

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 006 of 2016

[CRIMINAL JURISDICTION]

STATE

V

SULIO VUNIAMATANA TUINAYAU

Counsel : Ms. K. Semisi for State
Mr. J. Savou and Ms. A. Prakash for Accused

Dates of Hearing : 03rd to 05th October 2016

Date of Summing up: 06th October 2016

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as MLV)

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies to this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty.
2. During this summing up, if I express my opinion on the evidence or if I appear to do so, you are not bound accept such opinion. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.

3. Your opinion should be based only on the evidence presented inside this court room. Evidence in this case is what you heard from the witnesses who took the stand in the witness box inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard such information.
4. Please remember that this summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. You heard the opening address and you heard the closing addresses. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you consider it appropriate.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court; how they conducted themselves in the witness box; how they answered the questions during examination-in-chief, cross-examination and re-examination. Applying your day to day life experience and your common sense as representatives of the society, you should decide whether you can believe what each witness said in court. Having listened to the evidence of each witness and having seen how he/she gave evidence, you may decide that the entire evidence of a particular witness can be believed; or you may decide to believe only a part of the evidence and reject the other part; or you may reject the entire evidence of a witness if you decide that the entire evidence of that particular witness is not capable of being believed.

7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. Obviously, you may have a difficulty in believing someone who is not consistent. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what he/she said in evidence. You may ask yourself whether the evidence of a particular witness seem reliable when compared with other evidence you have decided to accept.
9. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. A victim's reluctance to complain could also be due to shame coupled with the cultural taboos existing in the society in talking about matters of sexual nature with others. When it comes to children, a child can be confused about what has happened to him/her; sometimes children may blame themselves for what has happened. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished.
10. You heard MLV ("complainant") saying that she was 09 years old at the time material to the two counts and he is 14 years old now. The main task before you in this case therefore is to judge whether this witness has told the truth and whether the account of the events he gave is reliable. You may have come

across children of different ages. You will have an idea of the way a child would think, respond and describe things at a particular age.

11. Children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned.
12. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint.
13. I explained the above possibilities simply to assist you in evaluating the evidence. However, it is up to you how you assess the evidence and what weight you give to a witness' testimony. It is for you to decide what happened in this particular case based on the evidence presented.
14. Based on the evidence you would consider as truthful and reliable, you should decide what facts are proved and what reasonable inferences you can properly draw from those facts. Then you should decide whether the elements of the offences the accused is charged with have been proved considering those proven facts and the reasonable inferences. I will explain you the elements of the offences in a short while.
15. You are not required to decide every point which has been raised by the lawyers in this case. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the elements of that offence have been proved.
16. As a matter of law you should remember that the burden of proof always lies on the prosecution. The accused is presumed to be innocent until proven guilty.

This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt. In order for you to find the accused guilty of a particular offence you must be sure that he is guilty.

17. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. If you have a reasonable doubt in respect of any element of an offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. However, if you find that the prosecution has proved all the elements of a particular offence beyond reasonable doubt, you should find the accused guilty of that offence.
18. The accused is charged with two offences. You should bear in mind to consider each count separately. You must not assume that the accused is guilty of the other count just because you find him guilty of one count.
19. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion where all three of you agree on whether the accused is guilty or not guilty; but it is not necessary.
20. The Director of Public Prosecutions has charged the accused for the following offences;

COUNT ONE

Statement of offence

Rape: Contrary to section 207 (1) and (2)(c) and (3) of the Crimes Decree, No. 44 of 2009.

Particulars of offence

SULIO VUNIAMATANA TUINAYAU between the 1st day of July 2011 to the 31st day of July 2011, at Kadavu in the Central Division,

penetrated the mouth of MLV a child under the age of 13 years with his penis.

COUNT TWO

Statement of offence

Sexual Assault: Contrary to section 210 (1)(a) of the Crimes Decree, No. 44 of 2009.

Particulars of offence

SULIO VUNIAMATANA TUINAYAU between the 1st day of July 2011 to the 31st day of July 2011, at Kadavu in the Central Division, unlawfully and indecently assaulted MLV by touching her vagina.

21. Now let me summarise the evidence led by the prosecution and the defence.

Case for the prosecution

22. The complainant said in evidence that she is 14 years old and her date of birth is 12/07/02. She is studying in form 3 now. She was 9 years old in July 2011. During this time, she was living in Kadavu with the accused who is related to her as her grandfather. The accused's wife, his son, her brother and a cousin also lived in the same house. She said, on one day in the month of July 2011, after lunch, the accused was sitting near the door and he told his son, her brother and the other cousin to look away and to go to sleep. Then they went to sleep and the accused's wife was also sleeping in the room. The accused then called her and told her to look down and he showed her his penis. When she saw it, she looked the other way. Then the accused forcefully put his penis inside her mouth. She was struggling and after about 2 minutes he pulled it out. He told her if she tells anyone, he will kill her.
23. After a few days when she woke up one morning, she noticed that there was no one in the house except her and the accused. When the accused was about to go to the farm he told her to bring the knife to him. When she took the knife to him, he told her to move closer. Then he took her panty off and touched her vagina. She was scared that he would kill her if she tells anyone.

24. She left Kadavu and came to Suva in 2012. Before she came to Suva, she told the accused's wife about the incidents. The accused's wife cried and then told her not to tell anyone. After she came to Suva, she lived with her grandmother and she also lived with her aunt. She stayed with her aunt in 2012 for about one year. She lived with her grandmother for a short while. During this time she went to Draiba Primary School.
25. She told her aunt who is the second prosecution witness and then her grandmother who is the third prosecution witness, about what the accused did to her. On her grandmother's advice, she reported the matter to the police.
26. She was then taken to the CWM hospital by her grandmother and the police officer Sereima and a doctor examined her. She said, when she came to Suva she tried to forget what happened and that is why she told her aunt and then the grandmother about the incident. She recognized the accused in open court.
27. During cross examination she said her Uncle Inoke took her to Kadavu in December 2010 and then her Aunt Makereta who is her mother's sister brought her from Kadavu to Suva. Makereta stayed with her for a short time in Kadavu before they came to Suva. She admitted that she did not tell anyone apart from the accused's wife about the incident when she was in Kadavu. Not even her Aunt Makereta when she was in Kadavu. She admitted that there was a family meeting held in the accused's house after she told the accused's wife about the incidents. She also admitted that the accused's wife asked her about what she had told the accused's wife earlier on during this meeting. She denied the suggestion that she was silent and did not say anything during that meeting. She admitted that she did not tell anyone about the incidents when she was in Suva till April 2012. She said that the doctor who examined her did not ask questions from her. Her grandmother was answering the doctor's questions. She said 'No' when she was asked whether her grandmother told the doctor that it was one 'Joe' who had touched her private part. She said 'yes' when she

was asked whether the house that she lived in Kadavu was an open house with no rooms.

28. During re-examination, she said she didn't tell anyone else when she was in Kadavu because she did not trust anyone. She did not tell Makereta when they were in Kadavu, because Makereta was not at home most of the time. She said she told the accused's wife though she was threatened by the accused because she thought that it was safe to do so. She said that a part of the house at Kadavu looked like a room. Another part looked like a sitting room and there was a kitchen.
29. Next witness for the prosecution said the complainant is living with her and her family since the complainant came back from Kadavu in April 2012. Complainant's mother is her younger sister. She said the complainant was about 8 years old at that time. She said, on one day in the month of April 2012, she found the complainant crying outside her house. She took the complainant to the house and asked the complainant why she is crying. The complainant told her that the accused did something to the complainant. The complainant was scared to tell her because the accused was her uncle. After one day, the complainant told her that the accused showed his penis to the complainant. When she asked whether the accused do anything else, the complainant had sad that the accused told the complainant to put his penis inside her mouth. The complainant had also told her that the accused's wife told the complainant not to inform the police. She informed her mother and her mother then reported the matter to the police.
30. During cross examination she said Makereta brought the complainant back from Kadavu around April 2012. She said the accused is related to her by blood.
31. The final witness for the prosecution was the grandmother of the complainant who is also the mother of the second prosecution witness and of the complainant's mother. She said the complainant is 14 years old. She said, in April 2012, her daughter whom the complainant was living with, had told her

about something that had happened to the complainant in Kadavu. The next day, she spoke to the complainant and the complainant told her that Tutu Suli had removed her panty and had touched her vagina. Complainant had also told her that the accused rubbed his penis on the complainant's mouth. Complainant had also said that when the complainant told the accused's wife, accused's wife had cried and had told the complainant not to tell anyone. She then reported the matter to the police. She said she went to the hospital with the complainant and the Police Officer Sereima where the complainant was medically examined. She explained to the doctor that it was the second time this was done to the complainant.

32. During cross-examination she admitted the suggestion that the reason the complainant went to Kadavu was because the accused who is married from Kadavu was living there. She admitted that the reason for the complainant to be examined by the doctor is the complaint made against the accused. She also admitted that she answered most of the questions asked by the doctor during the examination. Then the defence counsel showed her a certain portion of the medical report and asked whether she told the doctor "Molested by grandfather 2010 (Joe)". She said that she explained to the doctor that it would be the second time as the first time it was by the stepfather and the second time by the grandfather. She said she mentioned the name Sulio and she thinks that the doctor has written that by mistake. She said that the doctor was from Africa.

Case for the Defence

33. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give sworn evidence and call one witness.
34. The accused in his evidence denied inserting his penis in the complainant's mouth. He said he does not know what the complainant was talking about. He

said his house is an open house, there is no bedroom or sitting room and the kitchen is outside the house. He denied the second allegation as well. He said his wife asked him about what the complainant had told her and that he told his wife that he does not know anything. On the day his wife questioned him, they sat down with the complainant and they had asked the complainant about it. He said the complainant was crying and did not say anything.

35. He said the complainant came to stay with him in Kadavu one week before Christmas in 2010. Her uncle Inoke brought her. She left at the end of the third term in 2011 and her aunt Makereta took her back. He said Makereta came during the second term of school and was staying in his house. He said he does not know the exact age of the complainant but he knows that she was in Class 4. He said he thinks that the reason for the complainant to make this allegation against him is because he used to beat her up. He said he used to question her about her past as she was a victim once. The complainant used to stare and that is why he questioned her.
36. During cross examination he agreed that the complainant is his granddaughter and that she lived with him and his family in his house at Kadavu in July, 2011. He said, he thinks that the complainant was about 9 to 10 years old in 2011. He agreed that the complainant was crying when he and his wife spoke to the complainant about what she had told his wife. He said he did not threaten the complainant or tell her not to tell anyone because he does not know what she is talking about. He admitted that he used to beat the complainant and to question her about her past. He again denied both allegations.
37. The second defence witness said he is a Pastor at Yavolu. He said that the accused's house is made out of tin and it is an open house with no rooms. There is no kitchen inside the house. He said the accused's house is the same since July 2011 until now. During cross examination he said that the bed was in one corner of the house and that corner was used by the accused and his family members to sleep. He said, the middle of the house is used as the sitting room. He said when he went to the accused's house there were no curtains inside the

house. But he said he is not sure. He pointed out an area in the court room which is about 6m x 5m as the area of the accused's house. He agreed that the house was spacious.

38. That is a summary of the evidence. Please remember that I have not reproduced the entire evidence of the case. I only referred to the evidence which I considered important to explain the case and the applicable legal principles to you. If I did not refer to any evidence which you consider as important, you should still consider that evidence and give it such weight you may think fit.
39. To prove the first count of *rape* in this case, the prosecution must prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) penetrated the mouth of the complainant with his penis;
 - c) the complainant was a child below the age of 13 years.
40. The first element of the offence is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that this accused committed the offence.
41. The second element of the offence of rape involves penetration. The law states that this element is complete on penetration to any extent. A slightest penetration is sufficient to satisfy this element. To establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the mouth of the complainant to any extent.
42. When it comes to the offence of rape, an essential element the prosecution should prove is that a complainant did not consent. However, law says that 'a child under the age of thirteen years is incapable of giving consent' in relation to the offence of rape. In this case the prosecution says that the complainant was under the age of thirteen years during the time material to this case. Therefore, in respect of the third element, what you have to decide is whether or not the prosecution has proven beyond reasonable doubt that the

complainant was below the age of thirteen years during the time material to this case.

43. The second count involves the offence of sexual assault. The elements of the offence of Sexual Assault are;
 - a. the accused
 - b. unlawfully and indecently
 - c. assaulted the complainant
44. Again, the first element involves the identity of the accused.
45. The word "unlawfully" simply means without lawful excuse.
46. An act is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent.
47. Assault is the use of unlawful force. Accordingly, a touch constitutes an assault if it is done without a lawful excuse.
48. You should also ask yourself, firstly, whether you consider the force which was used could have been sexual because of its nature; and if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.

Analysis

49. You heard the complainant saying in her evidence that she had informed the accused's wife about what the accused did to her before she was brought to Suva. The defence does not dispute this fact. What the defence says is that there was a family meeting after the complainant told the accused's wife and when the complainant was asked about what she told the accused's wife during this meeting, she did not say anything, and she only cried. However, there was no evidence as to what exactly she told the accused's wife.

50. Then you also heard the evidence that the complainant had told her aunt and then her grandmother about what the accused did to her, in April 2012. The complaint was made to the police thereafter.
51. According to the prosecution the complainant was threatened by the accused not to tell anyone about the incidents and that is the reason for the complainant not to tell anyone about what happened when she was in Kadavu. However, the complainant told the accused's wife about the incident and she was told by the accused's wife not tell anyone. The complainant said that she wanted to forget what happened and that is the reason she told her aunt about the incident when she came to Suva. The aunt said that she questioned the complainant after she found her crying outside her house and the complainant told her that the accused showed his penis and told the complainant to put it in her mouth, as a result of this questioning.
52. Defence says that the complainant did not complain to anyone, though she had the opportunity and the complaint made to the aunt is not a prompt complaint. Defence also says that there is an inconsistency between the complainant's evidence and what the aunt who was the second prosecution witness said in evidence. Defence points out that what the second prosecution witness said was that the accused showed his penis to the complainant and told her to put it in her mouth and that the complainant had not told that the accused inserted his penis in her mouth. Defence also points out that the complainant had not told the second prosecution witness about the second allegation.
53. If there is a delay in making the complaint to the police or a person in authority, there is a room to make up a story and that may affect the reliability of the story. If the complaint is prompt that usually leaves no room for fabrication. It is a matter for you to decide whether the evidence of the complainant is unreliable considering the time it took for the complainant to make a complaint regarding this matter.

54. The defence also says that there are inconsistencies in the evidence presented by the prosecution. Defence points out the following inconsistencies among others;
- a. Second prosecution witness said that the complainant told her that the accused showed his penis and told the complainant to put it in her mouth and did not mention about touching the complainant's vagina;
 - b. Third prosecution witness said that the complainant told her that the accused rubbed his penis on the complainant's mouth and that the accused touched the complainant's vagina;
 - c. Complainant said that she went to Draiba Primary School where the second prosecution witness said that she went to John Wesley School; and
 - d. The complainant said that she was scared after the accused threatened her that he will kill her if she tells anyone, but she told the accused's wife.
55. In dealing with inconsistencies, first you have to be satisfied that in fact there is an inconsistency. If you are satisfied that there is an inconsistency, then you should consider whether that inconsistency is material and relevant or insignificant and irrelevant. If you find the inconsistency to be material and relevant, then you must consider whether there is any explanation given by the witness in question with regard to the inconsistency. If there is no such explanation or if you are not satisfied with the explanation, again you have two options. You may either conclude that that particular witness is generally not to be relied upon or you may decide to disregard only part of his/her evidence which you consider unreliable.
56. On the other hand, if you consider the inconsistencies to be insignificant and irrelevant, or if you are satisfied with the explanation given, then you may consider such witness as a reliable witness notwithstanding the inconsistency.
57. The prosecution says that the accused penetrated the mouth of the complainant at his house in Kadau between 01st July 2011 and 31st July 2011. The prosecution

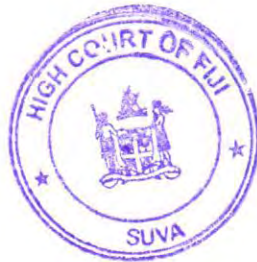
also says that the complainant was below the age of 13 years during that period.


58. The accused denies this allegation and says that he does not know what the complainant is talking about. Defence says the evidence of the complainant regarding this incident is improbable as the accused's wife, accused's son, complainant's brother and her cousin were all inside the 6mX5m open house at the time of incident according to the complainant.
59. The accused does not deny the fact that the complainant was below the age of thirteen years at the time of the offence but says that he does not know the exact age of the complainant. In cross-examination he said that he thinks the complainant was about 9 to 10 years old in 2011.
60. With regard to the second count the prosecution says that the accused sexually assaulted the complainant by touching her vagina. The accused denies this allegation as well.
61. According to the defence, the complainant has made these allegations because the accused used to beat her at Kadavu and therefore she wanted to avoid going back to Kadavu. Even though the accused said in his evidence that he thinks that the complainant is making false allegations because he used to beat her up, you may recall that the complainant was not questioned by the defence lawyer in this regard in order to give the complainant the opportunity to respond.
62. Defence also points out that the complainant had been a victim of a similar offence previously and that experience and the beating up by the accused may have led to the allegations of this nature being raised against the accused.
63. Considering all the evidence, if you are satisfied that the prosecution has proved beyond reasonable doubt that the accused penetrated the mouth of the complainant when she was below the age of thirteen years you should find the

accused guilty of the first count. If you are not sure, you should find him not guilty. If you are satisfied beyond reasonable doubt that the accused had sexually assaulted the complainant by touching her vagina, then you should find the accused guilty of the second count. If you are not, then you should find the accused not guilty of the second count.

64. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case.
65. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
66. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each offence;
 - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty of an offence charged. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

67. Any re-directions?
68. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
69. Your possible opinion should be as follows;
- 1st count - Rape - guilty or not guilty
 - 2nd count - Sexual Assault - guilty or not guilty




Vinsent S. Perera
JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : Legal Aid Commission, Suva.