

IN THE HIGH COURT OF FIJI

CRIMINAL JURISDICTION

AT LAUTOKA

CRIMINAL CASE: HAC 148 OF 2013

BETWEEN : STATE

AND : RATU LUKE SOVA

Counsel : Ms. S. Kiran for State
Ms. P. Chand for the Accused

Date of Hearing : 18th of May 2016

Date of Closing Submissions : 19th of May 2016

Date of Summing Up : 19th of May 2016

SUMMING UP

1. It is my duty to sum up the case to you. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. You are to determine the facts of the case, based on the evidence that has been placed before you during the course of the hearing. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give you as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion. I say so because you are the sole judges of the facts.
4. You all have been chosen from the community and represent a pool of common sense, knowledge and experience of the conduct of human beings in our community. Accordingly, you are required to use your experience, common sense and knowledge of the community and the human conduct in your deliberating of facts of this case.
5. You must reach your opinion on evidence. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits and agreed fact. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel of the prosecution is not evidence. The purpose of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the accused are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony, agreed facts and the

exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.

7. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that your opinion will assist me in reaching my judgment.
8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused 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 solely 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.
9. Matters which will concern you are the credibility of the witnesses, and the reliability of their evidence. 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 is correctly recalling the facts about which he or she has testified.
10. 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 own evidence but also with other evidence presented in the case.

11. It is your duty as judges of facts to consider the demeanor of the witnesses, how they react to being cross examined and re-examined, where they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he testifying, his disinterestedness, his integrity, and his veracity in order to determine the credibility of the witness and his evidence.

Burden of Proof and Standard of Proof.

12. I now draw your attention to the issue of burden and standard of proof. The accused person is presumed to be innocent until his is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused person is guilty for the offence.
13. 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 words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
14. 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 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.

Information

15. The Accused person is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars of the offence are before you. Hence, I do not wish to reproduce it in my summing up.
16. The prosecution alleges that the accused person met the victim at the Ratu Rakavi carnival in Sigatoka on the 20th of June 2013. He then had a walk with her along the tramline. He then pushed her into the bush and asked her to have sexual intercourse with him. When she refused it, the accused forcefully had sexual intercourse with her. The prosecution alleges that the victim did not give her consent to the accused person to insert his penis into her vagina.
17. The main elements of the offence of rape as charge in the information are that;
 - i) The Accused,
 - ii) Penetrated into the vagina of the victim with his penis,
 - iii) The victim did not consent to the accused to penetrate into her vagina with his penis,

iv) The Accused knew the complainant was not consenting for him to insert his penis in that manner.

19. Prior to taking your attention to the main elements of the offence of Rape, I kindly request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven facts by the prosecution beyond reasonable doubt.
20. The accused person has admitted in the agreed facts that he had a sexual intercourse with the victim. The prosecution alleges that the victim did not give her consent for the accused person to have a sexual intercourse with her. However, the accused person claims otherwise. Accordingly, the main dispute in this matter is the consent of the victim.
21. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven that the victim did not give her consent to the accused to insert his penis into her vagina.
22. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the victim consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.
23. If you are satisfied, that the accused had inserted his penis into the vagina of the victim and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed that

the victim was freely consenting for this alleged sexual intercourse. I must advise you that belief in consent is not the same thing as a hope or expectation that the victim was consenting. You must consider whether the accused knew either that the victim was not in a condition or a position to make a choice freely and voluntarily, or the victim had made no choice to agree to sexual intercourse. If you conclude that the accused believed that the victim was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that prevailed at the time of the alleged incident took place.

24. You must bear in mind that offences of sexual nature do not need the evidence of collaboration. It means that if you are satisfied with the evidence given by the victim and accepts it as reliable and truthful, you are not required to look for any other evidence to support the account given by the victim.
25. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape or a rapist or a victim of rape.
26. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses and the exhibits during the course the hearing.

27. It is your duty as judges of facts to assess the evidence in order to determine whether the accused penetrated into the vagina of the victim with his penis and she had not consented for this alleged sexual intercourse. In doing that, you must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanor of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.
28. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.
29. The first witness of the prosecution is Mereoni Kariniu. She is the victim of this matter. She was staying with her uncle and aunt at Sigatoka village in 2013. She was 16 years old in 2013. She stated that she went to Ratu Rakavi carnival on 20th of June 2013. She met one Seini, a friend of her. She was then introduced to Ratu Luke, the accused and Osea by Seini. They then went out of the ground and walked towards the tramline. While they were walking along the tramline, Semi and Osea left them leaving Mereoni and Luke alone. They reached to Paramount Joinery building, where she asked him to just sit and talk. He said no. He wanted to go into the bush. He pushed her into the bush, near the cemetery. He holds her hand and pulled her inside the bush. He then asked her to sit there. She then sat on a tree trunk. He also sat beside her. He then started to ask her to have sexual intercourse with him. She refused it. He then forcefully did everything to her. He took off her pant and came on top of her. He then had a sexual intercourse with her. Mereoni stated that she tried to move away when

he was having sexual intercourse with her, but could not do so as he was holding her tightly.

30. Mereoni stated that it was the first time she met Luke on 20th of June 2013 at the carnival. She stated that she went with Luke because he asked her for a walk. She agreed for the walk. She stated that she agreed for a walk for a date. After the sexual intercourse, she went home. She felt that blood coming down along her legs. She reached home and tried to sleep, but could not. She collapsed on three times at home. Having noticed that, her aunty called her sister, who is staying at the next house. Her sister came and helped her to take Mereoni to hospital. Luke did not speak to her after he had the sexual intercourse with her.
31. During the cross examination, she stated that her uncle gave her permission to go to the carnival with her cousin sister Kalesi. However, she went alone leaving Kalesi as she was busy with her work. She said the tramline was few meters away from the carnival ground. Mereoni and Luke were walking ahead of Seini and Osea along the tramline. Seini and Osea went other way while leaving them alone. They then went near to the rain tree. She stated that there was no one near the tree. She further said that they did not sit there and talk. Mereoni stated that Luke asked her three times whether he can have sexual intercourse with her. She had denied for it at all the time. She said that she did not get close to him. She said that they kissed each other but that was to convince her for sexual intercourse. They kissed only for one and half minute. He then took off his clothes. She said that she did not take off her clothes. She further stated that it was not a consensual sexual intercourse. After that he left and goes. She went home. According to her evidence Luke did not drop her at the main road.

32. Mereoni stated during the cross examination that only half of the things were fresh in her mind when she made her statement to the police. She said that the statement was true. She said that she could now recall the event took place on that day, because she read her statement before giving evidence. She stated that it is not recorded in her statement that Luke pulled her into the bush, but it was the actual things happened on that night. She further said that she forgot to tell the police that he pulled her into the bush. Mereoni said that they had no conversation at the rain tree. She stated that the conversation took place only she was pulled in to the bush. She further stated that she sat on a trunk of a tree beside a tree in the bush and talked with Luke. That conversation was actually to convince her for sexual intercourse.
33. Mereoni further stated that she did not flee the place, when Luke tried to persuade her to have sexual intercourse because it was very dark and the road was not clear. She followed the way that he came through to leave the place. In respect of the medical certificate, she stated that what the doctor has stated in it is very different to the account that she told the doctor.
34. According to the evidence given by Mereoni, her cousin Kalesi was angry when she returned home in that night. She was angry because Mereoni left her at home and went to the carnival alone. Kalesi saw the blood strains in her cloths. Kalesi did not assault her but she talked to her. She was angry when she was talking to Mereoni. She said that she did not make up this story to save her from more trouble. She further said that she was afraid to tell her cousin that she had consensual sexual intercourse.

35. During her re examination, she stated that Luke kissed her in order to convince her to have sexual intercourse.
36. When she was asked to explain further what she meant by kissing by the court in order to clarify it further, she said that he kissed on her lips and she also kissed him back and participated it. She further said that she still kept on telling him "no" to have sexual intercourse.
37. The second witness of the prosecution is Kalesi Tabulawaki. She is a cousin sister of the victim. She recalls that she was called by her aunty to her house on the morning of 21st of June 2013. When she came to her aunty's house, she found Mereoni was lying on the floor. Mereoni appeared as she was shocked. She further found blood stains on her cloths, floor that's gone towards the bathroom. Her aunty asked her to look after Mereoni as she had to go to work. Kalesi then took Mereoni to her place. She then removed her cloths and took her for bath as she was very hot. She then gave Mereoni a cup of hot water. Mereoni did not tell anything, when she was asked by Kalesi what has happened to her.
38. Kalesi came again to Mereoni after half an hour and asked her what has happened to her. Mereoni then told her that she met Luke at the carnival and talked to him and had a walk. He then forced her to have sexual intercourse with him. Kalesi then took her to hospital. The doctor has informed her that hospital cannot do anything as it was a police matter. Kalesi then went to the Sigatoka police station and reported the matter.
39. During her cross examination, Kalesi said that she did not meet Mereoni on the night of 20th of June 2013 when she was retiring home from the carnival. Kalesi

was also supposed to go to the carnival, but she did not make it. Kalesi further stated that she felt sorry for Mereoni for what has happened to her.

40. Kalesi stated that the statement she made to the police contents with what Mereoni told her about this incident. She further said that Mereoni did not tell her that she was raped and only said that Luke forced her to have sexual intercourse with him. Kalesi stated that she mentioned only about sex and not force to have sex in her statement to the police.
41. At the conclusion of the prosecution case, the accused person was explained about his rights in defence. The accused person opted to give evidence on oaths. However, he advised the court that he does not wish to call any other witnesses for his defence.
42. The accused in his evidence stated that he was introduced to Mereoni by his cousin Osea at the carnival on the 20th of June 2013. It was the first time he met Mereoni. They then went to tramline. He and Mereoni went there for a date. Luke and Mereoni walked bit ahead of Osea and his friend on a tramline. Osea and his friend then sat on the tramline. Luke and Mereoni went further and sat under a rain tree, where they started to talk. It was at the back of the Paramount Joinery building. There were some other people at the rain tree. They were eating and drinking liquor. They had spent few minutes there. Luke then asked her politely whether he can have sex with her. He had asked her three times. She said yes. They then started to kiss each other. When Luke asked her first time, she shook her head and said yes. When he asked her second time, she moved close to him and said yes. Third time, they started to kiss and she said yes. She kissed him back. Luke then took off his clothes as she took off her. They

then had sexual intercourse. It lasted for about 3 to 4 minutes. At all time she has not told him that she was not consenting. Neither had she looked scared during this time.

43. Luke stated that he asked her to go back to the carnival after they had sexual intercourse. However, she refused to go back to the carnival. He then dropped her at the main road. Luke stated in his evidence that during this all time he did not believe that she was not consenting to have a sexual intercourse. She was afraid to go back to home. He did not know what made him to say that she was afraid to go back to home.
44. Luke said that he did not push Mereoni to the bush. He went to the bush first and she then followed him. Luke said that he tried to convince her to have sexual intercourse. He asked her three times and she said yes. He said he did not force into her.
45. During the cross examination, Luke said that he liked her when he met her at the carnival. It was the reason that he took a walk with her. Luke said the reason for asking her second time to have sexual intercourse as she was not sure when she was asked first time. She said yes when he asked second time. He said that he had to ask her three times. That was the reason he asked her third time too. He stated that is how the girls are asked. He has informed her that he will ask her three times and she had said "yes". Luke said he wanted to be sure of her consent. He said he never forced her and asked her politely to have sexual intercourse.

46. I have summarised the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Analyses

47. The prosecution and the defence presented conflicting versions of events, which took place in private between the victim and the accused. The victim claims that the accused forced her to have sexual intercourse with him. He then had a sexual intercourse with her against her consent. The accused person did not dispute that he had a sexual intercourse, but claims that it was a consensual sexual intercourse.
48. The victim stated in her evidence that she did not consent to the accused to insert his penis into her vagina on that night. She said that she also kissed him back and participated in kissing, however she was still telling him " no" to have sexual intercourse. On other hand, the accused claims that he asked her three times and she said yes. He had to asked second time as she was not sure on the first time. He then asked her third time as he wanted to asked her three times, though she said yes for the first two occasions.
49. As I mentioned above, there is no stereotype of circumstances for a rape, or a rapist and or a victim of rape. A mere fact that a girl went with a boy for a walk in the night at a remote place and kissed him, does not automatically constitute that she has given her consent to have sexual intercourse with the boy. You are

required to consider all the circumstances of this incident. Having considered all the circumstances as a whole, if it leads to an indisputable and inescapable conclusion that she had no freedom and capacity to voluntarily make a choice to have sexual intercourse with the accused and expressed that choice freely, you can then conclude that the victim has not given her consent to the accused to insert his penis into her vagina.

50. You have heard the evidence that on the following morning after this alleged incident took place, Mereoni informed Kalesi about what has happened to her on the previous night. On the same day Mereoni informed the doctor about what happened to her when she was medical examined by the doctor. The doctor has stated the background information under A (4) of the Medical Report and the history as related by the victim under D (10) of the Medical Report. The medical report is tendered as an agreed fact by the parties. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between Mereoni and Luke. Neither Kalesi nor the doctor were present and witnessed what happened between Mereoni and Luke.

51. You are entitled to consider the evidence of recent complaint in order to decide whether or not Mereoni has told the truth. The prosecution proposed you that Mereoni's complain to Kalesi is consistent with her account of this alleged incident and therefore she is more likely to be truthful. On the other hand, the defence proposed you otherwise. It is for you to decide whether the evidence of recent complain helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between Mereoni and Luke. It therefore cannot of itself prove that the complaint is true.


52. Mereoni stated in her evidence that she felt the blood was coming down along her legs. She went home and tried to sleep but couldn't. She then collapsed three times. Kalesi in her evidence stated that when she came to her aunty's place she found Mereoni was laying. She saw blood stains on her clothes and the floor. Mereoni's body was hot. According to Kalesi's evidence she found that Mereoni was in a shock.
53. In order to consider the evidence of victim's distressed condition, you must satisfy beyond reasonable doubt that the victim's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged sexual offence. In other words, you must be satisfied that the distressed condition was not feigned and was only referable to the alleged offence and not to any other cause. In deciding these matters, you must take into account all relevant circumstances of this incident.
54. The Doctor in her medical report at D (15) made her observation about the bleedings. She has stated that the victim was supposed to have her menstruation and unsure of whether this bleeding was from sexual assault or a normal menstruation.
55. If you are satisfied that the evidence of distressed condition of the victim is relevant to the alleged offence, then you are allowed to give such weight to these evidence. It is entirely for you to decide what weight you put on those evidence in your deliberation. If you are not satisfied, you should then disregard the evidence of the distress condition of the victim.

56. Ladies and Gentlemen, you might recall that the learned counsel for the accused cross examined the victim about the omissions and inconsistencies in her statements made to the police and the history provided to the doctor with the evidence given in court. The learned counsel for the accused proposed you that the statement made by the victim to the police and to the doctor were in conflict with the evidence given by her in the court. The evidence of victim is what she told us in court on oaths. I now explain you the purpose of considering the previously made statement of the victim with her evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such a statement when you consider whether the victim is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents.
57. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not accept every detail to be the same from one account to the next.
58. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

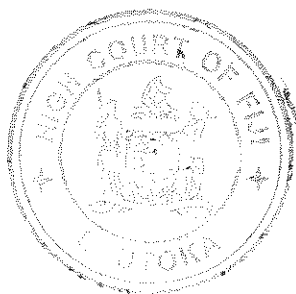
59. Ladies and Gentleman, it is your duty now to consider whether the evidence presented by the prosecution is reliable and truthful. If you accept them as reliable and truthful, then you can consider whether you accept them as proven facts. Likewise, you must consider whether the evidence presented by the accused could be accepted as reliable and truthful.
60. You heard the evidence presented by the accused, where he denied this allegation. If you accepted the version of the accused person as reliable and truthful, then the case of the prosecution fails. You must then acquit the accused from this charge.
61. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.
62. Even if you reject the version of the accused person that does not mean that the prosecution has established that the accused 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 has committed this offence as charged in the information.
63. 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 not guilty.
64. Madam and gentleman assessors, I now conclude my summing up. It is 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 be reconvened.

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


R. D. R. Thushara Rajasinghe
Judge

At Lautoka
19th of May 2016



Solicitors : Office of the Director of Public Prosecutions
Office of Legal Aid Commission