

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 04/2013

BETWEEN : **THE STATE**
AND : **LEPANI LIKUNITOGA**
COUNSEL : **Ms J Prasad with A Paka for the State**
Mr S Waqainabete for the Accused

Dates of Trial : **24-26/03/2014**

Date of Summing Up : **27/03/2014**

[Name of the victim is suppressed. She will be referred to as A.N.T]

SUMMING UP

Madam and Gentlemen Assessors,

[01] It is now my duty to sum up this case to you. I will direct on matters of law which you must accept and act upon. On matters of facts however, which witnesses to accept as reliable, which version of the evidence to accept, these are matters for you to decide for yourselves. So if I express my opinion to you about facts of the case or if I appear to do so it is a matter for you whether you accept what I say, or form your own opinion. In other words you are the judges of facts. All matters of facts 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.

[02] You have to decide what facts are proved and what inferences drawn from those facts. You then apply law as I explain it to you and form your individual opinion as to whether the accused is guilty or not guilty.

- [03] Prosecution and defence made their submissions to you about the facts of this case. That is their duty. But it is a matter for you to decide which version of the facts to accept or reject.
- [04] You will not be asked to give reasons for your opinions but merely your opinions of yourself and your opinion need not be unanimous but it would be desirable if you agree on them. Your opinions are not binding on me but I can tell you that they carry great weight with me when I deliver my judgement.
- [05] On the question of proof, I must direct you as a matter of law that the onus of burden of proof lies on the prosecution throughout the trial and never shifts. There is no obligation on the accused person to prove his innocence. Under our criminal justice system the accused person is presumed to be innocent until he is proved guilty. This is the golden rule.
- [06] The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt then you must express an opinion that he is not guilty.
- [07] Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence that who saw the incident or felt the offence being committed. The other kind of evidence is circumstantial evidence that you put one or more circumstances together and draw certain irresistible inferences. Evidence presented in the form of a document is called Documentary Evidence.
- [08] The facts which are agreed between the prosecution and the defence are called agreed facts. You may accept those facts as if they had been led from witnesses from the witness box. The following facts and documents are agreed between the prosecution and the defence.

1. The complainant in this matter is A.N.T.

2. The accused person in this case is Lepani Likunitoga who was employed as a security guard at the Flea Market at the time of the alleged offence.
3. The date of the alleged offence was 26th December, 2012 in the early hours of the morning.
4. Sometime in the early hours on 26th December 2012, A.N.T was accompanied by a male companion along the street in front of the Flea Market in Suva.
5. The accused person, Lepani Likunitoga, was on duty on 26th December 2012 when A.N.T and her male companion were walking in the street in front of Flea Market.
6. The accused person, Lepani Likunitoga, saw A.N.T and her male companion out of the street from his position inside the Flea Market.
7. The accused person, Lepani Likunitoga, invited A.N.T and her male companion to come inside the Flea Market.
8. A.N.T accompanied by her male companion went inside the Flea Market by climbing over the fence.
9. The accused person Lepani Likunitoga had sexual intercourse with A.N.T on 26th December, 2012.

Documents

1. The original caution interview of Lepani Likunitoga.
2. The original charge statement of Lepani Likunitoga.

[09] The caution interview statement of the accused person is in evidence. What an accused says in his caution interview is evidence against him. I will direct you shortly on how you should consider that evidence.

[10] 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 have heard about this case outside of this court room.

[11] Your duty is to find the facts based on the evidence apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotions.

[12] Now let's look at the charge.

FIRST COUNT

Statement of Offence

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

Particular of Offence

LEPANI LIKUNITOGA on the 26th day of December 2012, at Suva, in the Central Division, raped **A.N.T** by having carnal knowledge of said **A.N.T** without her consent.

[13] In Fiji law, the offence of Rape is committed when the vagina is penetrated either by the penis or by the finger of the accused. Hence in this case the prosecution has to prove:

1. The accused had carnal knowledge of the complainant,
2. without her consent,
3. He knew or believed that she was not consenting or did not care if she was not consenting.

[14] As far as the element of consent is concerned in our law, a child under the age of 13 years is incapable of giving consent. In this case victim was 22 years of age at the time of the offence and, therefore, she had the capacity under the law to consent. Therefore, the offence of rape is made out only if there was no consent from the alleged victim.

[15] I now remind you of the prosecution and defence cases. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by the counsel. I will summarize the salient features. If I do not mention a particular witness, or a

particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

[16] Now let's look at the evidence led by the prosecution in this case.

[17] The victim A.N.T was 22 years old at the time of the incident. In the year 2012 she resided at Nausori. On 25/12/2012, she went to her sister-in law's place to celebrate Christmas. Towards the night four of them drank rum and beer. After drinking, the four of them went to Raiwaqa and drank some more beer and went to Suva City. This time their gang consisted of 08 persons. All went to Ritz Night Club, drank some more beer and danced till dawn. When Ritz Night Club was closed she walked to another night club with a person called Iowane. While walking, both stopped near the Flea Market. Iowane then spoke to a security guard at the Flea Market who then told both of them to come inside by climbing over the gate. A carton about the size of the witness box was given to them by the security and went away. Both sat on the carton, talked for some time and had sexual intercourse. After that Iowane talked to the security and went out to buy something. In the absence of Iowane, the security came to her and requested to have sex. As she said no, the security then pushed her down by her chest, removed her pants. Though she moved on her back, the security lay on top of her, removed her T- shirt, touched her breasts, parted her legs and had sexual intercourse. Though she shouted and pushed the security but he had sexual intercourse with her forcibly. After having sex, when both were wearing their pants, another security came there and she told him what happened to her. When she told this to the second security, the first security was standing there and listening to their conversation. The second security then took her to the Market Police Post and told the police what he had seen. Thereafter, both had been referred to Totogo Police Station where her statement was recorded and she was taken for medical examination at the CWM Hospital. She identified the first security as the accused in this case.

[18] In the cross examination the victim admitted that she did not tell police that she had sex with her boy friend. She said that she did not go to hospital immediately but went in the afternoon. She had not sustained injuries on her buttocks when she went backward on the floor. Victim admitted that she

asked bus fare from the accused. She also admitted that she came and sat down where the accused sat on the carton.

- [19] In the re-examination witness reiterated that she asked money from the accused to go home.
- [20] Dr. Saiasi Caginidaveta, who examined the victim, stated in his professional opinion that evidence of intercourse within 24 hours ago. She told the doctor that she had sexual intercourse with her boy friend inside the Flea Market before accused had sexual intercourse with her.
- [21] Vitori Tabua also works as a security guard at Flea market Suva. On 26/12/2012 he was on night duty. After completing his duty he had gone to the main entrance of the Flea Market but no one was there. After calling several times, he then jumped in to the Flea Market and saw the accused and a woman were standing inside. The accused's pants was unbuttoned and the woman was wearing her pants. When he called the girl, she told him that the accused had forced her twice. He felt sorry for the girl and took her to the Market Police Post.
- [22] In the cross examination witness said that he told the police that she was crying at that time. He had not heard any cry or noise when he banged the gate.
- [23] WPC 3614 Ana is the investigating officer in this case. She read out the caution interview statement of the accused. The original caution interview was marked as P1(a) and the typed version as P1(b).
- [24] That is the end of the prosecution case. Defence was called and explained the rights of the accused. After understanding his rights he elected to give evidence from witness box.
- [25] According to the accused he was on night duty at Flea Market on 26/12/2012. At the early hours a couple came in front of the market and started to hug each other. Seeing this he called the couple inside Flea Market as it is a dangerous area. Both came inside climbing over the wall. He then gave a carton and went away to perform his duty. When he returned after a while had seen the couple having sex. After sex the couple started to talk and he told them to leave the place. But the girl was short of money. He overheard

the boy telling the girl to find her own way. At that time the accused proposed sex for money from the couple. After consulting with the boy, the girl voluntarily came and sat on the carton. He then took off her pants and panty, kissed her stomach, parted her legs and had sexual intercourse. After about 1-2 minutes when the girl said enough, he stopped. He then gave money to her and she left the place. Vitori, another security officer at the Flea Market saw her and he followed her up to the bus stand.

[26] In the cross examination accused said that he never spoke to the boy. The girl agreed when he asked sex for money. He denied forcing the girl for sex. According to the accused the victim never cried. He reiterated that the girl left Flea Market alone and Vitori followed her. He stopped having sex when the girl said enough.

[27] In the re-examination accused said that he never forced the girl but she agreed to have sex.

[28] That is the end of defence case.

Analysis of the Evidence

[29] Madam and Gentlemen Assessors, in this case the victim gave evidence first. According to her she never consented for sex with the accused but she had sex with her male companion. Her male companion was never seen after she had sex with him. It is a mystery up to know as to what happened to him. Victim admitted that she asked money from the accused after the incident. She confirmed this in her re-examination. She did not go to the hospital immediately after she lodged her complaint to the police. In the agreed facts victim agreed that she went with her male companion on 26/12/2012. As assessors and judges of facts you have to consider her evidence very carefully.

[30] The doctor confirmed evidence of sexual intercourse within 24 hours. In this case the accused has not denied sexual intercourse with the victim.

[31] Vitori had taken the victim to police on 26/12/2012 after seeing her sorry plight. He had not seen the boy who had taken the victim to the Flea Market.

- [32] Madam and Gentlemen Assessors, accused admits that he had sex with the victim with consent. He says that he paid for sex. As Assessors and Judges of facts you have to consider this evidence very carefully.
- [33] As I told you earlier, the caution interview statement of the accused is in evidence. What the accused said in his caution interview statement is evidence against him. The accused admitted that he had sexual intercourse with the victim with consent. He maintained this throughout the trial.
- [34] Madam and Gentlemen Assessors, in this case accused opted to give evidence from witness box. That is his right. But he has nothing to prove to you.
- [35] In this case the accused is charged for Rape contrary to Section 207(1) and 207(2) (a) of the Crimes Decree No: 44 of 2009. I have already explained to you about the charges and its ingredients.
- [36] You have heard all the prosecution witnesses. You have observed them giving evidence in the court. You have observed their demeanour in the court. Considering my direction on the law, your life experiences and common sense, you should be able to decide which witness's evidence, or part of their evidence you consider reliable, and therefore to accept, and which witness's evidence, you consider unreliable and therefore to reject.
- [37] You must also carefully consider the accused's position as stated above. Please remember, even if you reject the version of the accused that does not mean that the prosecution had established the case against the accused. You must be satisfied that the prosecution has established the case beyond reasonable doubt against the accused.
- [38] Madam and Gentlemen Assessors, remember, it is for the prosecution to prove the accused's guilt beyond reasonable doubt. It is not for the accused to prove his innocence. The burden of proof lies on the prosecution to prove the accused's guilt beyond reasonable doubt, and that burden stays with them throughout the trial.
- [39] In relation to issue of consent, you have to consider whether the accused knew or ought to have known whether the victim was not consenting.

[40] Once again, I remind, that your duty is to find the facts based on the evidence, apply the law to those facts and come to a correct finding. Do not get carried away by emotions.

[41] This is all I have to say to you. You may now retire to deliberate. The clerks will advise me when you have reached your individual decisions, and we will reconvene the court.

[42] Any re-directions

I thank you for your patient hearing to my summing- up.

P Kumararatnam
JUDGE

At Suva
27 /03/2014

