

IN THE HIGH COURT OF FIJI  
AT LABASA  
CRIMINAL JURISDICTION

Criminal Case No. HAC 16 OF 2016

STATE

V

KOAE BARERE

Counsels: Mr. R. Kumar for State  
Ms. N. Mishra for Accused

Date of Trial : 11 October 2017  
Date of Summing Up: 12 October 2017

SUMMING UP

1. The name of the complainant is suppressed.
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.

3. Our functions are different. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
4. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
5. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion. I say so because you are the judges of the facts.
6. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you and it is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
7. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I form and deliver my judgment.



8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

### **Burden and Standard of Proof**

9. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.

10. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.

11. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused.

### **Information**

12. The accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act. The particulars of the offence are before you. Hence, I do not wish to reproduce them.

13. Section 207 (1) and (2) (b) of the Crimes Act states that:

*A person rapes another person if—*

*b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*

14. Accordingly the main elements of this offence of Rape are that:

- i) The Accused,
- ii) Without the consent of the complainant,
- iii) Penetrated the vagina of the complainant with his tongue,
- iv) The Accused knew or believed or reckless that the complainant was not consenting for him to insert his tongue in that manner.

#### The Accused

15. It is the responsibility of the Prosecution to prove beyond reasonable doubt that it was the accused who actually had penetrated the vagina of the complainant with his tongue without her consent.

#### Penetration

16. Evidence of slightest penetration of the tongue of the accused into the vagina of the complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.



## Consent

17. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent to the accused to insert his tongue into her vagina.
18. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.
19. The complainant must have the freedom to make the choice. It means that she must not be pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. The consent for sexual activities must be comfortable to the person who made such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.
20. If you are satisfied, that the accused had inserted his tongue into the vagina of the complainant and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew that the complainant was freely consenting for this alleged sexual activity. I must advise you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual intercourse. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that prevailed at the time of the alleged incident took place.



### Evidence of Corroboration

21. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. The offence of Rape falls within this category. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable and credible beyond reasonable doubt, you are then not required to look for any other evidence to support the account given by the complainant.

### Agreed Facts

22. I now take your attention to the agreed facts. They are the facts that the Prosecution and the Defence agreed to without any dispute. Hence, you are allowed to consider the agreed facts as proven facts beyond reasonable doubt by the Prosecution.

23. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.

24. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses during the course of the hearing.

25. It is your duty as judges of facts to assess the evidence in order to determine whether the accused penetrated the vagina of the complainant with his tongue without her consent. In doing that, you must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not.



Demeanors of the complainant in the court while giving evidence is not necessarily a clue to the truth of the complainant's account.

### Evidence of Prosecution

26. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

27. The complainant in her evidence said that she went to sleep with her sister on the mattress in that particular night where this incident took place. They were covered by a mosquito net. Her mother and two brothers were sleeping on the other mattress beside them. She did not know when the accused approached and removed her shorts and undergarment. She then felt that someone was leaking her vagina. She felt that he was using his tongue to leak inside her vagina. She was scared. At that point of time, her mother switched on the torch and directed it towards her. She then found that it was her father, the accused, who had leaked her vagina. He tried to pretend that he was sleeping inside her mosquito net when the mother put the torch on. The complainant said that she did not know that it was her father, until her mother switched on the torch. Once the torch was on, she found that it was the accused who was leaking her vagina with his tongue. She had observed him for about one and half minute from the light came from the torch and her vision was not disturbed by anything else. The mother of the complainant then asked the accused what was he doing inside the mosquito net, for which the accused had answered saying that he went into the wrong mosquito net. Thereafter, the complainant did not do anything as she was scared of the accused. She was scared of him because he is her father.

28. The complainant in her evidence said that she told her mother about this incident two days after incident. Her mother had then confronted him, asking about it, which he denied.

29. You have heard evidence of the mother of the complainant, where she said that the complainant told her about this incident about two weeks after it took place. The complainant had not told her mother anything about this incident in that particular night.



30. The mother in her evidence explained that she went to sleep with her children in that particular night. In the night, she saw the accused was lying beside the legs of the complainant when she woke up and switched the torch on. She then called and told the accused that was the wrong mosquito net. The accused then came and slept beside her. During the cross examination, she said that nothing unusual happened when she switched on the torch.

### Evidence of the Defence

31. The accused in his evidence said that he drank grog at his neighbour's place from 3p.m to 11p.m. He then came home and consumed eight cans of beer mixed with rum at the porch of the house. He then went and slept. According to his evidence, nothing had happened after he went to sleep. When the learned counsel for the defence asked him about this allegation, the accused said that he does not know anything about it. He further explained that he went to sleep and woke up in the following morning. His family was happy and nothing happened in the following morning. If something happened in the night, they should have told him in the following morning. He said that if he did such a thing in the night, his wife would have chased him away from the house. He cannot remember whether his wife switched on the torch in the night.

### Analysis

32. According to the evidence adduced by the prosecution and the defence, and the agreed facts, there is no dispute between the parties that the accused slept in the same room where his children slept in that particular night. Hence, the main issues, that you have to determine are that;

- i) Whether the accused entered into the mosquito net and pulled the shorts and undergarment of the complainant, and
- ii) Whether the accused leaked and penetrated the vagina of the complainant using his tongue without her consent.



33. In order to do it, you have to evaluate the evidence presented by the prosecution and the defence during the course of this hearing.

### Evaluation of Evidence

34. In order to evaluate the evidence, you have to consider the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.

35. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is testifying in the evidence. You then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that, you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.

36. It is your duty as judges of facts to consider the demeanor of the witnesses, how they react to being cross examined and re-examined, were they evasive, in order to decide the credibility of the witness and the evidence.

### Evidence of Juvenile Complainant

37. The most important part of your task is to judge whether the complainant has told the truth, and has given a reliable account of the events that she was describing. In doing that you have to take into consideration the age of the complainant. She is fifteen years old. According to our law, she is still consider as a juvenile young person. Some of you will have children or grandchildren who are of a similar age to the complainant. If so, I think you will recognize



the sense of the advice I am going to offer you about your judgment of the evidence of the juvenile complainant, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice and if you do not agree with it, you should reject it.

38. Children do not have the same life experience as adults. They do not have the same standards of logic and consistency. Their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may be embarrassed about it, and about using certain words they think are bad, and therefore find it difficult to speak.
39. Remember how you normally talk to children of this age. You should bear those difficulties in mind when you consider the answers given by the juvenile complainant. All decisions about the evidence are for you to make.

### Consent

40. You may recall that the complainant in her evidence did not specifically stated that she did not consent to the accused to leak her vagina with his tongue. According to her evidence she did not feel when the accused removed her shorts and undergarments as she was sleeping. She only felt when he leaked her vagina with his tongue. He leaked inside her vagina. The complainant said that she felt bad when he did that. You can take into consideration these evidence in order to determine whether the complainant gave her consent to the accused to leak and penetrate her vagina with his tongue or not.

### Recent Complaint

41. You have heard the evidence that the complainant said that she told her mother about this incident two days after it took place. The mother in her evidence said that the complainant told her about this incident about two weeks after this incident took place. This form of



evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between the complainant and the accused. Mother of the complainant did not actually see what happened between the complainant and the accused. Apart from the evidence of recent complaint, the mother in her evidence further said that when she switched the torch on, she saw the accused was lying beside the legs of the complainant.

42. You are entitled to consider the evidence of recent complaint in order to decide whether or not complainant has told the truth. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the accused and the complainant. It therefore cannot of itself prove that the complaint is true.

#### Delay

43. You have heard that the complainant in her evidence said that she did not tell her mother about this incident when she switched on the torch. She said that she was scared because it was her father. She finally related this matter to her mother two days after this incident. According to the mother, it was about two weeks after this incident took place.
44. 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 court 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, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint, likewise an immediate complaint does not necessarily demonstrate a true complaint.

#### Inconsistency

45. You may recall that the learned counsel for the defence in her closing address submitted that the evidence of the complainant and her mother are inconsistent in regard to the time that the



complainant related this matter to the mother. The complainant said that she told her mother about this incident two days after it took place. However, the mother in her evidence said that the complainant related this incident two weeks after it. You are allowed to consider such inconsistencies in evidence.

46. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
47. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

### Evidence of the Accused

48. I now take your attention to the evidence adduced by the defence. The accused elected to give evidence on oath. The accused is not obliged to give evidence. He does not have to prove his innocence. However, the accused decided to give evidence. Therefore, you have to take into consideration the evidence adduced by the defence when determining the issues of fact of this case.
49. Accordingly, it is for you to decide whether you believe the evidence given by the defence. If you consider that the account given by the accused is or may be true, then the accused must be acquitted.
50. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.



51. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence.

### Directions

52. Ladies and gentleman, I now take your attention to the final directions of the summing up.

53. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you can find the accused is guilty for the said offence of Rape.


54. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused is not guilty for the said count of Rape.

### Conclusion

55. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.

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



  
R. T. Rajasinghe  
Judge



At Labasa

12 October 2017

**Solicitor for the State** : **Office of the Director of Public Prosecution, Labasa**  
**Solicitor for the Accused** : **Legal Aid Commission, Labasa**