

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. 63 of 2014

STATE

V

KAND SAMI

Counsels: Ms. A. Vavadakua for State
Ms. S. Dunn (L.A.C.) for Accused

Dates of Trial : 16 and 17 May 2016

Date of Summing Up : 17 May 2016

SUMMING UP

[Name of victim is changed to protect her identity]

1. Ladies and Sir 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 have 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 proof 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 he or she 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.
8. The accused faces two counts or charges of rape. In our law and for the purposes of this trial, rape is committed when a person penetrates the vagina of another and where the person doing that does not have the consent of the victim or is reckless to whether she was consenting or not.
9. I will further direct you that when the female in question is under the age of thirteen years, in law she cannot be said to be consenting. That applies to the first count when the sexual act took place sometime within the year 2012.
10. So for the first count all you need to find is that the accused did have sexual intercourse with Linda and nothing else.
11. For the second count however the issue of consent comes in to play because on the 17th August 2014 she was 13 years old.
For that count you must find:
 - (1) That there was an act of sexual intercourse
 - (2) That it was this accused who was doing that act, and
 - (3) That Linda was not consenting to it, and
 - (4) The accused knew that she was not consenting or was reckless as to whether she was consenting or not.

12. As I have said the accused faces two counts. You must look at each count separately; the evidence on each is different. Just because you might think he is guilty of one count does not necessarily mean he is guilty of the other and similarly with a finding of not guilty.
13. To find lack of consent you will of course look at all the evidence, including the circumstances of the act, if indeed you believe there was an act and of course Linda's evidence.
14. I know it was a very short case and that the evidence will be fresh in your mind but it is my judicial duty to sum up the evidence to you in order that you may apply the law to it as I have directed you.
15. The first prosecution witness was the young complainant in this case who I am going to call Linda. She told us that in 2012 when she was 11, she was living with her Dad and they went to stay at Aunty Prem's house. The aunt's house wasn't ready so they went instead to Poe and Subama's house to spend the night. That night when they were all sleeping she felt a touch on her shoulder and a "boy" whom she later identified as the accused took her out of the living room to the bedroom, took her clothes off, took his own clothes off and had sexual intercourse with her. She knew the "boy" as Raj. He was a visitor in the aunt's house as well – in fact he was related to Poe and Subama. Raj had been sleeping alone in the bedroom and all the others including Linda were sleeping in the living room. He pushed her onto the bed. She felt pain after the sex and she was bleeding. He then told her to go back to sleep.
16. In 2014 in August when she was 13 she had been to church and was walking home. When she got to the middle of the road

she saw Raj standing there. He pulled her by the hand and took her “up the hill”. When arriving there he kissed her on the lips, kissed her breasts, then took all her clothes off. He kissed her genitals and then proceeded to have sexual intercourse with her. When she got home after that she eventually told her father and he reported the matter to the Police.

17. The place on the hill was deserted with nobody around and no houses. She didn't want to go up there with him and she didn't want to have sex with him. She was scared he would do something to her if she didn't submit.
18. In cross-examination she admitted that her father had given her a hiding and it was only after that she told him the whole story. She denied that she was making up this story because of the hiding.
19. The second prosecution witness was a Medical Officer who examined Linda on the 20th August 2014, three days after the “hill” incident that we heard about. From her extremely confusing testimony, the crux of her evidence was first that Linda's hymen was not intact and secondly that there was a small abrasion on her vaginal wall. It is for you to make what you will of this evidence and to give it the weight that you think it deserves.
20. The third prosecution witness was a Police Officer who said that he interviewed the accused in Nabouwalu in 2014. He knew the accused as Kand Sami otherwise known as Raj.
21. You might think that his evidence was not very helpful.

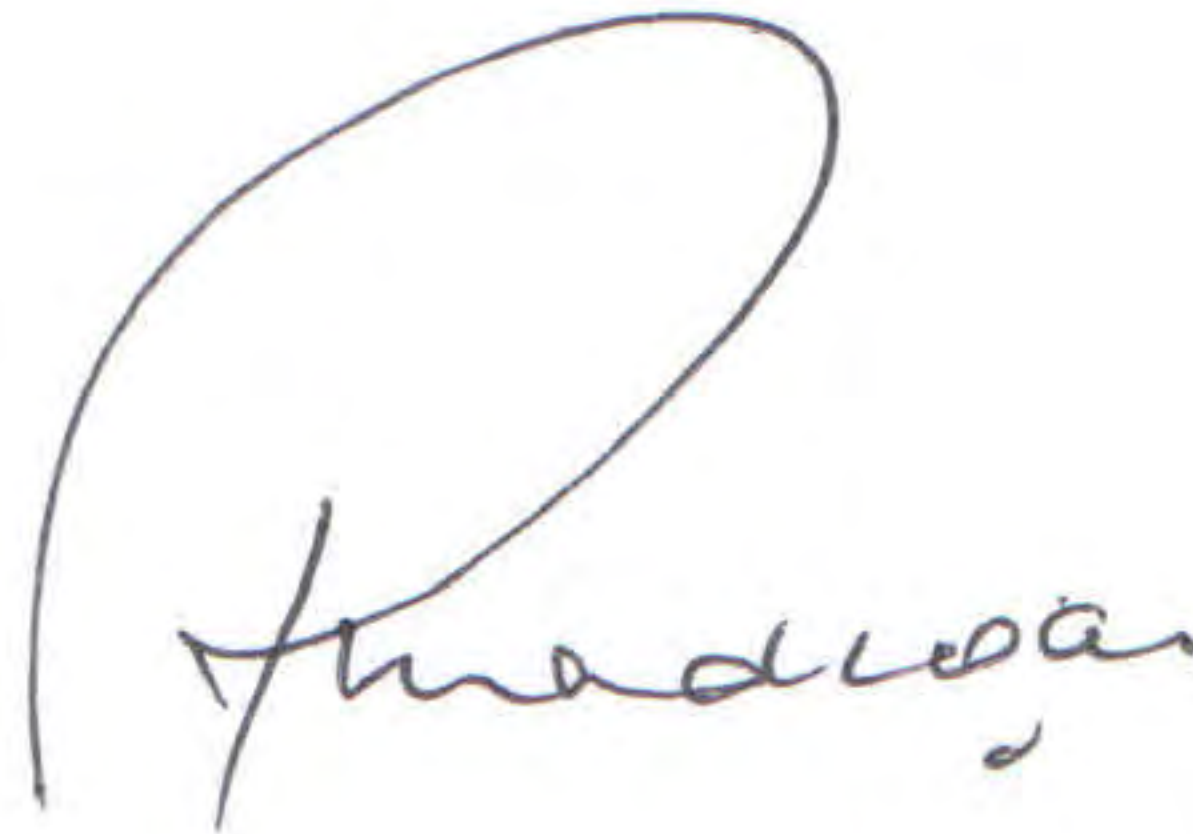
22. Well Ladies and Gentlemen that was the end of the Prosecution case and you heard me tell the accused what his rights are in defence. He could give evidence and be cross-examined or he could remain silent and say that the State had not proved their case to the required standard. In either case he could call witnesses.
23. He chose to give evidence, saying that he had been advised by his Counsel. Now Ladies and Sir, the accused did not have to give evidence and the fact that he did does not shift the burden on the State to prove their case beyond reasonable doubt. Even if you don't believe a word he and his witnesses say then that does not necessarily make him guilty. It is however evidence that you must weigh up in the normal way and give it whatever weight you see fit. If you think what he says is true then you will find him not guilty of both counts.
24. Kand Sami told us that until 3 years ago he was living in Bua, in Sawani. With reference to Linda's evidence about the night in 2012, he said that he slept in the living room and Poe and his wife were in the bedroom. He slept next to Pita Kaisau. He did not have sex with Linda, nothing happened at all.
25. In 2014 he never took her up a hill. That day he had worked his dalo crop and later, at 11am had gone to Poe's house to drink grog. He aunt (Poe's wife) had made him vakalolo and he had left at 2.30pm and eaten his vakalolo under a coconut tree.
26. In cross-examination, he said that Linda was there with her father but they left at 1.30pm.
27. The second and third defence witnesses were mother and son respectively.

28. The mother (DW2) is Subama Reddy. The accused is her nephew. She is the wife of Poe and on the night that visitors were staying in 2012 they all slept in the living room while she and Poe slept in the bedroom. Raju was in the living room and Linda was there sleeping with her father.
29. When asked what happened on 17th August 2014 she gratuitously said "Raju was eating vakalolo. I kept it for him." You might think that it is very odd that she would say this of all things, I certainly did but as I say it matters not what I think; it is what you think that counts.
30. She said that Raju came to her house in the afternoon that day. Sifra was also there and she left in the afternoon around 3 to 4 pm. She doesn't know anything about Sifra having bad things done to her. But in 2012 Sifra was sleeping in the sitting room with her family and nothing happened to her.
31. The third defence witness was Pita Kaisau the accused's cousin and the son of DW2. On the 17th August 2014 he was at home. His grandfather had come for a function and they and many others were drinking grog from 11am onwards. At about 2pm or 2.30pm he went to fetch more water for the tanoa and when he was at the well just near Prem's house he could see into that house because the door was open. He could see Linda lying on a bed sleeping and her father on another bed. He took the water back. On the way to get the water he saw the accused eating vakalolo under a coconut tree.
32. In 2012, he was sleeping at the house with all the visitors. He was sleeping next to the accused in the living room. Linda was sleeping with her father a few people distant. He is a very light

sleeper and if someone moved he would wake and stand. His parents were sleeping in the bedroom.

33. In cross-examination he started to forget things and wasn't sure if his sister was there or not. The only time he woke up was when the accused went out to relieve himself.
34. Well Ladies and Sir, that is my summary of the evidence. If I have omitted to remind you of evidence that you think is important, give it the weight you think it deserves. I have not covered in detail the cross-examination by both sides but you will be aware of it and will take it into account.
35. That is all I wish to say to you. Take as much time as you need and let a member of my staff know when you are ready with your opinions and I will reconvene the Court. You may retire now but just before you do I will ask Counsel if they wish me to alter or add anything to this summing up.

36. Counsel?



P.K. Madigan
Judge



At Labasa
17 May 2016