

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 207 OF 2013

STATE

-v-

NAVITALAI NAIVALULEVU

Counsels : Ms. L. Latu for the State
Ms. L. Raisua for the accused

Date of Trial : 7 August 2014 to 12 August 2014

Date of Summing Up : 13 August 2014

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

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 state counsel and the counsel for the defence 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 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. 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:

1. **THAT** the Accused in this matter is Navitalai Naivalulevu.
2. **THAT** the Complainant is AN.
3. **THAT** the Accused is the grand uncle of the Complainant.
4. **THAT** the Accused is charged with 3 counts of Rape and 1 count of Sexual Assault under the Crimes Decree 2009.

16. The information against accused is as follows:

FIRST COUNT
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

NAVITALAI NAIVALULEVU between the 18th of August 2012 and 2nd day of September 2012 at Vatukoula in the Western Division, inserted his finger into the vagina of **AN**, a 10 year old girl.

SECOND COUNT
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

NAVITALAI NAIVALULEVU between the 18th of August 2012 and 2nd day of September 2012 at Vatukoula in the Western Division, inserted his finger into the vagina of **AN**, a 10 year old girl.

THIRD COUNT
Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) and (2) of the Crimes Decree 44 of 2009.

Particulars of Offence

NAVITALAI NAIVALULEVU between the 03rd of September 2012 and 30th day of September 2012 at Vatukoula in the Western Division, indecently assaulted **AN** by licking and sucking the vagina of the said **AN**.

FOURTH COUNT
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

NAVITALAI NAIVALULEVU between the 03rd of September 2012 and 30th day of September 2012 at Vatukoula in the Western Division, inserted his penis into the vagina of **AN**, a 10 year old girl.

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

18. 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.

19. If a person penetrates the vagina of another person to any extent with part of that person's body that is Rape under Section 207 (2) (b) of the Crimes Decree. So, the elements of the 1st charge of Rape are that the accused penetrated the vagina of the victim to some extent with his finger which means insertion of finger fully into vagina is not necessary.
20. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man to the vagina of a woman to any extent. So, that is rape under Section 207 (2) (a) of the Crimes Decree.
21. So, the elements of the offence of Rape in the 2nd and 4th 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.
22. 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 10 years of age and therefore, she did not have the capacity under the law to consent. So, the prosecution does not have to prove the absence of consent on the part of the girl because law says that she, in any event, cannot consent. This position will apply to all the charges.
23. I will now deal with the elements of the offence of Sexual Assault. The offence of Sexual assault is defined under Section 210 of the Crimes Decree:

A person commits Sexual Assault if:

(a) Unlawfully and indecently;
(b) Assaults another person.
24. 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.
25. Apart from the elements of the offences, 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.
26. 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.

27. 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.
28. 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 issues/s before court on the basis of their learning, skill and experience.
29. 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 his 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 his 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.
30. 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.

31. 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.

32. I will now deal with the summery of evidence in this case.

33. Prosecution called complainant as the first witness. She is 12 years old. In 2012 when she went to the cattle farm with Ratoto and Sikeli the accused had caught her. Ratoto and Sikeli had gone to collect firewood at that time. The accused had inserted his penis into her bua. (private part). She had pushed him away. That was not the first time. On a Sunday when she was sleeping the accused had come and inserted his finger into her bua. (private part) She had pushed him away. She did not give permission to do that. This was in school term holiday. He had inserted his penis into her vagina another time when she was peeling cassava in the kitchen. She had told about this to her friend, teacher and mum. She identified the accused in Court.
34. Under cross examination she stated that she only told her friend and teacher that the accused touched her breast and vagina. She had told mother accused touched her vagina once. When suggested it was not the accused who inserted finger into her vagina she stated it was him. She said that there was light from a lantern to identify him. She admitted that Ilisabeta and Ratoto were sleeping in the same room. She had not told Ratoto about this at that time as she was worried that he will get angry. She had told her friends about this before telling her mother. When accused inserted his penis into her vagina while peeling cassava she was holding a knife. But she had not used the knife on the accused. She admitted that she told about this to her mother while returning from hospital. She also admitted that she had a sickness of getting collapsed and injured. She denied the suggestions that accused was never alone with her or did not do any of the acts mentioned by her.
35. 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? You might have observed that she took time in answering the questions. The doctor told us that she was scared at the time of examination. 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? There is a delay in making a complaint. Are there any reasons for such delay. What was her family background. What was the relationship between her and the accused. Was there any change in the life of the victim after these incidents. 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 AN beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish elements of all the charges.
36. The next witness for the prosecution was the mother of the victim. She identified and tendered the birth certificate of the victim marked P1. Her daughter had told her the accused touched her private thing at the Ba market. Victim was crying when she told this. She got angry and was thinking about it. She had told the victim to go and tell this to her teacher. She identified the accused in Court.

37. Under cross examination she admitted in 2012 she was living in one house with the accused. There were 8 people living in that house. Her mother is always at home. Children were left at her care when she leaves home. She admitted that her daughter told her this in September 2013. She was scared to report the matter and that is why she told her daughter to tell the teacher. She admitted that her daughter was never alone at home. She does not spend much time with the accused.
38. You saw this witness giving evidence in Court. If you believe her evidence beyond reasonable doubt you have to consider whether her evidence is confirming the victim's evidence or creating reasonable doubt in her story. She had not reported the matter to police even after victim told her. But she wanted the victim to tell this to her teacher.
39. The third witness for the prosecution was Ms. Seini Tuikubulau. She is the class teacher of the victim. On 25.10.2013 after lunch some students have informed her about some comments passed in the class. She had called the children concerned and asked them. Then she had questioned the victim. She had told her that her grand uncle is touching her breast and private parts. She cried and it was very hard to get words out. When head teacher came following Monday she had reported the matter to the head teacher. Head teacher had reported the matter to the police.
40. Under cross examination she stated that the victim was a basic student in the class. She is sick in the school at some times. Sometimes it is headache and she collapse at other times. She had notice this since 2012.
41. The next witness for the prosecution was the acting head teacher of the school. She confirmed the evidence of the class teacher. She had called the victim to her office and asked her three times. She had kept saying the same thing. Then she sent a word to the president of the Koroboya village crime committee. Mr. Vodo had come to the school following day. Victim was called to the office again. Victim had told the same thing to him. He wanted to report the matter to the police. Thus they have gone to Vatukoula Police Station and reported the matter. Victim was shivering and frightened when she told this.
42. Under cross examination she admitted that victim only told her Tai Vita touched her breast and private part.
43. The next witness for the prosecution was Valirio Vodo. He had received a message from the head teacher on 29.10.2013. He had gone to the school. He was told what victim had told the head teacher. Victim was called to the office. Victim had told her Tai Vita normally touch her body and her private part. He had asked her at any time he lied on her body? She said 'No'. She was scared and frightened. As it was a serious thing they reported the matter to the police.
44. Under cross examination he stated victim did not tell him about accused inserting his penis into her vagina.

45. These three witnesses are independent witnesses. You have to decide whether their evidence is confirming the evidence of the victim or creating a reasonable doubt in the prosecution case.
46. Doctor was called as the next witness for the prosecution. He is a doctor with 4 years experience. He had examined the victim on 30.10.2013 at 3.30 p.m. The history was taken from the victim through mother. According to the history victim was sexually abused by her grand uncle more than once last year. Child appeared scared. According to medical findings, there were no cuts or redness. There was no hymen. His finger could be inserted into vagina without resistance. This could have happened due to penetration into vagina. Either by penile penetration or penetration by a finger. The history was consistent with his findings. He tendered the Medical report marked P2.
47. Under cross examination, he said what he meant by finger goes in freely is that the hymen is not intact.
48. The doctor is an independent witness. If you believe his evidence there is confirmation on penetration to the vagina. However, these are not fresh injuries. You have to decide whether this evidence is confirming the evidence of the victim before attaching any weight to this evidence.
49. The next witness was PC Loame Turagalevu. He is police officer for 10 years. He had caution interviewed the accused at the crime office Tavua Police Station on 31.10.2013. It was in i-taukei language in question and answer format. It was commenced at 9.50 a.m. The accused was given his rights. The accused did not make a complaint. He tendered a carbon copy of the original i-taukei caution interview marked P3A and the English translation marked P3B. He read out the translation to the Court. Cpl. Eremasi Naraga was present as the witnessing officer. He identified the accused in Court. He had taken part in arresting the accused with other officers. He was transported in the police vehicle to the station. No assault was done on the way. The answers were voluntarily given by the accused.
50. Under cross examination he admitted that the accused did not know how to read or write. He admitted that he is related to the accused from his wife's side. He denied that his rights were not given. He denied threatening the accused during the interview. He denied telling him if he did not admit another team will be brought in to interview him. He denied that answers to questions 10, 34, 35-37, 43-47 were not given by the accused. He denied that the content was not read back to the accused at the conclusion.
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 the charges are proved by this statement. The admissions in the caution interview statements alone is sufficient to establish all the charges provided you accept that caution interview statement was made voluntarily and the content is truthful.

52. After the prosecution case was closed you heard me explaining the accused his rights in defence.
53. The Accused elected to give evidence. He explained to Court in detail about the family members living at his house. He said that he is not close to the victim. He denied all the allegations against him. According to him there was no reason for the victim to make these allegations. He stated that on 30.10.2013 after 5.00 p.m. police came to his house. His brother had given them bowl of grog. He had given them sevusevu. Police officer informed him the reason why they came and he was asked to come to police station. One of the officers was his cousin. He was taken in a police vehicle. On the way police sergeant was questioning him about the allegation. He denied the allegation. Then vehicle was stopped he was asked to get down and sit on the road. The sergeant squeezed his jaw for about 2 minutes. It was very painful and he admitted the allegation. Then he was taken to Tavua Police Station and locked in the cell. He was not given a meal that night by police. He gave money to a police officer to buy him four buns and juice. Following day he was interviewed under caution. He was not given his rights. Then he said that these were explained to him at Tavua Police Station. He did not admit the allegations. Then he was told that if he did not admit the allegation another team of officers will be called. He thought they will call Army officers. He was really scared and frightened. He can't stand arguments. He gave answers to the questions asked. Those were not read back to him. Then he said that officer who came to give evidence explained the questions and answers to him. He put his thumb impression as he could not write.
54. Under cross examination he stated that he did not complaint to Magistrate. He was scared and he could not tell. He had not complained to the Magistrate that his jaw was squeezed or that he was verbally abused. He did not know that there is an opportunity to say something bad was done. There was no reason for the victim to make a false allegation against him. He is close to her as a grandniece. He denied the allegations against him.
55. 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? His position taken up in Court is different from his caution interview statement. In other words his evidence is inconsistent.
56. 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.

57. 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.
58. 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.
59. 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.
60. 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.
61. 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.
62. 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

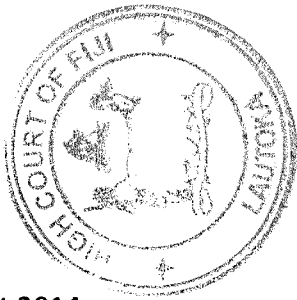
separately. The fact that the accused is Guilty or Not Guilty of one charge does not necessarily mean that he is Guilty or Not Guilty of the other charges as well.

63. 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 |
| (iii) | Third charge of Sexual Assault | Accused Guilty or Not Guilty |
| (iv) | Fourth charge of Rape | Accused Guilty or Not Guilty |

64. 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.

65. Any re-directions?



At Lautoka
13th August 2014


Sudharshana De Silva
JUDGE

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