

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 67 OF 2012

STATE

-v-

JOSEVA VEIVALI

Counsel : Mr. J. Niudamu for the State

Accused in Person

Dates of Trial : 15th March 2016 – 16th March, 2016

Date of Summing Up : 17th March, 2016

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

SUMMING UP

Ladies 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. 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 facts. 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 the prosecution made submissions to you about the facts of this case. That is his duty as the Counsel. Accused also addressed you. 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. 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 opinions 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 it 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 or sympathy.
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 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 gives evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.
13. 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 time of this Court.
14. The agreed facts of this case are:

that the victim in the matter is AT of Drevedreve Settlement of Nalawa, Ra.

that the accused in this matter is Joseva Veivali, also of Drevedreve Settlement, Nalawa, Ra.

that the victim is the biological daughter of the accused with his defacto wife Sonoveva Mole, also known as Makelesi Mole.

that the victim was 7 years old at the time of offending.

that between the 1st day of January 2011 and the 24th of April 2012, the accused was residing at Drevedreve Settlement, Nalawa, Ra.

that sometimes between the 1st day of January 2012 and the 24th day of April 2012, the accused wife was taken to Lautoka to give birth.

that between the time that the accused defacto wife was taken to Lautoka to deliver their baby, the accused had taken the victim and another son namely Joseva to visit their mother.

15. The accused is charged with the following 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

JOSEVA VEIVALI, between the 01st day of January 2012 and the 24th day of April 2012 at Lautoka in the Western Division, penetrated the vagina of **AT**.

16. I will now deal with the elements of the offence of Rape. 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.
17. 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 person under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The complainant in this case was 7 years old during the period of the alleged offence 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. The elements of the offence of Rape in this case are that:
- a. the accused,
 - b. penetrated vagina of the victim, to some extent with his penis.

18. Other parts of the offence are irrelevant to the facts of this case.
19. Insertion of penis fully into her vagina is not necessary. Slightest penetration is sufficient.
20. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.
21. 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 a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.
22. 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.
23. Expert evidence is also important to be 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. 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 expressed on a particular fact to aid Court to decide the issue/s before Court on the basis of their learning, skill and experience. Doctor in this case gave evidence as an expert witness. However, doctor's 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 led in the case.
24. In evaluating evidence, you should see whether the story related in evidence is probable or improbable; whether witness is consistent in his

or her own evidence and with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the prosecution or for the defence. You must apply the same standards in applying them.

25. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers or were they evasive? How did they conduct themselves in Court? In general, what was their demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting. You observed demeanor of AT, other prosecution witnesses when they gave evidence. Although, demeanor is not 100% accurate test to assess credibility of a witness, the behavior of them in the witness box will give you an idea when it comes to assessing their evidence for its truthfulness and reliability.
26. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.
27. You can consider 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 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.
28. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. There can be a reasonable explanation for the delay. It is for you to decide, when victim did eventually complain, whether it was genuine.
29. Please remember, there is no rule in Fiji for you to look for corroboration of victim's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of victim, depending on how you are going to look at her evidence.

30. You saw victim giving evidence hiding behind a screen so she can't see the accused. The screen was put up because the victim is an underage vulnerable witness. You must not draw any negative inference against the accused from that.
31. I will now remind you of the prosecution and defence cases. In doing this, it would not be practical for me to go through the evidence of every witness in detail and repeat every submission made by Counsel. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of Counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

Case for the Prosecution

32. Prosecution called the victim, AT, as its first witness. She was 13 years old when she gave evidence. Accused is her father. In 2012, she was residing in Drevedreve Settlement with her father, mother and siblings.
33. During the period mentioned in the information, she visited her mother one day, in Lautoka with the accused and her younger brother. They stayed at Buk's place. Buk is her father's friend who used to have drinks together.
34. Whilst staying at Buk's place, accused asked her to go down the river and asked her to take off her undergarment. Then he took his penis and put it into her vagina. She was lying down on the ground facing upwards. Accused was facing downwards. He was moving forward and backward. It was very painful. Blood started coming out.
35. After doing this, accused asked her to go to the river and have a wash. He warned her that if she were to tell anyone he will chop her into pieces.
36. One day, her mother and father were in a fight. Her uncle Joseva Loko came and took her and her brothers to his place in Dobuilevu. She related the incident to her uncle.
37. Under cross examination, she denied that she was coached by anybody to give evidence against her father.

38. Next witness ladies and gentleman was the doctor Mohammed Imtishan. He is an MBBS qualified with Bachelor of Medicine and Bachelor of Surgery with six years' experience.
39. On 24th April, 2012, when he was attached to the Rakiraki Hospital, Police brought the victim for medical examination. He examined the victim and prepared a report which he tendered in evidence marked as PE1.
40. Doctor described his medical findings and his opinion. He did not notice any visible external injuries or bite marks on victim's body. Upon internal examination of her vagina, he found her hymen not intact. He opined that the victim had experienced sexual intercourse.
41. Prosecution called Police Inspector Koro next. On 24th April, 2012, a report was lodged by one Joseva Loko who is the brother of the accused of Drevedreve Settlement with regard to an abuse. He inquired into the complaint and summoned the accused to the Nalawa Police Station. Investigation was conducted with regard to allegations of Sexual Assault and Rape.
42. Joseva Loko was the last witness for the prosecution. He is a brother of the accused. He came to know that accused's children live in a carton house. He made a request to the Social Welfare Department and got the custody of the children. Department had advised the accused and his wife not to visit the children in Dobuilevu. However, both of them came and stayed with the children at his place.
43. Accused wanted his children back. However, children were scared of their father and reluctant to go back. He built a separate house adjacent to his house. Accused and his family moved to the new house. That did not stop the children from coming to him complaining of their father's harassments.
44. On 17th April, 2012, he was shocked when the victim came running to him and complained that she was scared of her father. After that he moved to another house in Dobuilevu with the victim and her brother. Accused came there too and wanted his children back. Children were scared to go with him. On the same day, he took the children back to his father despite their reluctance. On the following day, the victim ran away from her father's house and came back to Dobuilevu.

45. He inquired from the victim what the problem was. She informed everything his father did to her. Victim said that accused took her to a creek and took off her clothes and did one painful thing to her. Accused also touched her body. He reported the matter to Police and told everything the victim had related to him.

Case for the Defence

46. After the prosecution closed its case, you heard me explain the accused's rights in defence; his right to remain silent, right to give evidence and call witnesses on his behalf. His rights were explained not because the accused had to prove anything. I had to do so since I am required, in law, to do so.
47. Accused elected to remain silent. That is his right. You must not draw any negative inference against him and think that accused remained silent because he is guilty.
48. Accused denied the allegation against him in when he addressed you. He cross examined the victim on the basis that she lied to Court on the instruction of Police or somebody.

Analysis

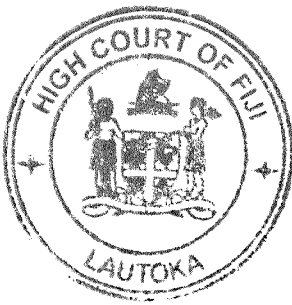
49. The prosecution based its case mainly on the evidence of the victim. If you are satisfied that the evidence she gave in Court is reliable and trustworthy you can safely act upon her evidence in coming to your conclusion. You must remember that evidence of the victim alone is sufficient to bring about a conviction in a rape case, if the Court believes her evidence to be truthful.
50. A most important part of your task is to judge whether the child witness has told the truth, and has given a reliable account of the events she was describing. Some of you will have children and grandchildren who are of a similar age to the victim who has given evidence. If so, I think you will recognize the sense of the advice I am going to offer you about your judgment of their evidence, but remember that I am speaking of an approach to the evidence and evaluation of the evidence is your

responsibility. You do not have to accept my advice and if you do not agree with it you should reject it.

51. Children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. You have to be mindful about that.
52. I told you earlier that there must be positive evidence on identification of the accused-person that connects him to the offence that he is alleged to have committed. There is no dispute in this case with regard to the identity of the accused. Accused is the father of the victim.
53. It is an agreed fact that the victim was seven years old during the period mentioned in the information. All that the prosecution need to prove in this case is that accused penetrated the vagina of the victim with his penis.
54. You consider whether the victim had any reason or motive to fabricate a story against the accused to put him in trouble. It is up to you to form your own opinion as to whether victim had any reason to fabricate a story against her father.
55. If you are satisfied that the victim had told the truth and her evidence is believable, then you have to consider whether the prosecution had discharged its burden and proved the charge beyond reasonable doubt.
56. You must be satisfied that the accused penetrated her vagina with his penis.
57. 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.
58. If you accept the prosecution's version of events, and you are satisfied that the prosecution has proved the case beyond reasonable doubt, so that you are sure of accused's guilt you must find him guilty. 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.

59. You may now retire to deliberate on the case, and once you have formed your opinions, you may inform our clerks, so that we could reconvene, to receive the same.
60. Any re-directions?




Aruna Aluthge
JUDGE

AT LAUTOKA
17th March, 2016

Solicitors: Office of the Director of Public Prosecution for the State
Accused in Person