

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No.301 of 2012

STATE

V

PELAME RAQIO

Counsel: Ms V. Prasad for the State
Ms. L. Raisua (L.A.C.) for the accused

Dates of trial: 28, 29, 30 July 2014

Date of Summing Up: 30 July 2014

SUMMING UP

Ladies and gentleman assessors. It is now my duty to sum up to you. In doing so, I will direct you on matters of law which you must accept and act on. You must apply the law as I direct you in this case.

2. As far as the facts of this case are concerned, what evidence to accept, what weight to put on certain evidence, which witnesses are reliable, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts, or if I appear to do so it is entirely a matter for you whether you accept what I say or form your own opinions. In other words you are masters and the judges of facts.
3. Counsel for the prosecution and the defence had made submissions to you about how you should find the facts of this case. They have the right to make these comments because it is part of their duties as counsel. However you are not bound by what counsel for either side has told you about the facts of the case. If you think that their comments appeal to your common sense and judgment, you may use them as you think fit. You are the representatives of the community in this trial and it is for you to decide which version of the evidence to accept or reject.
4. You will not be asked to give reasons for your opinions, but merely your opinions themselves, and you need not be unanimous although it would be desirable if you could agree on them. Your opinions are not binding on me and I can assure you that I will give them great weight when I come to deliver my judgment.
5. On the issue of proof, I must direct you as a matter of law that the onus or burden of truth lies on the prosecution to prove the case against the accused. The burden remains on the prosecution throughout the trial and never shifts. There is no obligation upon the accused to prove his innocence. Under our system of criminal justice an accused person is presumed to be innocent until is proved guilty.

6. The standard of proof is one of proof beyond reasonable doubt. This means that before you can find the accused guilty of the offence charged, you must be satisfied so that you are sure of his guilt. If you have a reasonable doubt about the guilt of the accused, then it is your duty to express an opinion that the accused is not guilty. It is only if you are satisfied so that you feel sure of the guilt of the accused that you can express an opinion that he is guilty.

7. Your opinions must be based only on the evidence you have heard in the courtroom and upon nothing else. Whatever you have read or heard about this case in the media or elsewhere you must totally disregard. Your duty is to apply the law to the evidence you have heard.

8. The accused faces one count of rape. In our law and for the purposes of this trial penetration of a vagina with a penis without consent is rape. As the prosecutor told you in her opening address, rape is penetration without consent. All that needs to be proved by the prosecution in this case therefore is that the accused, Pelame, did penetrate the vagina of Mereseini either fully or partially with his penis: it matters not how much penetration there is but there must be some. The State must also prove to you so that you are sure that when there was sexual intercourse Mereseini was not consenting. You will realize that it is common ground between the parties that there was an act of sexual intercourse in the park that night. It is for you to decide the one narrow issue in this case and that is was the sex with the consent of Mere, or was it against her will. If it was against her will then you will find Pelame guilty; if you think that Mere was consenting to the act or if you are not sure, you will find him not guilty.

9. The evidence that the prosecution seeks to rely on in this case comes from the direct evidence of Mereseini herself. She told us in evidence that she is married to Ken with 2 children. In August she and Ken (who was then her de facto partner) had one child and they were living in Davuilevu Housing. On 30 August 2012 at about 7pm she was coming back from staying at her parent's house in Nabitu village. She had got off the bus at Nakasi and she had walked up towards Davuilevu Housing. She went into the shop and bought herself an ice block then she came outside and saw Pelame staring at her. He asked if she was Ken's wife and she said yes. They then said hello to each other; he told her his name was Jerry and she said that she was Mere. She said that she needed to urinate and he then said there was a toilet at his uncle's house nearby that she could use. They both walked towards the house but when she looked she thought she saw that there were a lot of people there and she didn't want to go in. They walked to a driveway and a coconut tree and she relieved herself there. When she had finished she pulled up her tights and she told him that she was going back to the shop to wait for her husband. She said she didn't go home to relieve herself because it was dark and she was waiting for him. When she was starting for the shop he came back and started pulling her and kicking her. She said "what are you doing? I am married with a child". He then told her to relax and for them to have sex. He kissed her and pulled her towards the ground. He told her to have sex and she said "no I am married". She told him that if he did have sex and assaulted her she would report him. He kept pulling her and told her to lie down. He took off her tights, lifted both her legs and she started crying. She said "stop I don't want you to do that". He inserted his penis into her vagina. He then said "you haven't tried a marble yet, maybe you will like it". She begged

him to stop and said that what he was doing would damage her baby bag. She was terrified. He kept forcing himself onto her. She kicked him she pushed him away with her knee and then kicked. She kicked him in the stomach: she put her tights on and then ran towards the junction. When she was running he ran after her. She told she told him that she would report to the police for what he had done. He said that if she did report he would go to her husband's father and tell him that they had been having sex for some time. He would also tell him that she is a prostitute from Nausori town. She kept walking to the main road; he kept pulling her and telling her not to tell. He got his passport from his pocket and said that if she reported he would leave the country the next day. There were no people around. It was about 7 to 7:30 pm - she kept walking and saw the bus that her husband was meant to be on. She told him that it was her husband's bus and she went and waited for the bus then he had gone. Ken got off the bus and they walked home together. She told him that something big had happened and that she would tell him about it when they got home. When she told Ken he got angry and wanted to look for him. He went out to look for him and couldn't find him. He came back and told his father about what had happened. The father then told the police at Nakasi. She was medically examined at the Nausori Health Centre on 31 August 2012. She said that she did not call out for help when she was being raped she was crying and didn't have the strength to shout. This was not the first time she had seen Jerry because she had seen him earlier outside the shop about one or two months before the incident. She identified the accused as the man she called Jerry or Pelame.

10. In cross examination, she denied that she had known Jerry earlier and had had a sexual relationship with him. She also denied that she had had an argument with the husband.

11. The second witness for the prosecution was Kenneth, the complainant's husband. He said that on 30 August 2012 at 7:45pm, he was coming back from work. His wife was waiting for him when he got off the bus. There was no one else with her. They went home when they got home she started crying and telling him the story. She told him that when she was waiting for him at the bus stop Pelame was standing by the fence on the other side. She thought of going home and on her way Pelame followed her. She said that he was pulling her and using the name Jerry. She said he pulled her and pushed her to the grass and then he tried to take off their clothes. She told him to stop but he kept on. He was naked and doing things to her such as kissing her neck. After that she stopped resisting . She told him that she just lay there and waited for him to come onto her. When he did she kicked him and then she ran towards the ground. Ken said that when he first saw her she was scared and crying. In 2012 they were getting on very well. He said that after she had told him the story he went to look for Pelame but couldn't find him He told his father and the police were informed.

12. The next witness for the prosecution was the doctor. She told us that she examined Mereseini on 31st August, 2012. Mere had told her what had happened to her. She said that when she was visiting her de facto husband, a stranger approached her and in a verbal exchange he said that he wanted to have sex with her. She refused but he followed her and at a secluded spot he pulled her pants off and raped her. She escaped and her partner got off the bus; she went to him and told him about it. She told the doctor that the attacker had stifled her screaming. In her medical findings the doctor said there were no injuries however there was a visible and tender laceration about half a centimetre

long at the 6 o'clock position of the vagina. It was a small superficial tear; it was an injury on the floor of the vagina. She said it was fairly recent it could be due to any forceful trauma to the vagina. She concluded that's the injury was consistent with the history told to her by Mereseini. It is a matter for you what you make of the medical evidence Ladies and Gentleman.

13. The next witness for the prosecution was the officer who produced the formal charge statement when the accused was charged with the offence of rape. The accused said nothing in response to the charge and you may think that his evidence is of no use one way or the other.
14. The other officer was the police officer who interviewed the accused under caution and recorded the questions and answers in a document that was placed before you. He said that he recorded the answers exactly as the accused gave them and that it is a true record of the Interview.
15. I direct you as a matter of law that is for you to decide after hearing the evidence and in looking at the interview questions and answers whether those answers were in fact truthfully made by the accused. If you decide that they were truthful then it is evidence for you to take into account and give weight to as you think fit. Bear in mind that the general story he gives in that interview is much the same as what he told us in evidence.
16. That was the end of the prosecution case and you heard me tell the accused what his rights are in defence. He could remain silent and say that the State had not proved the case against him to the required standard, or he could give evidence from the witness box and be cross-examined. Whichever course he took

he would be able to call witnesses if he wished. As you are aware, the accused elected to give evidence in his own defence.

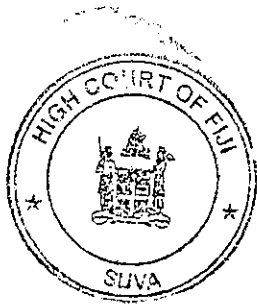
17. I must direct you that the accused does not have to prove anything, the onus of proof being on the prosecution to prove to you so that you are sure that's the accused had sex with Mere against her will. Even if you don't believe a word the accused says, it doesn't matter if you think that the state had not proved their case to the requisite standard.

18. He told us that on the evening of 30 August 2012 he had been at Davuilevu playing volleyball with his brothers and friends. After the game he went to pick up his bag and he found the boys at the shop and they all stayed at the shop drinking juice. He went to his brother's place to get his bag but his brother was having a shower so he told the brother he would go back to the shop and wait for him there. He went inside the shop to get his Glo - band charged and Mereseini came into the shop when he was there. They greeted each other in the Fijian dialect. He knew Mere because before in 2011 until 2012 he had met her in Nausori and they used to "hang-out" together and they were boyfriend and girlfriend. She told him that she was waiting for her husband, so the accused sat outside waiting for his brother. Mere came out and started a conversation with him about Ken's bus and about other things. They sat together on the stone and talked, laughing and joking. The accused said he knew Ken because they used to work together at the car wash and they had been friends since 2005. In fact he said they were cousins. Mere told the accused that Ken had chased her away from home and that she had gone back to her family place in Lautoka, but her father had chased her away from there telling her to come back to Ken. The accused told her that if Ken didn't want to take her back she could come and stay at his house. Mere told

him that she wanted to urinate so he took her to his uncle's house which was just three or four houses away. There were a lot of people in the house and she was not prepared to go in there so the accused said he took her to a place near the sea wall and she urinated there. When she had finished she called out to him and came over to him and said that she wanted to relive the past. She said Ken was not a good husband and she wanted to have sex with him for one more time before Ken came. The accused said "no- it is over" and anyway they couldn't do it there near the sea wall because there were two houses nearby and one of them could easily see them. He suggested they go to the ground and she said yes. He told her to wait a few minutes while he went back to the shop to get an empty carton. He did that and brought it back and smoothed it out on the ground so that she could lie down. She sat on a carton and then did things to arouse him. She took off her tights, he took his trousers and they had sex until he ejaculated. He said that she made no sound and didn't yell out but he couldn't kiss her because her mouth was not smelling good. Everything they did, they did to enjoy themselves and everything was done with her consent. If she didn't want to have sex, then when he went to the shop to get the carton she could have run away. He told us then that they got dressed and walked the long way back towards the shop. Ken's bus did eventually come and the accused said that he saw Ken face-to-face after he got off the bus. When he saw Ken, he crossed to the other side of the road and he noticed that Ken and Mere seemed happy and were taking a walk.

19. The accused told us that he had never given the answer in his caution interview that told about sex with the marble but he was told by the police that it would be easier for him if he said that. It is a matter for you.

20. As you know ladies and gentleman there was no more evidence from the defence - that was the end of all the evidence in this case.
21. It is now time for you to retire and consider your opinions. It would be better if you could all be agreed but that is not strictly necessary. You will be asked individually for your opinion and you will not be asked to give a reason for it. When you are ready, and you can take as little time or long time as you like, then you will let my staff know and I will reconvene the Court to hear your opinions. Remember, if you think there was no consent from Mere to the sex that night, then you will find him guilty. If you think she was a willing party or if you are not sure, you will find him not guilty.
22. You may now retire but just before you do, I am going to ask Counsel if there is anything they wish me to add, explain or correct in this summing up.
23. Counsel?



P.K. Madigan
Judge

At Suva

30.07.2014