

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 116 OF 2011L

BETWEEN : STATE

AND : SIONE SADRUGU

Counsel : Mr. Niudamu J for State
The Accused is in person,

Date of Hearing : 26th of February and 2nd of March 2015

Date of Summing Up: 3rd of March 2015

SUMMING UP

Madam Assessors and Gentleman Assessor,

1. We have now reached to the concluding stage of this proceeding. It is my duty to sum up the case to you on law and evidence. You must carefully and attentively concentrate your attention to my summing up. During the cause of my summing up, I will direct you on matters of law which you must accept

and act upon it. You must apply the law as I directed in your deliberation to form your opinion of the accused person's guilt or not.

2. In respect of the facts of this case, it is entirely for you to decide which evidence to accept or refused, which witness is reliable or unreliable, which version of the evidence is to be accepted or refused and what weight to put on certain evidence. Hence, if I expressed any opinion or view on the facts of the case, or if I appeared to do so, it is entirely upon you to accept or disregard it in order to form your opinions. I say so because you are the judges of the facts in this case.
3. Please bear in your mind that you and you alone are the judges of facts. Therefore, you will have to decide on facts and such decision on facts cannot be made by anyone else other than each one of you. No one can influence you in the forming of your opinion. As judges of the facts, you are allowed to talk, discuss and deliberate on facts of this case among yourself only. However, each one of you must reach your own conclusion or form your own opinion. It is important that your opinion must be upon the evidence presented during the cause of the hearing and upon nothing else. In other word, you must disregard anything that you have heard about this case from any form of outside sources and your opinion must only be founded on the evidence given in the court room.
4. You will recall that the learned counsel for the prosecution and the accused made their respective closing submissions and explained how you should find and consider the facts of this case. It is true that the accused person made only a brief statement reiterating that he did not commit this crime. It is their duty to make these submissions in order to present their version of the case. However, as the judges of the facts, you are not bound or required to accept

what the counsel and the accused have told you about the facts of this case. It is a matter for you to decide which version of evidence to accept or refuse based on your own common sense and judgment.

5. Moreover, I must caution you that you should dismiss all feelings of sympathy or prejudice, whether it be sympathy for or prejudice against the accused or the victim or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.
6. You are not required to give reasons for your opinions, but merely your opinions themselves. Your opinions need not be unanimous, though it would be desirable if you could agree on them. I must emphasise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinion when I form and deliver my judgment.

Burden and Standard of Proof

7. I now turn to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocent is in force until you form your own opinion that the accused is guilty for the offence based on the evidence presented during the cause of this hearing.
8. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused person is presumed to be innocent until he is proven guilty. Accordingly, the burden of proof rest on the prosecution throughout the trial and it never shifts to the accused person. In other word,

there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.

9. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused person’s guilt. If there is a riddle in your mind as to the guilt of the accused person after deliberating facts based on the evidence presented, that means, that the prosecution has failed to satisfy you the guilt of the accused person beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

The information

10. The accused person is charged with one count of Rape. I will call the victim as “x” since I have ordered to suppress his real name. The particulars of this count of rape are;

Rape contrary to section 207(1) and (2) (a) of the Crimes Decree 2009,

“Sione Sadrugu, on the 28th day of May 2011, at Nadi in the Wesrern Division, inserted his penis into the anus of X, without the consent of the said X.

11. Section 207 (1) and 207 (2) (a) states that;

*“Any person who rapes another person commits an indictable offence.
A person rapes another person if-*

(b)the person has carnal knowledge with or of the other person without the other person's consent,

12. In this instant case, the accused is alleged that he inserted his penis into the anus of the victim without his consent. Accordingly, the main elements of the offence of rape that the prosecution is required to prove beyond reasonable doubt against the accused person are that;
 - i. The accused,
 - ii. Inserted his penis into the anus of the victim,
 - iii. Without the consent of the victim, and
 - iv. The accused knew the victim was not consenting for him to insert his penis in that manner.
13. It appears that slightest penetration into the anus of the victim by the accused with his penis is sufficient to satisfy the second element of the offence of rape.
14. The third and fourth elements are connected to the consent of the victim. Section 206 (1) of the Crimes Decree states that;

"The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent".
15. Accordingly, it is the onus of the prosecution to establish beyond reasonable doubt that the accused inserted his penis into the anus of the victim without the consent of the complaint. The prosecution is required to establish that the victim had not freely and voluntarily consented to the accused to insert his penis into his anus.

16. 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 purpose of the act; or
 - vi. by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

17. It is important to note that proof can be established only through evidence. Evidence can be presented in the form of:
 - i. Direct evidence,
 - ii. Circumstances evidence,
 - iii. Documentary evidence,
 - iv. Expert evidence.

18. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his/ her own evidence but also with other evidence presented in the case.

19. At this point, I must emphasis you that the offences of sexual nature do not require evidence of corroboration.

20. I now draw your attention to summarise the evidence presented by the prosecution and the defence respectively.

21. The first prosecution witness is the Victim(PW1). In his evidence he stated that he met the accused and his friend in the town and spent the evening with them. He drank with them and then went back to his hotel to have a change. He then went to a restaurant with them to have dinner. He stated that it was a friendly evening with them. The accused and his friend asked him to go to a night club which he agreed. After the night club, he went back to his hotel, where he found that his mobile phone was missing. He went back to the club to see that whether the people who spent the evening with him were still there. He met the accused and his friend again in the club. They told him that they know the residence of the person who took his mobile phone and agreed to take him to that place. They went in his rental car to the house of that person.

22. However, according to the victim, he was not actually taken to the place of that person. Instead they took him to some other place, where they assaulted the victim and robbed him. They threatened to kill him and put him into the booth of the car. He pleaded with them not to injured him and do any irrational thing. They then put him into the back seat of the car and drove somewhere in to the country side. At that place, the friend of the accused took his rental car and went to look for his money in the hotel. The accused stayed with the victim. He then forced him to remove his cloths. He threatened the victim with a bottle in his hand. The victim stated in his evidence that he had no option but to surrender to the accused and remove his cloths. At that time, the accused penetrated his penis into the anus of the victim. The victim had no idea how long the accused did that.

23. At that time, the victim heard a foot sound of someone was approaching and shouted for help. The accused then ran into the wilderness in the dark. The victim then met the person who came in response of his shouting and told him the predicament he had.
24. In his cross examination he denied the accused's allegation that he takes young Fijian boys into his hotel room whenever he visited Fiji. He stated that he asked the accused to close the door when he was drinking and smoking in the balcony because it was not allowed to smoke inside the room. He denied that he asked the accused to come inside and do the same as his friend did. However, the accused did not specify in his question what he meant by "do the same".
25. The second prosecution witness is James Emberson. He stated in his evidence that he heard a sound of someone seeking help coming from the jungle while he was walking back home after drinking party early in the morning on 29th of May 2011. He first thought that it was a joke of someone, and shouted back in Fijian language to ask "who is". He then heard the sound again from the jungle and realised it was from a foreigner. He then picked a stone for his self-defence and shouted back. At that time, he heard someone ran through the bush and the victim came out from the jungle. He observed the victim was shaken and naked apart from his underwear. Mr. James then untied his legs and hands and gave his shirt to the victim and comforted him. He then took the victim to the road and called the police.
26. In his cross examination he affirmed that he only saw the victim and did not see anyone as it was very dark.

27. The third prosecution witness is PC Waisake Valesu who is the interviewing officer of the accused person. He stated in his evidence that he observed a cut on the left ear of the accused, but denied it was bleeding when he was interviewed. He stated that there was no witnessing officer during the recording of the caution interview; however, the charging officer, witnessing officer of the charging statement and the investigation officer were present in the crime office at that time. He specifically stated that though these officers were present in the crime office, none of them interrupted the conduct of the caution interview. The accused was given his rights to consult a counsel and treated well during the recording of the caution interview. The interviewing officer confirmed that he recorded the two injuries that the accused had sustained before he was arrested in the caution interview. He affirmatively stated that the accused was not threatened, assaulted, forced, or induced to make his statement in the caution interview.
28. The fourth prosecution witness is Sgt Seruvi Caqusau. He is the charging officer. He too confirmed the accused was treated well and had not received any complaint from the accused. He too affirmatively stated that the accused was not forced, threatened, induced, or assaulted during the recording of his charging statement.
29. The fifth prosecution witness is PC Jolame, who is the witnessing officer of the charging statement. He in his evidence confirmed the evidence of Sgt Seruvi, that the accused was not forced, intimidated, threatened or assaulted during the record of his charging statement.
30. The last prosecution witness is PC Aca Bibi, who is the investigation officer of this case. Apart from that he was a member of the arresting team with PW2. He stated that PW2 gave his rights and cautioned him before he was formally

arrested. He stated that the accused was treated well. The injury that the accused had on his left ear at the time of his arrest has recorded in the cell book, which confirms that the accused had that injury before he was arrested. He further stated that he translated the caution interview of the accused into English language.

31. At the conclusion of the prosecution case, the accused person was explained of his rights in his defence. The accused gave evidence on oaths and called no other witness for the defence. He denied the charge as alleged though he admitted that he robbed the victim with his accompish.
32. I have summarised the evidence presented during the cause of the trial. However, I might have missed some. It is not because that they are not important. You have heard every items of evidence and reminded yourself of all of them. What I did only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.

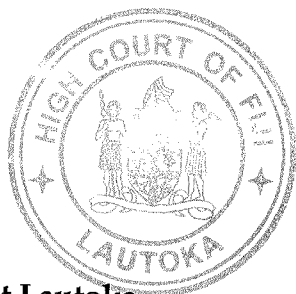
Conclusion

33. The prosecution presented direct evidence of the victim, Mr. James, and four other police officers. Apart from that they tendered the copies of the caution interview of the accused person, its English translation, charging statement and its English translation in the form of documentary evidence. . In respect of the record of caution interview and the charging statement of the accused person, you are allowed to take into account the contents of these documents if you believe and satisfy that the accused person has given his statement in those documents voluntarily and on his own free will.

34. The victim spent most of that evening with the accused and his friend. He travelled with the accused to find the place of the person whom he thought might have taken his mobile phone. He confirmed that the accused was also got down from the car, when the friend of the accused hijacked his rental car and went to the hotel to take his money.
35. The victim then stated that he was forced to remove his cloths by the accused. He had no option as the accused was young and fit and also threatening with a bottle in his hand. He then removed his cloths. At that time the accused inserted his penis into the anus of the victim. Mr. James in his evidence confirmed that he heard the shouting of the victim for help and also heard that someone ran through the bushes in the dark. He saw the victim was naked apart from his underwear when he came out from the jungle.
36. On the other hand, the accused in his evidence denied this allegation.
37. It is your duty as judges of the facts to decide which witness is credible and which evidence is reliable. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he has testified.
38. You watched that all the witnesses gave evidence in court. It is your duty as judges of facts to consider the demeanour of the witnesses, how they react to being cross examined and re- examined, were they evasive, in order to decide the credibility and the truthfulness of the evidence and the witnesses. It will assist you in forming your decision to accept or refuse the evidence or part of the evidence of witnesses.

39. You have heard the evidence presented by the accused, where he denied this allegation of rape. If you accepted the version of the accused person that he did not commit this offence, then the prosecution case fails. You must then acquit the accused from this charge.
40. If you neither believe nor disbelieve the version of the accused person, it then creates a reasonable doubt in the prosecution case. You must then acquit the accused person from this charge.
41. Even you reject the version of the accused person that does not mean that the prosecution has established that the accused person is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused person has committed this offence as charged in the amended information.
42. Upon consideration of all evidence, if you believe that the count of rape is proved beyond reasonable doubt, you can find the accused is guilty of the charge. If you believe that that charge is not proved beyond reasonable doubt, then you must find the accused is not guilty.
43. Madam and gentleman assessors, I now conclude my summing up. It is the time for you to retire and deliberate in order to form your individual opinions on the charge against the accused person. You will be asked individually for your opinion and are not required to give reasons for your opinion. Once you have reached your opinion, you may please inform the clerks, so that the court could reconvene.

44. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



At Lautoka

3rd of March 2015

R. D. R. Thushara Rajasinghe

Judge

Solicitors : Office of the Director of Public Prosecutions
The accused person,