or opinion based on her 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 her 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.
24. 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 created just to make 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.

25. 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.
26. I will now deal with the summary of evidence in this case.
27. Prosecution called IN as the first witness. He is 23 years old now. On 15th November 2011 he was drinking Beer with Homa, Jone, Lavinia and the two accused. After sometime other three had left leaving him with the two accused. He wanted to go home but the accused had stopped him. He had seen that Jale's leg is bleeding. He had gone to get some leaves to rub on that. When he went, he had seen Jale following him. He had tried to run away. Jale had grabbed him by hand. Jale had asked to suck his penis. He did not want to do that. He was forced to do that. Kolaia had come there. Jale had told him if he does not suck Jale will punch him. Jale had asked him to take off the pants. He didn't want to do that. Then he was punched.
28. He had fallen on the ground. He was forced to take off his pants. Then Kolaia had put his penis into his anus while he was sucking the penis of Jale. He had tried to escape. Both accused had punched him on the face, ribs and back. Then Kolaia had asked to suck his penis while Jale penetrated his penis into his anus. This took about 20-25 minutes. He could not run away as the accused were holding him. He was in pain when the accused were penetrating their penis into his anus and punching him. He identified both accused and told Court that he did not consent to these acts by the accused.
29. After the incident he had gone and complained to his aunt. They have waited for his grandmother to come home from work and went and lodged a complaint at the Police station.
30. In cross examination by the 1st accused the victim said that 1st accused did not take off his clothes. When cross examined by the 2nd accused the victim denied that he went to the 2nd accused and wanted to suck his penis. Further he denied calling 2nd accused to follow him when the victim went to get some leaves. He further stated that 2nd accused forced to suck his penis.

31. You watched him 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? 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 IN beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charge.
32. The second witness for the prosecution was Nanise Lewatu. On the date in question when she returned home after work around 5.30 p.m. she was informed by Timaima that the victim is at her house. She had gone there. Victim was on a bed shivering. When inquired, the victim had told the two accused had raped him. His face was swollen and red. She had gone with the victim to the Nadi Police station and then to the Nadi hospital.
33. Either on the same day or following day the father of the 2nd accused and uncle of the 1st accused had come to her house with some 'Kava'. They have sought forgiveness. She had told them that the matter is now reported to Police.
34. Under cross examination by the 1st accused she said that she did not examine the face of the victim but took him to the Police station. Answering the questions of the 2nd accused she told that she was not there at the time of the incident and repeating what victim told her.
35. You saw her giving evidence in Court. She had given prompt answers to questions put to her by the accused. But she had also told that she could not recall certain things due to lapse of time. 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 regarding recent complaint.
36. The third witness for the prosecution was Doctor Shereen Lata. She had examined the victim on 15th November 2010 at 7.45 p.m. at the Nadi hospital. In short history victim had stated that he was drinking Beer with four boys and a girl. Two of those boys have assaulted him physically as well as sexually in his anus. The victim was in pain at the time of the examination.

37. The victim had a small cut beneath his left eye. There were bruises behind both ears, back of shoulders, back of both arms and on the back of the chest. Near the entry of the anus there were two deep cuts at 5 o'clock and 6 o'clock positions. These were 2cm long and ½ cm deep. The victim could not walk normally. Her diagnosis was the victim was physically assaulted on the face, back of both ears and in the anal area at 5 o'clock and 6 o'clock positions. The injuries in the anus area could have been caused by forced penetration of penis to anus. From the two injuries she could say that either one person had entered the penis twice or two persons have entered their penis.
38. The Doctor is an independent witness. Her evidence further corroborated the evidence of the victim regarding recent penetration into anus. The injuries as described by the doctor are indicative of forcible penetration of penis into anus.
39. The next witness for the prosecution was Timaima. According to her on the date in question around 2.00 p.m. when she was preparing lunch she had noticed the victim standing outside her house crying. Victim had called her. When inquired, the victim had told her that the two accused had assaulted him and raped him while they were drinking Beer beside the river. She asked him to wait in her house till his grandmother returned from work.
40. When grandmother came she went and told her about the incident. She had come with grandmother and accompanied them to the police station.
41. When cross examined by the 1st accused she could not tell the time period the victim stayed at her house. Further she had stated that she did not go to police station immediately as she didn't have the bus fare.
42. Her evidence is that the victim made a recent complaint to her. She could not take him to Police as she did not have the bus fare. If you accept this evidence beyond reasonable doubt then there is evidence of recent complaint.
43. Prosecution case was closed with this evidence and submitting the exhibit-1, the Medical Officer's report.
44. After the prosecution case was closed you heard me explaining the two accused their rights in defence.

45. The 1st Accused elected to give evidence. His position was that on the date of the incident in the morning he had drinks with Homa, Ross, Lavinia, the 2nd accused and the victim. After that he had gone home. He was arrested by the Police following day and was threatened to tell the truth and if not he will be taken to army barracks. He felt scared as he had heard a youth was killed by Army officers. The police officers have taken down his statement. Some things told by him were not written down.
46. When cross examined he admitted that he gave different version to police. He also said that Jale and victim went out of the group when Jale went to urinate. He further stated that on that Monday morning the victim was walking differently and victim kept on standing while the others were seated. He admitted that he is coming out with this position very late. Further he admitted at the time of cross examination of the victim he took up different position and he is taking a new position at the time of defence case.
47. With this evidence the 1st accused closed his case.
48. The 2nd accused also gave evidence. His position was while he was waiting to go to school on this day, friends who came in a taxi asked him to get into a taxi. When the taxi stopped the victim pulled him and asked him to join them to drink. All of them were drunk. The way the victim walked was different. When all of them sat the victim kept standing. After drinks he had gone home.
49. When cross examined he admitted that he went to urinate while drinking. He denied anything thereafter. When asked about his questions to the victim he admitted asking victim that whether victim came to him and wanted to suck his penis at the time he went to urinate. He admitted lying to the victim in court.
50. He further admitted asking victim, when the victim went to get the leaves, whether the victim asked him to follow the victim. But later denied even asking that question in cross examination. He also admitted that he is trying to shift the blame to the victim.
51. He also admitted taking a different position in the police statement and the stand taken at the time of cross examination.
52. Therefore the positions taken up by the two accused in giving evidence in the court is different from their police statements and the position taken up by them at the time they cross examined the victim. In other words their version is inconsistent. It is up to you to decide whether you could accept their version and their version is sufficient to establish a

reasonable doubt in the prosecution case. If you accept their version both accused should be discharged. Even if you reject their version still the prosecution should prove it's case beyond reasonable doubt.

53. 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 from 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.
54. Please remember, there is no rule for you to look for corroboration of the victim's story to bring home a verdict 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 his evidence. You may, however, consider whether there are items of evidence to support the alleged 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.
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 are not required to prove their innocence, or prove anything at all. In fact, they are presumed innocent until proven guilty beyond reasonable doubt.
56. You have to also bear in mind that according to Section 130 of the Criminal Procedure Decree, "In any case of a sexual nature, no evidence shall be given, and no question shall be put to witness, relating directly or indirectly to-
- (a) The sexual experience of the complainant with any other person other than the accused; or
 - (b) The reputation of the complainant in sexual matters, except by leave of court.
57. 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 each charge you must find him guilty for each charge. You have to consider evidence against each accused separately. 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 them not guilty as charged.

58. Your possible opinions are as follows:

- (i) First charge of Rape against 1st Accused Guilty or Not Guilty
- (ii) Second charge of Rape against 2nd Accused Guilty or Not Guilty

59. 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.

60. Any re-directions?

Sudharshana De Silva
JUDGE

AT LAUTOKA
26 July 2013

Solicitors for the State : Office of the Director of Public Prosecution, Lautoka
Solicitors for the Accused: Both in Person