

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 103 of 2016

[CRIMINAL JURISDICTION]

STATE

V

PANAPASA GANITA

Counsel : Ms. K. Semisi for State
Accused in Person

Dates of Hearing : 26 - 28 October 2016

Date of Summing up: 28 October 2016

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

SUMMING UP

Madam and gentleman assessors;

It is now my duty to sum up the case to you.

1. I will now direct you on the law that applies in 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. However, 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.

2. Evidence is what the witnesses said from the witness box in this court room, and the admitted facts. Your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must completely disregard such information.
3. 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 feelings of sympathy for or prejudice against, the accused or anyone else. What you have to decide in this case is whether the accused is guilty or not guilty of the relevant criminal offences according to law and not whether his conduct is right or wrong according to moral, cultural or spiritual standards.
4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the counsel for the prosecution are not evidence. A suggestion made to a witness during cross examination is not evidence unless the witness accepted that suggestion. You heard the opening address and the closing address made by the prosecution and the closing address of the accused. The arguments and comments made during addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if they coincide with your own reasoning.
5. 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. 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.

6. When you assess the testimony of each witness, you should bear in mind that witnesses 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.
7. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. 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.
8. 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.
9. You may also consider the ability and the opportunity each 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 accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

10. 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. 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.
11. As a matter of law you should remember that it is not required to look for corroboration of the evidence of a complainant in a case concerning a sexual offence. To look for corroboration is to look for the existence of independent evidence to support the evidence of a particular witness. Therefore, you do not have to look for any other evidence to support the complainant's evidence in this case.
12. 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.
13. 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.
14. 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.

15. 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.
16. Let us now look at the Information. The Director of Public Prosecutions initially charged the accused for 7 counts. However, as I have already informed you your opinion is required only in respect of count 1, count 2 and count 6. They are;

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

PANAPASA GANITA on the 19th February 2016 at Nasinu in the Central Division had carnal knowledge of EK without her consent.

SECOND COUNT

Statement of offence

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

Particulars of offence

PANAPASA GANITA on the 26th February 2016 at Nasinu in the Central Division had carnal knowledge of EK without her consent.

SIXTH COUNT

Statement of offence

SEXUAL ASSAULT: Contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

Particulars of offence

PANAPASA GANITA on 26th February 2016 at Nasinu in the Central Division unlawfully and indecently assaulted EK by sucking her breast.

17. Please remember to consider each count separately. You must not assume that the accused is guilty of the other counts just because you find him guilty of one count. You must be satisfied that the prosecution has proved all the elements of each count separately in order for you to find the accused guilty of each count.
18. The first two are rape counts. To prove the offence of *rape*, the prosecution must prove the following elements beyond reasonable doubt;
 - a) the accused,
 - b) had carnal knowledge of the complainant,
 - c) without her consent,
 - d) the accused - knew or believed that she was not consenting or
was reckless as to whether or not she was consenting
19. 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 the accused committed the offence.
20. Second element is having carnal knowledge of the complainant. Carnal knowledge in the context of this case is, penetrating the vagina of the complainant by the accused with his penis. In this case, the accused admits that he had sexual intercourse with the complainant on 19th February 2016 and on 26th February 2016. Therefore, the first two elements of the two rape counts are not disputed. The two elements based on consent are in dispute.
21. With regard to the issue of consent; firstly, the prosecution should prove beyond reasonable doubt that the complainant did not consent for the accused to insert his penis into her vagina.

22. Secondly, the prosecution should prove that the accused knew that the complainant did not consent to the act or that the accused was reckless as to whether or not she was consenting.
23. What is meant by 'reckless as to whether or not she was consenting'? If the accused was aware of the risk that the complainant may not be consenting for him to insert his penis into her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate her vagina with his penis, you may find that the accused was reckless as to whether or not she was not consenting. Simply put, you have to see whether the accused did not care whether she was consenting or not.
24. You should also bear in mind that consent means consent freely and voluntarily given by a person with the necessary mental capacity to give consent. The fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
 - a) by force; or
 - b) by means of threats or intimidation of any kind; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
25. Next, we will look at the elements of the offence of sexual assault. The accused is charged with sexual assault in count 6.
26. The elements of the offence of sexual assault are;
 - a) the accused;
 - b) unlawfully and indecently;
 - c) assaulted the complainant.
27. Again, the first element involves the identity of the accused.
28. The word "unlawfully" simply means without lawful excuse.

29. An act is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent.
30. Assault is the use of unlawful force. Accordingly, a touch constitutes an assault if it is done without a lawful excuse.
31. 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.

Case for the prosecution

32. The complainant said that her date of birth is 19/08/96. She lived in Lau before October 2015 and she came to the accused's house in October 2015 to look after the accused's children on his request. She said that the accused's behavior changed while she was living there in his house. The accused would speak to her slowly and he gave her money saying that it was for her makeup.
33. She said she was living with the accused and his family from October to December and she did not live with him in January and in February this year.
34. She said when she was living with the accused, the accused was signaling her that he is going to do something at night. She wanted to tell her aunt, Tulia but she could not. The accused told her not to tell anyone and she will have no money if others come to know.
35. One night the accused came and switched off the lights. She told him to on the lights and the accused said 'no'. Then she turned the lights on. The accused went to the room and showed her money. She told him to take the money and that she will tell his wife. The accused then told her if she tells his wife, it will finish. The accused gave her the money and she returned it.

36. She said she does not recall 19/02/16. She said on 26/02/16 she was looking after the accused's children and was doing the work in his house. When she was asked whether she had sexual intercourse with the accused on 26/02/16, she said 'yes'. When she was asked how it happened, she said the accused gave her money for her make-up and then started to explain how she was carrying the accused's son as the son was crying. When she was asked again, she said, the accused came and locked the door when she was cleaning the room. She said the accused pushed her onto the bed when she tried to open the door. She said the accused tried to take her clothes off. She pushed him and struggled.
37. She said the accused lay on top of her, licked her neck, her mouth and her breast. She said the accused forcefully opened her legs and inserted his penis inside her vagina. She said she pushed him away and she did not consent. She told him that she didn't like what he was doing to her. She said the accused forced her not to tell anyone at home. After that he slapped her, punched her and pushed her. She cried and then she went to open the door. The accused came to stop her but she pushed him and went outside. She told the accused's wife but the accused's wife did not believe her. She then went to a relative named Tui Vakacegu and told them everything. She went to report the matter to police with her aunt, Apikali Vutevute. She said she was not staying with the accused in February and she was staying at Vakacegu's house on 26th February. She came from Vakacegu's house to the accused's house on that date. She said she can't remember the months and that is why she said in her evidence earlier that nothing happened after December. She said the accused would come to her and tell her that he is going to give her \$10 or \$20 to buy recharge or her hair products before his wife gives her money. She said the accused forced her 10 times to have sex with her and the accused had sex with her on two occasions.
38. She said she can't remember the date the accused had sex with her on the other occasion. Then when she was asked whether the accused had sex with her on 19/02/16, she said 'yes'.

39. Giving evidence on what happened on 19/02/16, she said that the accused forced her to say 'yes' for them to have sex. When she said 'no', the accused got hold of her and pulled her to lie down on the bed. He removed her clothes and his clothes and then penetrated his penis into her vagina. She said she could feel the pain and she cried. She was worried that she would get pregnant. She said she did not consent for him to penetrate her vagina with his penis. She said, on both 19th February and on 26th February, she said 'no' but the accused forced her to agree to have sex.
40. During cross examination, she said she had sex with the accused three times. She said, apart from 19th February and 26th February they had sex on a Sunday. She said the accused forced her to say 'yes' to have sex. When she was asked whether she screamed she said 'no'.
41. Based on the accused's version of events, the complainant was asked certain questions by the court because the accused was unrepresented. Accordingly, she was asked what she has to say about the accused's version that she asked money from the accused before they had sex on 19/02/16. She said she asked money for recharge and for her body spray. Then she was asked what she has to say about the accused's version that she agreed to have sexual intercourse after having a conversation. She said the accused forced her to say 'yes'. When she was asked how she was forced by the accused to say 'yes' to have sexual intercourse, she said the accused told her to have sex. She also said, *"For him to give the money first, then to say 'yes' to have sex with him in the evening"*.
42. When she was asked what she has to say about the accused's version that she asked for money from the accused before they had sex on 26/02/16, she admitted asking for money. When she was asked what she has to say about the accused's version that she consented to have sex on 26/02/16, she said that she told him 'no', but the accused forced her to sleep with him.
43. Then the accused was given an opportunity to ask questions arising out of the questions asked by the court from the complainant. Answering the questions

asked by the accused accordingly, she said she did not scream on the 19th. She said the incident on 26th February took place around 2.00pm and there were 4 boys, 6 children and her aunt's brother in the house at that time. She said she did not ask for help or scream. She said she did not scream or ask for help because the accused told her not to scream.

44. The second witness for the prosecution said she is the complainant's aunt. She said she met the complainant when she was at a wedding in Laqere on 26/02/16. After the wedding, the complainant came with her to her place in Tacirua. She noted that the complainant was staring for a while and that she was hiding something. She reported the matter to police on the following Monday after the complainant told her about same on Sunday.

Case for the Defence

45. 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.
46. The accused said in his evidence that he admits having sex with the complainant on 19/02/16, but he did not force her. He said that they had sex because of money. She asked for money and he asked to have sex with her. He said they both agreed.
47. He said on 26/02/16, he had sex but he did not force the complainant. The complainant came to the room and asked for money. He told her that he will give her money and also asked her to have sex with him. He said she agreed.
48. When they had sex on 26th, he told her that he will give the money on the next morning. On the following morning he went to work and he told her that he will give the money when he returns in the afternoon. He could not return that afternoon and was held up from Friday till Monday because of the cyclone

warning. When he returned on Monday, he was told that the complainant had left. He thinks that the reason she left is because of the money and because he was late. Thereafter he went back to work and was at sea for 1 week. Thereafter when he returned home, his wife told him that the police was looking for him and the police arrived the next morning.

49. During cross examination he said, on 19/02/16 when he asked for sex, the complainant did not say 'no' and she wanted the money for her body spray. He said he did not forcefully remove the complainant's clothes but she removed them herself because both of them agreed. He inserted his penis after she opened her vagina. He said he believed that she consented because she had taken the money.
50. He said on 26/02/16, he believed that the complainant consented when he sucked her breast because she removed her clothes. He denied inserting his penis inside the complainant's vagina without her consent and said that he inserted the penis when she opened her legs. He said that the complainant said 'yes' when he asked her and she removed her clothes. When it was suggested to him that the complainant left the house because he had sexual intercourse with her without her consent on the 19th and the 26th February 2016, he said that she consented and if she had not consented on 19th, she would have left straight after that.
51. After the cross examination, further clarifying his answer to the last question, the accused said that they had sex on 26th again because both of them agreed to have sex on both dates.
52. That is a brief 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. As I have already explained, which evidence you would accept

and do not accept is a matter for you to decide. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those agreed facts. You should consider those facts as proven beyond reasonable doubt.

Analysis

53. In relation to the first count, the prosecution says that the accused penetrated the vagina of the complainant without her consent on 19th February 2016. The accused admits that there was sexual intercourse between the accused and the complainant on that day but with the consent of the complainant.
54. You should remember that the prosecution should prove beyond reasonable doubt that the complainant did not consent for the accused to penetrate her vagina and also that the accused knew or believed that the complainant was not consenting or that the accused did not care whether the complainant was consenting or not.
55. In relation to the second count, the prosecution says that the accused penetrated the vagina of the complainant without her consent on 26th February 2016. The accused admits that there was sexual intercourse between the accused and the complainant on that day but with the consent of the complainant.
56. Again, the prosecution should prove beyond reasonable doubt that the complainant did not consent for the accused to penetrate her vagina and also that the accused knew or believed that the complainant was not consenting or that the accused did not care whether the complainant was consenting or not.
57. In relation to the sixth count, the prosecution says that the accused sexually assaulted the complainant by sucking her breast on 26th February 2016. The accused does not dispute sucking the complainant's breast on that date but he says he believed that the complainant agreed because she removed her cloths herself.

58. I have explained to you that, in order to prove the offence of sexual assault, the prosecution should prove beyond reasonable doubt that the accused used unlawful force on the complainant and that unlawful force is indecent and sexual in nature. When it comes to the offence of sexual assault, if the force was used with the consent of the complainant, such force cannot be considered as an assault. As the accused says that the complainant consented for his act, you have to consider whether the prosecution has proven beyond reasonable doubt that the complainant did not consent for the relevant act done by the accused.
59. You have to decide whether the complainant's account of what took place on 19th February 2016 and on 26th February 2016 is credible and reliable. Accordingly, you should decide whether the disputed elements in each count have been proven beyond reasonable doubt.
60. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that it is always the prosecution who should prove the case.
61. 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.
62. 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.

63. Any re-directions?

64. 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 opinion.

65. Your possible opinion should be as follows;

1st count (rape) - guilty or not guilty

2nd count (rape) - guilty or not guilty

6th 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 : In Person