

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 212 of 2012

BETWEEN: THE STATE COMPLAINANT

A N D: "A" ACCUSED

Counsel : Ms. Vavadakua A. for the State
 : Mr. Tawake P. for the Accused

Hearing : 22nd, 23rd and 24th April 2014

Summing Up : 25th April 2014

SUMMING UP

[Name and the identity of the victim is already ordered to be suppressed with the request of the Prosecution. The Accused and the Complainant will be referred as A and Ms. A.R.]

1. **ROLE OF THE JUDGE AND ASSESSORS.**

Madam Assessor and Gentlemen Assessors:

- (i) The evidence for the prosecution and the defense have been led and concluded. There will be no more evidence. The learned Counsel for the

State and the defence counsel made their closing addresses to you. It is now my duty to sum up the case. After my summing up you will be asked to retire for your deliberations. Once, each of you, madam assessor and gentlemen assessors, reach to a conclusion on the final verdict, the court will re-convene and your individual opinion will be asked. At any time, you will not be asked to give reasons for your opinions. The opinions of you three need not to be unanimous. Nevertheless, it would be desirable if you could agree on the final opinion. As the presiding judge of this case, though I am not bound by your opinions in delivering the final judgment of the court, I assure you, that your opinions will carry a great weight with me when I deliver my judgment.

- (ii) In my Summing Up I will direct you on the relevant areas of law which apply to this particular instance. You must accept that legal position and act upon that. In another words, you must apply the law as I direct you to the facts of this case. Facts, as you heard and saw in this court room, are entirely within your domain. You are the masters of the facts or judges of the facts of this case. It is your duty to determine what exactly happened in the early morning hours of 18th of June 2012 at Serua, based on the facts of the case. The alleged victim says that the accused, being her grandfather inserted his fingers into her vagina. The accused takes up a defense of total denial and says that such an act never took place. At the end of the day, you have to decide whose version you are going to accept and believe.

- (iii) In reaching to your final opinion, you have to rely on the evidence you saw and heard, from the witness box and the documentary evidence tendered in court, and nothing else. You should simply disregard what you saw or heard from the printed or electronic media regarding this case before or during the trial. At the same time, any views or opinions expressed by your friends, family members, relatives or anybody should face the same fate. It is you who have to draw your own conclusions based on the evidence in this case. The learned counsel for the prosecution and the defence, while making their closing submissions highlighted certain facts and tried to formulate their opinions according to their own views. You need not to accept either of those versions unless you agree with those. Same principle applies to me as well. If I express any opinion or appear to do so regarding any of the facts, do not follow it, simply because it came out of the Judge. It is solely your task to

form your own opinions. In my summing up I might not touch all the areas or evidence which you think to be important. Please feel free to give due consideration to all the evidence you see fit, though I mention it or not.

- (iv) You have to decide the credibility and truthfulness of each and every witness. In doing so, you can rely on not only what you heard, but what you saw as well. The way witnesses offered evidence from the witness box, how they face the cross-examination of the opposing party, questions from court, were they firm on their stand or evasive, can be helpful in determining their demeanor and in turn to judge their credibility as well. I would like to emphasize that you madam assessor and gentlemen assessors, you were chosen to be judges of the facts of this trial as you represent a cross section of the pulse of the society. Your common sense and the experience in day to day life must come into operation when you deliberate this case. That common sense and the life experience have to be utilized in deciding or assessing the truthfulness or honesty of witnesses. In that task, you have the liberty to accept the whole version of a testimony of a witness or a portion of that testimony and reject the rest. You can refuse to accept even the whole testimony of a witness.
- (v) Madam assessor and gentlemen assessors, please recall your oath administered when you assume duties as assessors; your true opinion to be given without any fear or favour or ill will in accordance with the evidence and the law. You are not supposed to be passionate towards anybody or any party. The complainant was just over 4 years when she faced the alleged act. The accused was the grandfather of her and over 60 years of age at the material time. Any of these factors should not distract you from the main objective. Your decision should not be tainted with sympathy or hatred towards anybody. It should only be based on the evidence presented in court and nothing else. You must not speculate or presume anything apart from that evidence.

2. THE BURDEN OF PROOF

- (i) The accused is presumed to be innocent until proven guilty. Even though the accused is charged with one count of 'Rape', his innocence is presumed until otherwise decided by this court. The burden in proving that the accused is not

innocent or guilty as charged rests on the prosecution throughout the trial. That burden never shifts. The accused need not prove anything either to show his innocence or otherwise.

- (ii) The prosecution must discharge their burden by proving the charge against the accused beyond reasonable doubt. That is for you to be 'sure' of the guilt of the accused. If you have any reasonable doubt over the guilt of the accused after analyzing the evidence, the benefit of such a doubt should be awarded to the accused. Nevertheless, a 'doubt' must be reasonable or substantial and stemmed out of the evidence. A mere trivial or imaginary doubt won't create a reasonable doubt.

3. THE INFORMATION

- (i) The information filed by the Director of Public Prosecutions against the accused contains following one count of Rape.

First Count
Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) (b) of the Crimes Decree 44 of 2009.

Particulars of Offence

A on the 18th day of June, 2012 at Serua in the Central Division inserted his fingers into the vagina of 4 year old A.R. without her consent.

4. ELEMENTS OF THE OFFENCE AND LAW

- (i) The charge against the accused is based on Section 207 (1) (2) (b) of the Crimes Decree 2009. For the prosecution to bring home this charge successfully, they have to prove the following elements in the charge.

- The accused, (A in this instance)

- had inserted his fingers into the vagina of the complainant (Ms. A.R. in this instance),
 - without her consent.
- (ii) According to the legal definition of 'Rape', if any person penetrates the vulva, vagina or anus of the other person to any extent with any object or any part of the body, other than the penis, such an act also constitutes the offence of Rape. In this instance, prosecution claims that the accused inserted his fingers to complainant's vagina. As explained, inserting a finger to a vagina is sufficient to constitute the offence of 'Rape'.
- (iii) In a ordinary context, the 'consent' of the alleged victim is a material element in deciding whether there was a 'rape' or not. But, here in this instance, it is not that important. According to our law, a girl under the age of 13 years cannot give a valid consent to perform sexual intercourse. Therefore, it is only the 1st and the 2nd elements that the prosecution has to prove to your fullest satisfaction in this instance.
- (iv) As a matter of law, I am directing you that according to our law there is no need to look for any corroboration of the complainant's evidence for an accused to be convicted on a charge of 'Rape'. If the evidence of the complainant, Ms. A.R. in this instance, is so convincing that you can place your reliance beyond reasonable doubt, you can solely act upon it even in the absence of any corroborative evidence.
- (v) You would recall that unlike all the other witnesses Ms. A.R. did not take an oath before giving her evidence. It is because this court thought she is too small to realize the rationale of the administration of an oath. On the other hand this court was convinced that Ms. A.R. is capable of giving intelligible evidence. The corroboration rule which I said in the above paragraph applies to this type of unsworn evidence of a child as well. Nevertheless, you might have to take a particular care of the evidence of Ms. A.R. as she is a very small girl. Other than that, whether sworn or unsworn, you can rely on a child's evidence if you are fully satisfied about it.
- (vi) When doing so, you might have to consider the evidence given by the medical expert as well. The medical professional took the stand as an 'expert' in her

respective subject areas. Expert evidence is permitted in the criminal trials to provide the panel of assessors a better view on certain scientific information, which is outside your experience and knowledge. An expert witness is entitled to express an opinion in relation to the issues arisen within their subject area of expertise. Nevertheless, after a careful consideration of the expert opinion, you can either accept the expert opinion or reject it. Once again it is for you to decide whose evidence and whose opinion you are going to accept or reject.

5. CASE OF THE PROSECUTION

- (i) Ms. A.R. a 6 year old girl was the first witness of the prosecution. She is the alleged victim in this instance. Her evidence was very short. She said that one day her "Tutua" (means Grandfather in Seruan dialect) touched and poked ('tonoka') her "ivi" (means vagina in Seruan dialect) and he did it by his hand. She identified the accused as her "Tutua" (grandfather in Seruan dialect).
- (ii) Doctor Salma Sahinaz Khan had examined Ms. A.R. at Navua Hospital in 21st June 2012. She tendered the Medical Examination Form of Ms. A.R. as Prosecution Exhibit No. 1. According to the narrated history to her, by the mother of Ms. A.R., the child had been sexually assaulted by her grandfather. The alleged victim had been medically examined by the doctor after she had been sedated. The doctor had failed to visualize the existence of the hymen of the girl and observed two lacerations on the hymen at 3 o'clock and 9 o'clock positions along with a slight inflammation around the vaginal orifice.
- (iii) Doctor Khan opined that the injuries she observed are consistent with the given history to her. She said what she meant by 'the hymen could not visualize' is that the 'hymen was not intact' and such a thing is most likely happened due to a blunt force been inserted to the vagina.
- (iv) The third witness of the prosecution was Ms. A.M., the mother of the alleged victim. She tendered the Birth Certificate of Ms. A.R. marked as Prosecution Exhibit No. 2. She recalled 18th June 2012 and said that she witnessed the accused, her father-in-law and her daughter Ms. A.R. were on the bed whilst

the accused holding his penis. She said that the accused was putting his penis on Ms. A.R. while shaking it at the same time.

- (v) Ms. A.M said that she did not do anything once she saw this, but went and reported the incident to "Turaga ni Koro" or the village headman. The "Turaga ni Koro" had advised her to report the matter to the police. Ms. A.M. confirmed that Ms. A.R. told her that the accused touched and inserted his finger into her vagina.
- (vi) After calling the above three witnesses, the prosecution decided to close its case. The Court then decided to call for the defence.

6. THE DEFENCE CASE

- (i) The accused and his wife took the stand on behalf of the defence. The accused plainly refused the allegation leveled against him. He said he does not know why this was done to him. He went on to say that it was he who looked after the family with his farming and fishing and that includes the support to his son's family as well. He narrated the structure of his compound and said on 18th of June 2012, around 6.00am his wife got out of the bed to boil the water and came back on bed. As Jorama, his grandson was also with him on bed, Ms. A.R. had come on bed and started playing with her brother.
- (ii) The accused said that he was not in good terms with his only daughter-in-law as she goes out every time till late night for grog and to watch movies leaving the children neglected. He said that he confronted her on this behavior and she sometimes talks back to him. He claimed that even now Jorama lives with him and he looks after all his needs. He further said that he still buys things for his grandchildren and sends through his wife and that includes Ms. A.R. as well. Finally he said he still does not know why this allegation was brought against him.
- (iii) Ms. S.K. the wife of the accused offered evidence next. She said that she sleeps with her husband on the only bed in their house. She said that after

putting the kettle on fire she went back to the bed. She confirmed that she did not see anything else, but saw only her husband on the bed.

7. ANALYSIS

Madam assessor and gentlemen assessors,

- (i) I hope that the evidence led in relation to this case is still fresh in your minds. The alleged victim, Ms. A.R. said that the accused poked his finger or fingers to her vagina. The doctor who examined her said that she could not visualize the hymen of Ms. A.R. and observed two (2) lacerations in the hymen along with a 'redness' around the vagina. The accused vehemently denied the charge or allegation leveled against him. But, he said that Ms. A.R. came on bed in that morning to play with her own brother, who slept the previous night with him and his wife. It is now left to you to decide whose evidence that you are going to accept and relied upon.
- (ii) You would recall madam assessor and gentlemen assessors that the prosecution called the mother of Ms. A.R. to support their case. She described in court what she eye witnessed on that particular morning. Now you can decide whether you are going to accept her narration or not.
- (iii) Finally, the wife of the accused was called by the defence to support their side of the story. According to her, she has never seen anybody on the bed with her husband and any incident as alleged by the prosecution. It was only her slept on the bed with the accused in the previous night. Once again this piece of evidence should also be considered and weighed when you deliberate your opinions.
- (iv) Madam assessor and gentlemen assessors, you would recall that the mother of Ms. A.R. and the wife of the accused offered evidence on behalf of both sides. There is no legal barrier for a close relative or a spouse to testify in support of either side in a criminal matter. Nevertheless, such a close relative or a spouse is obviously an interested witness. Still, that should not be a ground for you to dismiss or reject their evidence. After a careful analysis and scrutiny, if you think that an interested witness's evidence appeal to your

conscience and no reason to disbelieve his or her story, you can act upon their testimony.

8. SUMMARY

- (i) Please recall that the accused need not to prove anything to show his innocence. You might not agree with the explanation offered by the accused. That does not necessarily mean the accused is guilty as charged. The burden of proving the guilt of the accused beyond reasonable doubt still lies on the prosecution. The evidence adduced by the prosecution to prove their case must be appealing to your conscience to be sure of the guilt of the accused.
- (ii) I have directed to you at the very beginning that you have to approach the case in an open mind. That is because the accused is presumed to be innocent until proven his guilt. If you are satisfied that the prosecution has proven the guilt of the accused to your fullest satisfaction or for you to be sure, you must return with an opinion of 'guilty'. If you are not sure of the guilt of the accused, it must be an opinion of 'not guilty'.
- (iii) Your possible opinions in this instance are 'GUILTY' or 'NOT GUILTY' to the charge of Rape.
- (iv) You may now retire to deliberate your opinions. When you are ready with the opinions, I will reconvene the court and ask your individual opinions.
- (v) Any re-directions or additions to what I said in my summing up Ms. Tawake?
- (vi) Ms. Vavadakua?




Janaka Bandara
Judge

At Suva

Office of the Director of Prosecution for State
Office of the Legal Aid Commission for the Accused