

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 151 OF 2011

STATE

-v-

ROHIT PRASAD

Counsels : Mr. T. Qalinauci for the State
The accused in person

Date of Trial : 18 March 2014 – 19 March 2014
Date of Summing Up : 20 March 2014

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

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 accused and the state counsel made submissions to you about the facts of this case. That is their duty as the accused and the prosecution 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. 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.

14. I will deal with the law as it is applicable to the offence with which the accused-person is charged, in a short while.

15. The information against accused is as follows:

First Count

Statement of Offence

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

Particulars of Offence

Rohit Prasad, between the 1st of April 2011 and the 30th of April 2011 at Tagitagi, Sigatoka in the Western Division had carnal knowledge of **RS** without her consent.

Second Count

Statement of Offence

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

Particulars of Offence

Rohit Prasad, on the 27th day of July 2011 at Barotu, Rakiraki in the Western Division had carnal knowledge of **RS** without her consent.

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

17. 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. So, the elements of the offence of Rape in the Charges are that the accused penetrated the vagina of victim to some extent with penis which means that the insertion of penis fully into vagina is not necessary.

20. 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 above 13 years of age at the time of the incident and therefore, she had the capacity under the law to consent. So, the prosecution has to prove the absence of consent on the part of the girl and the accused knew that she was not consenting. Further, bear in mind submission without physical resistance by a person to an act of another person shall not alone constitute consent.

21. 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.

22. 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 victim was witness who offered direct evidence, if you believe her as to what she saw, heard and felt.

23. 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.
24. Expert evidence is also important to borne in mind. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by 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 issue/s before court on the basis of their learning, skill and experience.
25. 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 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.
26. 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 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 some 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, insofar 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.

27. 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.
28. I will now deal with the summary of evidence in this case.
29. Prosecution called Doctor Alunita as the first witness. She is a doctor with 7 years experience. She is not the person who examined the victim. She marked and tendered the medical report PE1. According to the report, the complainant was examined on 28.7.2011 at 3.30 p.m. She had given a history of being raped by the step father on 27.7.2011. It was not the first incident of Rape. She was raped earlier by the same person in April 2011. She said that second sexual intercourse could take place without leaving any injuries. Her hymen was not intact. The professional opinion is that the vaginal examination indicated that hymen is not intact indicating sexual penetration. But this was not the first incident.
30. Under cross examination, she was asked whether she could tell when the complainant was raped first. She answered 'no'. That was the only question in cross examination.
31. The doctor is an independent witness. If you believe her evidence there is corroboration on sexual intercourse. However, there are no injuries. The doctor is not the person who examined the victim. She was giving evidence on a report prepared by another doctor. Before attaching any weight to this evidence you have to keep these factors in mind.
32. Prosecution called victim RS as next witness. She is seventeen years old now. She stated that on a date in April 2011 when she was looking after the baby sister and her mother was out in the field, the accused had come to her. He pushed her on the bed and removed her clothes. Then he had put his penis into her vagina. She could not shout as the accused had covered her mouth with a hand. After about 10-15 minutes accused had told her not to tell anyone, otherwise he will kill her. Thus she had not told her mother. This incident was in Sigatoka.
33. On 27.7.2011 she was living in Barotu, Rakiraki. When she was looking after baby and her mother was in the garden, the accused had come to her. He had asked for tea. When she brought the tea she was pushed to the bed and her clothes were taken off. Then accused had penetrated her vagina for 15-20 minutes. Accused was covering her mouth with a hand. She had not told the others as the accused had threatened to kill her.

34. On 28.7.2011 when she was on the way to the police station she had met Vicky. He had taken her to the police station in his vehicle. She had told Vicky that step father Rohit Prasad raped her. She was taken to Rakiraki hospital from the police station. She was medically examined there. She identified her signature in the medical report PE1. She pointed out and identified the accused in Court. She had not consented for the sexual acts with the accused.
35. Under cross examination she said that when accused took off her clothes he was still covering her mouth with the hand. She further said that the accused threatened to kill her. She admitted that her brother Rishat Chand was beaten and asked to go out when the accused had sex with her. She denied taking off her clothes on her own and going to accused's room. She denied her grandparents asking to tell something against the accused to separate him from her mother. She denied lying in Court.
36. 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? You must bear in mind the age of this witness at the time of the incident. Whether she has any reason to falsely implicate the accused? 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 RS beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish elements of both charges.
37. The next witness for the prosecution was Vicky Eliyaz Rafiq. He was on his routine trip to field on 28.7.2011 around 9.00 a.m. with his attendant in his vehicle. At Barotu he had seen an Indian girl wearing a Pink top and Black skirt running towards the main road. As the girl looked scared he had talked to her. This girl was not known to him earlier. She told him that she was raped by her step father Rohit Prasad and she wants her medical done. Thus he had taken this girl to the police station in his vehicle. Accused did not cross examine this witness.
38. This is an independent witness. He corroborates the version of the complainant. If you believe this witness's evidence beyond reasonable doubt there is evidence of recent complaint in respect of the last incident on 27.7.2011.

39. After the prosecution case was closed you heard me explaining the accused his rights in defence.
40. The Accused elected to give evidence. His position was that he was framed to this case. The girl had told him that she was sent by the grandparents to somehow frame him. He had sent the complainant to police on 28.7.2011 as she was doing lot of bad things against him. At 2.00 p.m. he was away from home as he went to check the loading truck. He said that he asked the complainant to bring a cup of tea. At that time his mother was at home.
41. The following morning the complainant had told her mother that he raped her. He had told that if the complainant does not want to stay with them it is okay or else he could go and stay away somewhere. He could work somewhere, can come and visit them. After complainant went to police station he also went there with the wife. He was arrested at the station.
42. Under cross examination he admitted that he was residing in Sigatoka in April 2011. At that time the complainant was babysitting most of the time. He admitted that he was at home and complainant's mother was in the farm. He denied having sexual intercourse with the complainant in April 2011. He admitted that he was living in Barotu, Rakiraki on 27.7.2011. He admitted that he was in the house with the complainant while the mother was in the garden. However, he denied sexual intercourse with the complainant.
43. 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? 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 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.
44. 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.
45. 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 offences.

- (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 offences. 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 offences then the proper opinion would be Guilty.

46. The accused called his mother Susila Wati as a witness. She said at 3.00 p.m. all were at home. She further said the accused went somewhere at 1.30pm and came back at 2.00pm and then he had his lunch. Then all of them had gone to farm at 3.00 p.m. Then they have come back home at 5.30 p.m. When asked by court she said she cannot read time.

47. Under cross examination she said that complainant's family lived with them for about a month. She admitted that she is at the farm in week days except on Saturday and Tuesday when she go to market to sell vegetables. She further said that accused was never alone with the complainant at home. She admitted that she loves her only son and will do anything to protect him. She said that complainant's grandparents never visited them.

48. 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 himself generally in Court? It is up to you to decide whether you could accept her version and her version is sufficient to establish a reasonable doubt in the prosecution case. Even if you reject her version still the prosecution should prove it's case beyond reasonable doubt.

49. The last witness for the defence was the father of the accused Narendra. He said on 27.7.2011 from 1.30 p.m. to 3.00 p.m. the accused was not at home and he went to shop. When he came back he was at home and then he went to the farm.

50. Under cross examination he said that her wife was at home with the complainant when he went to farm. He admitted that he loves his son and would do anything to protect him.

51. 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? 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 case. Even if you reject his version still the prosecution should prove it's case beyond reasonable doubt.

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. 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.

55. 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 that 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 for that charge. You have to consider evidence against each charge separately. The fact that the accused is Guilty or Not Guilty of one charge does not necessarily mean that he is Guilty or Not Guilty of the other charge as well.

56. Your possible opinions are as follows:

(i)	First charge of Rape	Accused Guilty or Not Guilty
(ii)	Second charge of Rape	Accused Guilty or Not Guilty

57. 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.

58. Any re-directions?

Sudharshana De Silva
JUDGE

At Lautoka
20th March 2014

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