

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 129 OF 2012

STATE

-v-

RAM CHARAN MAHARAJ

**Counsel: Ms. L. Latu for State
Mr. W. Nainima for Accused**

**Dates of Hearing : 23rd, 24th of August, 2016
Date of Summing Up : 25th August, 2016**

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. 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 counsel for Prosecution and the Accused made submissions to you about the facts of this case. That is their duty as the 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 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.
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 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 a witness gives 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. Incidents of sexual assaults 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 incidents. 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.
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.

15. The agreed facts of this case are:

1. That Ram Charan Maharaj, 26 years old, Labourer of Nakavika, Ba, is the alleged Accused in this case.
2. That Virisila Marama also of Nakavika, Ba is the alleged victim in this case.
3. That the victim was medically examined on the 11th of October 2012 at the Ba Health Centre.

16. I now turn to elements of the offences with which the Accused is charged. The first count against Accused is as follows:

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

RAM CHARAN MAHARAJ, on the 3rd day of October, 2012 at Ba in the Western Division, inserted his penis into the vagina of **VIRISILA MARAMA**, without her consent.

17. I will now deal with the elements of the offence of Rape in this case. A person rapes another person if the person has carnal knowledge with or of the other person without other person's consent.
18. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man of the vagina of a woman to any extent. So, that is Rape under Section 207 (2) (a) of the Crimes Decree.
19. So, the elements of the offence of Rape in this case are that:

- a. the Accused
- b. penetrated the vagina of Complainant to some extent with his penis
- c. without her consent.

20. Consent as defined in 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.

Second Count

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

RAM CHARAN MAHARAJ, on the 9th day of October, 2012 at Rakiraki in the Western Division, unlawfully and indecently assaulted a girl namely **VIRISILA MARAMA**, by touching her body whilst she slept.

21 I will now deal with the elements of the offence of Indecent Assault. The offence of Indecent Assault is defined under Section 212 of the Crimes Decree:

A person commits Indecent Assault if he:

- (a). Unlawfully and indecently,
- (b). Assaults another person without other person's consent.

22. 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.

23. 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.
24. 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 complainant was a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.
25. 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.
26. In testing the credibility of a witness, you can consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If the complaint is prompt, that usually leaves no room for fabrication.
27. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in this case, complaint Complainant made to police is genuine and what weight you attach to the complaint.
28. Please remember, there is no rule in Fiji for you to look for corroboration of Complainant'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 Complainant, depending on how you are going to look at her evidence.
29. This is a case of sexual nature. You must bear in mind that because a person has a certain sexual reputation or a certain disposition in sexual matters or has had certain sexual

experiences, you must not draw the inference that, he or she is the 'kind of person' who would be more likely to consent to the act of sexual intercourse. You must consider the evidence led in this trial and form your opinion if the Complainant in our case in fact consented.

30. You must also bear in mind that because a person has a particular sexual reputation or disposition in sexual matters or has had certain sexual experiences, he or she is less worthy of belief than a person without those features.

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

VIRISILA MARAMA, THE COMPLAINANT

31. Complainant is the only witness called by the Prosecution. She was 22 years old at the time she gave evidence. In 2012, she was residing in Nakavika, Ba, with her mother, four sisters and her stepfather Ramu.
32. On the 3rd of October 2012, between 5–6 pm in the afternoon, she was home. Her mother and step father had a fight on that day. Her mother chased her away. She went to her room to get her bag. It was not there. Her sister told her that stepfather Ramu took her bag.
33. Then she accompanied her step sister to the farm house. After a while her step father also arrived there. She asked him about the bag. He did not tell the place where the bag was hidden. After that he went for cane cutting and came back in the afternoon, at 7.00 pm. Then he lit the fire and a candle. He was talking about his marriage life with her mom. Her step sister was sleeping by that time. Then Accused said that he liked her.
34. When she went to bed he pulled her clothes, the yellow wrap around or *sulu*. Then she pulled it away from him. Then he forcefully took off her panty. She pulled her panty up again. He forcefully pulled it down again. Then he tied her hands and legs.

35. She did not like what he did. He tied her legs and hands and did his penis on her. He forced her. She did not give her consent to what he did to her. He threatened her with a knife.
36. She told the police everything her step father did to her. She refreshed her memory by looking at the statement she made to police. Whatever she read in her statement, is the truth. Then she thought about her mother.
37. Ramu told her not to complain this to her mother or otherwise he will chop her altogether.
38. On the 9th of October, 2012 she was in Rakiraki at her grandfather's place. Early in the morning when she was still sleeping she could feel someone touching her. When she woke up, she saw her step father lying beside her. She could feel that he was touching her. She removed his hand. Her mother, two of her sisters and her brother were also sleeping with her.
39. You will remember, after an adjournment of 5 minutes, going back to the incident happened on the 3rd of October, 2012, Complainant retorted that he did his penis on her. When she was asked by the Prosecuting Counsel on which part of her body he did his penis, her answer was 'into my vagina'.
40. She agreed with the Prosecuting Counsel that Ramu forcefully inserted his penis into her vagina. She felt weak.
41. Complainant identified her step father Ramu as the Accused.
42. Under cross examination, Complainant agreed that she was born on the 3rd of June 1995. She denied that, on the 3rd of October of 2012 or prior to October 2012, her mother had noticed love bites on her chest and neck. She admitted that her mother had chased her out

of the house on 3rd October, 2012. She denied however that her mother chased her away because she had used their house as a meeting place with a boy.

43. She agreed that her relationship with the Accused was not good because of the marriage Accused had with her biological mother. She hated him.
44. She made a statement to police on the 11th of October, 2012. She admitted that Accused discouraged her to go back to the main house saying that her mother will do something to her.
45. She admitted that her step sister Lewa was also present in the small farm house sleeping whilst she was being raped. She shouted, but he blocked her mouth. Her sister just turned and slept again.
46. Complainant admitted that she did not tell police that Accused threatened her with a knife. She does not know if she told police that Accused threatened to chop her. She informed police that Accused tied her legs and hands.
47. She said that on the 9th of October 2012, Accused came drunk and lied down in the sitting room.
48. Complainant admitted that when her mom woke up in the morning she assumed that something had happened when she saw love bites and saw her sleeping in the sitting room just a few metres away from the drunk Accused. Complainant also admitted that when her mother inquired about this she had said that nothing had happened.
49. Complainant also admitted that this incident was reported to Police only after her mother, having suspected something had happened, reported it to her grandfather. Then only the October 3rd rape incident was also reported.

50. She denied having fabricated this story because of the hatred she had towards Accused. Under re-examination, the Complainant said that the reason why she was chased away from house was because her mother suspected them.
51. That was the case for Prosecution. You heard me explain to the Accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
52. You are aware; Accused elected to remain silent. That is his right. Now I must tell you that the fact that Accused did not give evidence in defence does not give rise to the inference that he is guilty. Burden of proof remains with the Prosecution throughout.

Analysis

53. There is no dispute in this case with regard to the identity of the Accused. It is admitted that the Accused is the step father of the Complainant.
54. The Prosecution based its case entirely on the evidence of the Complainant. Prosecution says that, on the 3rd of October 2012, the Accused forcefully penetrated the Complainant with his penis and, on the 9th of October, 2012, he unlawfully touched Complainant's body whilst she was sleeping in the Rakiraki house. Accused denies the charges and takes up the position that the allegation was made up by the Complainant because of the hatred she had towards him for marrying her biological mother.
55. First, you have to be satisfied that the evidence Complainant gave is truthful and believable. If you are satisfied that the evidence she gave in court is truthful and trustworthy you can safely act upon her evidence in coming to your conclusion.
56. If you are satisfied that Complainant told the truth and her evidence is believable, then you have to consider whether the Prosecution had discharged its burden and proved, each

element of counts 1 and 2, in the Information, beyond reasonable doubt. You have to consider each charge separately. If you find the Accused guilty of one count it does not mean the he is automatically guilty of the other count too.

57. In evaluating Complainant's evidence, you consider whether what she was talking about in her evidence is probable and believable in all the circumstances of the case.
58. First alleged rape incident occurred on the 3rd of October, 2012. This incident had been reported to police only when the Complainant's mother suspected of the second incident allegedly occurred on the 9th of October, 2012. Contention of the Defence is that the fact that Complainant did not report what had happened as soon as possible makes it less likely that the complaint she eventually made to police was true.
59. You have to see whether Complainant had given an acceptable and legitimate explanation for not complaining at the first available opportunity. Complainant said she was threatened with a knife and threatened to chop her altogether if the matter was reported to her mother. You decide what weight you attach to her evidence.
60. It would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the Courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others would react with shame, or fear or shock or confusion, do not complain or go to Police or any other authority for some time. It takes a while for self confidence to re-assert itself. There is, in other words no classic or typical response. It's a matter for you to determine whether, in the case of this particular Complainant, the lateness of the complaint, such as it is, assists you at all and, if so, what weight you attach to it. You need to consider what the Complainant herself said about her experience and her reaction to it.
61. Defence Counsel argued that if the Complainant was really raped she should have yelled and raised alarm since her step sister was also sleeping in the same small farm house.

intercourse. The experience of the Courts is that people who are being subjected to nonconsensual sexual activity may respond in variety of different ways.

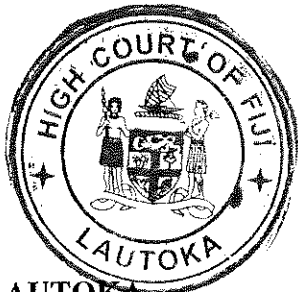
62. You consider whether Complainant was telling a story on the same lines without variations and contradictions and whether she is shown to have given a different version elsewhere.
63. Complainant said she reported to police everything her step father had done to her. Defence Counsel took up the position that Complainant's version is not consistent in that some of the things she told Court in evidence are not in her statement made to police on the 11th October, 2012. You consider whether there is a contradiction between her statement to police and evidence in court and, if so, the contradiction is material so as to affect the credibility of her evidence.
64. Please remember, what she told police is not evidence. However, you can use her previous statement to police to test the consistency and credibility of her evidence.
65. You watched Complainant giving evidence in court. She was sometimes crying. Sometimes she took long pauses to answer the questions. But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a victim in a trial such as this should react to the experience. Any person who has been raped, will have undergone trauma whether the Accused were known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in Court or at the Police Station. The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.
66. Defence took up the position that the whole story was made up by the Complainant because she hated the Accused. Complainant completely denied having made up a story.

You consider whether the complaint is honestly made and what weight you attach to the version of the Defence.

67. If you accept the evidence presented by the Prosecution, you must also be satisfied that each element of each count had been proved beyond reasonable doubt.
68. Complainant said that Accused having pulled her panty 'did his penis into her vagina'. If you are satisfied that he penetrated her vagina with his penis, then you can find Accused guilty of Rape.
69. If you are satisfied that the complainant told the truth, then you decide whether touching of a girl's body whilst she is at sleep constitutes an indecent assault.
70. 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.
71. If you accept the Prosecutions' 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 of each charge you must find him guilty of each charge.
72. If you do not accept the Prosecutions' 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.
73. Your possible opinions are as follows:
 - (i) First count of Rape Accused 'Guilty' or 'Not Guilty'?
 - (ii) Second count of Indecent Assault Accused 'Guilty' or 'Not Guilty'?

74. 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.

Any re-directions?



AT LAUTOKA

On 25th August, 2016


Aruna Aluthge
Judge

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