

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 72 OF 2013

STATE

-v-

VILIAME TUBUYA

Counsels : Mr. A. Datt for the State
Ms. S. Nasedra for the accused

Date of Trial : 1 April 2014 to 2 April 2014

Date of Summing Up : 3 April 2014

(Names of the victims are suppressed. They are referred to as ML)

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 assessing 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 and indecent assault. 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 offences 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:
- THAT** Viliame Tubuya is the Defendant in this case.
- THAT** ML is the Complainant in this case.
- THAT** the Defendant and the Complainant lived in the same house from 2006 to 2013.
- THAT** the Defendant is married to the mother of the Complainant and her mother is Veniana Nakama.
- THAT** the Complainant was medically examined on the 3rd of April 2013 by Dr. Luse T. Buinimasi.
- THAT** the complaint was made to the Police on the 2nd of April 2013 by the Complainant.
- THAT** the Defendant was arrested on the 3rd of April 2013 and was later cautioned interviewed and charged on the same day.

16. The charges against accused are as follows:

First Count
Statement of Offence

INDECENT ASSAULT: Contrary to Section 154 (1) of the Penal Code Cap 17.

Particulars of Offence

VILIAME TUBUYA, between the 1st day of May 2006 and 31st day of August 2006, at Rarawai, Ba in the Western Division, unlawfully and indecently touched the vagina of **ML**.

Second Count
Statement of Offence

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

Particulars of Offence

VILIAME TUBUYA, on the 2nd day of April 2013, at Rarawai, Ba in the Western Division, penetrated the vagina of **ML** with his finger without the consent of the said **ML**.

17. I will now deal with the elements of the offence of Indecent assault. The offence of Indecent assault is defined under Section 212 of the Crimes Decree:

A person commits indecent assault if:

- (a) Unlawfully and indecently;
- (b) Assaults another person.

18. According to Section 152 (2) of the Penal Code, Cap 17:

It is no defence to a charge for an indecent assault on a girl under the age of 16 years to prove that she consented to the act of indecency.

19. The complainant in this case was less than 16 years in 2006 and therefore prosecution does not have to prove the absence of consent in respect of the 1st count.

20. For the assault to be indecent it must be accompanied by a circumstance of indecency. Conduct is indecent when it is as such that ordinary people would so describe it, in light of prevailing standards of morality and, more specifically, in light of whether the victim has consented to the conduct in question.

21. 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.

22. 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).

23. So, the elements of the offence of Rape in this case are that the accused **penetrated the vagina of the complainant with finger** which means that the insertion of finger fully into vagina is not necessary.

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

25. 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 on 2.4.2013 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.

26. A person's consent to an act is not freely and voluntarily given if it is obtained-

- (i) by force; or
- (ii) by threat or intimidation; or
- (iii) by fear of bodily harm; or
- (iv) by exercise of authority; or
- (v) by false and fraudulent representations about the nature or the purpose of the act.

27. 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.
28. 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.
29. 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.
30. 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 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 expresses 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.
31. 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 and indecent assault 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.
32. 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.

33. 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.
34. I will now deal with the summary of evidence in this case.
35. Prosecution called complainant as the first witness. She was born on 16.9.1993. While she was at home on a Saturday in 2006, her father had sent her brother to shop. Her mother had gone to river to pick mussel. Her step father (the accused) had started to touch her legs while playing. He had touched up to vagina using his fingers. He had lifted her panty and put his fingers inside. She felt scared. This had continued for about 10 minutes. The accused had told her not to tell anyone. He had told her he will kill her or punish her. He had promised her to give pocket money in return for not telling anyone.
36. In 2008 she had told about this to her mother. She was scared to tell her mother as she is her mother. On 2.4.2013 she was alone at home. The accused had come home. He had asked her whether she had sex with anyone. She had told that she had sex once with a male. He had taken garden fork and threatened her. She was scared and frightened. Then accused had come from behind and had hugged her. Then he had put his hand into her vagina. His tallest finger went into her vagina.
37. After that she had packed her clothes and gone to aunt's place to report the matter to police. She was medically examined on 3.4.2013 at Ba mission hospital.
38. Under cross examination she admitted that her brother and wife live close to her house in 2006. However, according to her, they left to the village on this day. She admitted that she had close relations with her friends and teachers. She admitted that she did not tell her friends and teachers about this. She said that even though the accused was not at school

she was scared to tell this to anyone. She had not yelled at the time of the incident in 2006 as she was really scared.

39. She admitted that she had an affair with Shaheed for some time. She admitted that the accused asked about this affair on 2.4.2013 and she agreed. She denied that she raised these allegations as she was not happy that her affair was caught. She said that she quickly informed her mother before she went to police station. She admitted that she left her house as the father came to know about her affair.
40. You watched her giving evidence in court. What was her demeanor 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 ML beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish elements of both charges.
41. The next witness for the prosecution was the mother of the complainant. She said that the victim complained to her about sexual harassment in 2006. The step father had threatened her to stay with him. She was afraid of the accused as he is angry kind person. On 3.4.2013 she had gone to Ba police station. She had met the accused in the presence of Miri. The accused was giving his statement. No one else was there. The accused was apologizing to her for act he did to the complainant.
42. Under cross examination she stated that she visited the accused in the morning. She had talked to accused for only one minute. The accused was interviewed at that time. The complainant had not told her anything before leaving on 3.4.2013. The complainant had not informed her about the affair she was having. She came to know about it only through accused. If someone yells from her house neighbors will hear that.
43. In assessing her evidence, you have to keep in mind that she is the mother of the complainant. She is also the wife of the accused. If you believe her evidence beyond reasonable doubt you have to consider whether her version is consistent with the prosecution version or the defence version.

44. Prosecution called Doctor Lavinia as the next witness. She is a doctor with 5 years experience. She gave evidence on the medical report of the victim prepared by Doctor Luse Buinimasi. According to report, the victim had told that she was abused by her step father since 2006 when she was 13 years old. Both penetration and indecent assault. She further said that if a person was subjected to sexual intercourse there could be subsequent digital penetration without injuries. Her hymen was not intact. There were no visible injuries.
45. Under cross examination, she stated that it is difficult to find injuries if the person was involved in sexual activity.
46. The doctor is an independent witness. Apart from the fact that the complainant had given a similar history to the doctor, there are no medical observations to corroborate the version of the complainant. According to the doctor, that is possible. 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.
47. Prosecution called PC Shamim as the next witness. He had arrested the accused at his house on 2.4.2013 around 8.00 p.m. The accused was explained the reasons for the arrest. Accused had cooperated with the arrest. He was given chance to change his clothes. Then he was escorted to Ba police station.
48. There is no dispute that the accused cooperated with the arrest. You can accept this evidence and act on that.
49. Next witness for the prosecution was WDC Miriama Nadumu. She is an officer with 10 years experience. She is the investigating officer in this case. She had assisted PC Shamim in arresting the accused. On 3.4.2013 she had caution interviewed the accused in the crime office of the Ba police station. It was in question and answer format in iTaukei language. She identified and tendered the translated version marked as P2. She read out the same. She also tendered the rough sketch plan marked P3 and fair sketch plan marked P4. No one else was present at the interview. The accused was not threatened. No inducement or promise made to him. No physical assault or verbal assault was made to him. The accused was very cooperative and voluntarily answered the questions put to him. She identified and tendered the birth certificate of the complainant marked P5.
50. Under cross examination, she said that the wife of the accused spoke to him for 4 minutes at the beginning of the interview. She denied that the accused was threatened by officer Nakeke. She admitted that the accused had denied the allegations in the caution interview.

51. It is up to you to decide whether the accused made a statement under caution voluntarily to this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of each charge are proved by this statement.
52. The last witness for the prosecution was DC Tomasi Nakeke. He is an officer with 14 years experience. He had received instructions to charge the accused on 3.4.2013. It was done at the crime office. It was conducted in iTaukei language in question and answer format. He identified and tendered the translated version marked P6. He had not met the accused before the charge statement. He denied threatening the accused to admit or else he will be treated like an animal.
53. Prosecution is not using the charge statement of the accused as evidence. This witness was called by the prosecution due to allegation by the defence that this witness threatened the accused during the caution interview. It is up to you to decide whether that allegation is true or not.
54. After the prosecution case was closed you heard me explaining the accused his rights in defence.
55. The accused elected to give evidence. His position was that on 2.4.2013 around 10.00 a.m. he asked the complainant about going with an Indian man. She had admitted that she had an affair with boy named Shaheed. Complainant had stand up and gone. His wife was not at home at that time. When complainant left, wife came. Around 8.00 p.m. police came and arrested him. Next morning he was caution interviewed. Nakeke had threatened him that if he does not admit he will be treated like an animal. He was really scared. His wife had come during the interview. She came around 9.00 a.m. and only asked about money. He spoke to complainant in a normal tone on 2.4.2013.
56. Under cross examination he said only officer Nakeke threatened him. He had threatened him twice in the middle of the interview with same words. He admitted that he had denied the allegations later in the interview. He also admitted that he apologized to his wife regarding the allegation against him. He said that when he spoke to complainant on

2.4.2013 he was slightly angry. When she admitted the affair it made him more angry. However he was not very angry.

57. In re-examination he said that he apologized to his wife as the allegation spoiled his reputation. He said he did not understand the caution interview before signing it.
58. You watched the accused giving evidence in court. What was his demeanor 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.
59. 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.
60. 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.
61. 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.

62. 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.

63. 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.

64. 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.

65. 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. You have to consider evidence against each charge 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 him not guilty as charged.

66. Your possible opinions are as follows:

- | | | |
|------|-------------------------------|------------------------------|
| (i) | First charge Indecent Assault | Accused Guilty or Not Guilty |
| (ii) | Second charge of Rape | Accused Guilty or Not Guilty |

67. 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.

68. Any re-directions?

Sudharshana De Silva
JUDGE

At Lautoka
03rd April 2014

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