

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 70 OF 2015

STATE

vs

NAND KISHORE

Counsel : Ms. L. Latu for the State
Ms. K. Vulimainadave for Accused

Dates of Trial : 17th – 21st July, 2017
Date of Summing Up : 21st July, 2017

(Name of the Complainant is suppressed. She is referred to as KV)

SUMMING UP

Ladies 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 facts. 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 the 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. 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 opinions 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 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 the witness gives evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.
13. 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. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of time of this Court.
14. The agreed facts of this case are:
 1. That the victim in this matter is KV, 8 years old, student and resides at Elevuka, Ba.
 2. That the accused is Nand Kishore, 61 years old, Carpenter and resides at Veisaru, Ba.
 3. That on the 22nd April, 2015, the accused was renovating the house of Anita Devi at Elevuka, Ba.
15. The Accused is charged with the following count:

FIRST COUNT
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

NAND KISHORE, on the 22nd day of April 2015 at Elevuka, Ba, in the Western Division, penetrated the vagina of **KV**, a child under the age of 13 years, with his finger.

16. I will now deal with the elements of the offence of Rape first. A person rapes another person if:
 - (a) The person has carnal knowledge with or of the other person without other person's consent; or
 - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
 - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

17. A person under age of 13 years is considered by law as a person without necessary mental capacity to give consent. It is agreed that Complainant was 8 years old at the time of the alleged offence and therefore, she did not have the capacity under the law to consent. So, the Prosecution does not have to prove the absence of consent on the part of the Complainant because law says that she, in any event, cannot consent. The elements of the offence of Rape in this case are that:
 - a. the Accused, Nand Kishore,
 - b. penetrated vagina of KV, to some extent with his finger.

18. If you are satisfied that the Accused penetrated the vagina of the Complainant, to some extent with his finger you can find the Accused guilty of Rape. Insertion of finger fully into her vagina is not necessary. Slightest penetration is sufficient.

19. 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.

20. 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 complainant 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 they saw, heard and felt.

21. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, medical report is an example if you believe that such a record was made. Then you can act on such

evidence. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time on the document upon examination of the complainant.

22. Expert evidence is also led in this case. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before Court on the basis of their learning, skill and experience. Doctor in this case gave evidence as an expert witness. That evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if such opinion is reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence in the case.
23. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave evidence in Court. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same standards in applying them.
24. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers or were they evasive? How did they conduct themselves in Court? In general, what was their demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.
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. You can consider whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.
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. There can be a reasonable explanation for the delay. It is a matter for you to determine, what weight you should attach to the complaint Complainant made to her mother and Anjula and whether it was genuine.
28. 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, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Complainant's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. There is, in other words, no classic or typical response by victims of Rape.
29. 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.
30. You saw Complainant giving evidence hiding behind a screen so that she could not see the Accused. The screen was put up because the Complainant is an underage vulnerable witness. You must not draw any negative inference from that against the Accused.
31. I will now remind you of the Prosecution and Defence cases. In doing this it would not be practical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

Case for the Prosecution

Varanisee Lewakeitu (Vara)

32. In 2015 Vara was residing at Elevuka with her husband Delana and her three girls. Second daughter KV was born on the 11th of July 2006. She was in Class 4 at that time schooling at Ba Sangam Primary School.
33. On 22nd of April 2015, KV and her sister Wati came back from school at around 3.15 pm. They changed uniforms and went to play under the mango tree.
34. Vara saw Nand Kishore, the Carpenter who was doing renovation work at landlord's house calling from the adjoining compound. Vara had known Kishore before. He had done some renovations at Vara's house a week ago before he moved to landlord's house for renovations. Vara told the kids to go to Kishore and went to the clothes line to bring the clothes. When she came back she did not see KV with the other two. At the same time, she saw KV running to kitchen. Vara left the clothes and followed KV to the kitchen, because KV appeared frightened. KV was shaking and crying.
35. KV told her the reason why she was crying. KV said that Kishore called her and asked her to pick the rubbish inside landlord's room. KV went to the room; the room was clean. KV had told him that the room was clean. While KV was in the room, she had seen Kishore pulling down the curtains in the room. After that Kishore had told her to look for the rubbish properly. When KV was bending down, Kishore had pulled down her panty and her pants together. At the same time, his hand was fast when he poked her vagina.
36. As KV was telling this, she was frightened. Vara was worried and called the kids into the house and locked them up.
37. When her husband came back from work that afternoon she told him what had happened. When landlord Angie came home, they went to her house and told her what was happening inside her house. After that they went to the Ba police station.
38. Under Cross-examination, Vara said that she had never seen Kishore anywhere in Elevuka until April 2015. She admitted that Accused was repairing the ceiling a week before, and had assisted him in fixing her house.

39. Vara asked KV, 'What happened to you?' Three times she asked her, third time she was crying. She was really angry and kept asking her, but she couldn't answer, then the third time she got angry. KV started crying on the third time. Witness said that KV did not answer the first time because she was very scared. KV is close to her, like all her two daughters.

KV (Complainant)

40. KV came back from school and reached home at 3.15 pm. changed her clothes and wore her purple panty, pink shorts and a grey t/shirt. Then she went outside to play with her two sisters under the mango tree. After some time, the carpenter who was renovating landlord's house called them. Carpenter requested her mother if they could go and help him to pour water on cement. Then they went to the carpenter and started pouring water. Carpenter then went inside landlord's house, called her and asked if she could go and pick up rubbish that was inside the land lord's daughter's room.
41. KV went into the room but there was no rubbish. Carpenter then asked her to look properly. At the same time, he was standing behind her and quickly closed all the windows. Then he told her to bend down and look properly. She then bent down. She was shocked when he pulled her shorts. His hand was quick when he poked her vagina. She screamed when she felt pain. She was frightened pulled up her shorts and ran outside.
42. KV's mum was standing outside. KV then ran into her kitchen. Her mum followed her into the kitchen and asked- what happened? She answered her third question and told her what had happened to her in the room. Her mum was frightened and closed all the doors and told them to wait for her father to come back from work in the afternoon.
43. When her father came, KV told him everything that happened to her in the room. Then they went to the landlord and told what happened. Then they went to the police station. Later, a female Fijian doctor examined her.
44. This incident happened on 22nd April 2015. You will remember, when she was asked to describe as to how the carpenter used his hand to poke her vagina, she demonstrated her pointing finger.
45. She didn't know the carpenter a lot. He's an Indian. He was renovating the house of her landlord. KV identified the carpenter as the Accused in the dock.

46. Under cross examination, KV said that she read the statement three times and practiced.
47. She admitted that while she and her sisters were playing outside, Accused was the only person inside the landlord's house. When she was asked the third question, then her mother got angry because she was not answering
48. She always shared secrets with her mother. She didn't answer the first time because she thought her mother would beat her up.

Anjula Devi

49. When Anjula came back from work on the 22nd of April 2015, KV's parents came and complained about what the carpenter had done to KV. Anjula accompanied KV and her parents and reported the matter to the Police, and from there, she took KV to the hospital for further investigation.
50. Witness identified the Accused as the carpenter who was employed to do renovation work at her place on 22nd April, 2015.

Doctor Siteri Sautuca

51. Prosecution called doctor Siteri to give expert evidence. She is a MMBS qualified doctor with six years' experience. She was attached to the Nailaga Health Center of the Ba Mission Hospital. She conducted the medical examination on the Complainant on 22nd April, 2015.
52. Doctor had observed redness around Complainant's vaginal area and found her hymen not intact. Doctor said that her medical findings were consistent with vaginal penetration by a blunt object. Under cross examination, doctor did not rule out that horse riding and playing gymnastic could cause hymen to be not intact.
53. Seven police officers were called by the Prosecution to testify about arrest, the caution interview and the charge statement. Arresting officer said that Accused was properly cautioned and the reason for arrest was explained to the Accused at the time of the arrest. Under cross examination arresting officer denied that he had failed to explain the reason for arrest.

54. Interviewing officer Ravi Kumar and the charging officer Dhiresh Kumar said that the Accused was properly cautioned and his rights were afforded. They said that the interviews were conducted in Hindi, Accused's preferred language, and all answers were given by the Accused voluntarily. They further said that, at the conclusion of the interviews, Accused signed the records after they were read back to him.
55. Under cross examination, interviewing officer and charging officer denied that the records were never read back to the Accused and that it was fabricated.
56. After the Prosecution closed its case, you heard me explain the Accused's rights in defence; his right to remain silent, right to give evidence and call witnesses on his behalf. His rights were explained not because the Accused had to prove anything but I am required, in law, to do so.
57. Accused elected to give evidence. That is his right. His election to give evidence does not relieve the Prosecution of its burden to prove the case beyond reasonable doubt. Burden is always with the Prosecution. Accused does not have to prove his innocence or prove anything at all. He could have remained silent. As I said before, you must consider and evaluate his evidence the same way you evaluated the evidence of the Prosecution.

Case for the Defence

58. Accused completely denied the allegation against him that he had penetrated Complainant's vagina with his finger. Having admitted that he was doing renovation work on the 22nd April 2015 at Complainant's landlord's house denied calling the Complainant and her sisters to assist his work.
59. Accused said that he was neither given the caution statement for him to read nor read back to him. Accused said that he had told the police officers that he could only speak and understand Hindi but could not write or read. Accused disowned the signature appeared in the original caution statement and disputed the content of the caution statement and the charge statement.
60. That briefly is the case for the Defence.

Analysis

61. The Prosecution called 4 lay witnesses and 7 police witnesses and based its case mainly on the evidence of the Complainant. If you are satisfied that the evidence

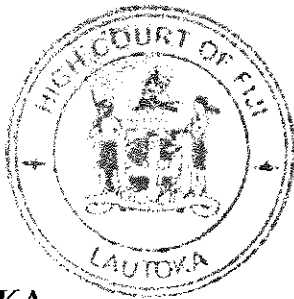
presented by Complainant is reliable and trustworthy you can safely act upon her evidence in coming to your conclusion. You must remember that evidence of the Complainant alone is sufficient to bring about a conviction in a rape case, if the Court believes her evidence to be truthful.

62. I told you earlier that there must be positive evidence on identification of the Accused-person. There is no dispute in this case that Accused was the only person doing renovation work at Complainant's landlord's house when the alleged incident occurred. Accused had done some renovation work at Complainant's house a week before the incident. Complainant and her mother identified the Accused in Court. You have to be satisfied beyond reasonable doubt that it is the Accused that committed this crime.
63. Prosecution is relying on recent complaint evidence and says that the Complainant has been consistent and credible. She had made a prompt complaint to her mother Vara soon after the incident and, in the same afternoon, to the landlady, Anjula, and finally to Police. Both Vara and Anjula gave evidence and said that they received the complaint that Accused had poked his finger on her vagina.
64. I must direct you here on legal position with regard to recent complaint evidence. You must use recent complain evidence only to test the consistency and credibility of Complainant's evidence. The statement is not evidence of the facts complained of, and must not be regarded by you, if believed, as other than consistent of the Complainant's credibility.
65. Prosecution also relies on the caution statement and the charge statement allegedly made by the Accused to police. Police witnesses said that Accused was afforded all his constitutional rights and those statements were given voluntarily. In answer to question 43 and 52, of the caution interview, and in answer to question 13 of the charge statement, Accused had admitted that he had poked his finger in the vagina of the Complainant. Accused in his evidence denied having made such confessions to police.
66. You heard what police officers and Accused had to say about those statements. It is for you to assess what weight should be given to his caution interview and charge statement. You may compare the evidence led in this trial with the caution interview of the Accused to see if the Accused had made a truthful statement to police. What weight you choose to give the interview and charge statement made by the Accused is a matter entirely for you. If you consider those

statements to be unreliable either because they were obtained unfairly or fabricated by police, then you may think that you cannot put much weight on them at all. If however you consider them to be reliable records of what the Accused said to police, then you may think that they contain important statements of what allegedly occurred that evening.

67. Prosecution also relies on doctor's medical finding to prove the credibility of the Complainant's version. Medical finding does not implicate the Accused. However, Prosecution says that the redness around the vaginal area and the fact that her hymen not being intact is consistent with Prosecution's version. It is up to you to decide what weight should be given to doctor's evidence.
68. You consider whether the Complainant had any reason or motive to fabricate a story against the Accused to put him in trouble. If there is such a motive or reason, then you should consider her evidence carefully. It is up to you to form your own opinion as to whether Complainant had any reason to fabricate a story against the Accused.
69. You watched the Accused giving evidence in court. You can expect any person accused of a crime to give an innocent self-serving version generally to escape criminal liability. However, you must evaluate the evidence of the Accused in light of the evidence led in this particular trial and be satisfied that he told the truth.
70. You also consider whether Accused's evidence is consistent with the stance taken by his Counsel in the course of cross examination of prosecution's witnesses.
71. If you accept the version of the Defence that means you have a reasonable doubt in the prosecution case. In that event, you must not find the Accused guilty as charged. Remember, even if you do not believe a single word he uttered and completely reject the version of the Defence, still the prosecution should prove its case beyond reasonable doubt.
72. If you are satisfied that the Complainant had told the truth and her evidence is believable, then you have to consider whether the Prosecution has discharged its burden and proved each element of the offence beyond reasonable doubt. If you are sure beyond reasonable doubt that Accused penetrated Complainant's vagina with his finger you can find him guilty of Rape.

73. 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.
74. You may now retire to deliberate on the case, and once you have formed your opinions, you may inform our clerks, so that we could reconvene, to receive the same.
75. Any re-directions?




Arun Aluthge
JUDGE

AT LAUTOKA
21st July, 2017

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