

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 271 of 2015

STATE

v.

SAMISONI TIKOINASAU TABUA

Counsel: Ms. K. Semisi for State

Hearing: 2nd and 3rd October 2017

Summing Up: 4th October 2017

SUMMING UP

1. 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.
2. 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.
3. 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.

4. 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.
5. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witness said from the witness box. This summing up, statements, questions and comments made by the counsel of the prosecution 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. The closing address of the counsel of the prosecution is not evidence either. That is her 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.
6. 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.
7. 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

8. 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.
9. 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 to prove his innocence, as his innocence is presumed by law.
10. 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.
11. As you see, the accused did not attend to the hearing. The accused was present together with his counsel, when the matter was fixed for the hearing. Hence, he and his counsel were fully aware and informed about the date of the hearing. However, the accused chose not to attend to the hearing. Under such circumstances, the court can proceed to the hearing in his absence. You must bear in mind the fact that the accused chose not to attend the hearing does not automatically make him guilty for these offences. You should not make any assessment or speculation against the accused for his absence. It is not relevant to your assessment of the evidence, which you must judge with care. The prosecution is still required to prove beyond reasonable doubt that the accused is guilty for each of these three counts as charged.

Information

12. The Accused is charged with two counts of Rape contrary to Section 207 (1), (2) (a) of the Crimes Act and one count of Sexual Assault, contrary to Section 210 (1) (a) of the

Crimes Act. The particulars of the offences are before you. Hence, I do not wish to reproduce them in my summing up.

Elements of the Offence

13. The main elements of this offence of Rape are that:
 - i) The Accused,
 - ii) Penetrated into the vagina of the complainant with his penis,
 - iii) The complainant did not consent to the accused to penetrate into her vagina with his penis.
 - iv) The Accused knew or believed that the complainant was not consenting for him to insert his penis in that manner.

14. The main elements of the offence of Sexual Assault are that:
 - i) The accused,
 - ii) Unlawfully and Indecently,
 - iii) Assault the complainant.

15. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded person would consider the act as indecent. It is your duty as Assessors to consider and decide whether the act of touching the breast of the complainant by the accused is an indecent act amounting to sexual assault.

Separate Consideration

16. The accused is charged with two separate counts of Rape and one count of Sexual Assault. It is your duty to consider each of these three counts separately. If you found the accused is guilty for one count, that does not automatically make him guilty for the remaining counts for which he is charged with.

Admitted Facts

17. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.

18. The accused has admitted in the agreed fact that he had sexual intercourse with the complainant twice at Peninsula Hotel on the 7th of August 2015. The prosecution alleges that the complainant did not give her consent for the accused to have such sexual intercourse with her on these two occasions. Accordingly, the main dispute in this matter is the consent of the complainant in respect of the two counts of Rape.
19. In view of the admitted fact, the first two elements of the offence of Rape, the identity of the accused and the penetration into the vagina of the complainant by his penis, are not disputed by the Prosecution and the Defence.

Consent

20. 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 penis into her vagina.
21. 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.
22. If you are satisfied, that the accused had inserted his penis 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 intercourse. 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 was prevailed at the time of the alleged incident took place.

Evidence of Corroboration

23. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accepts it as reliable and truthful; you are not required to look for any other evidence to support the account given by the complainant.
24. 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.
25. 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 witness during the course of the hearing.

Summary of the Evidence and Analysis

26. This alleged incident has taken place in private between the complainant and the accused. The complainant claims that the accused had sexual intercourse with her without her consent on two different occasions. Moreover, the prosecution alleges that the accused had unlawfully and indecently touched her breast. In order to determine whether the complainant has given her consent, it is important to consider how the complainant and the accused behave before and after the alleged sexual intercourse.
27. As I mentioned above, there is no stereotype of circumstances for a rape, a rapist, or a victim of rape. You are required to consider all the circumstances of this incident. Having considered all the circumstances as a whole, if it leads to an indisputable conclusion beyond reasonable doubt that the complainant had not given her consent

freely and voluntarily to have sexual intercourse with the accused, you can then conclude that the complainant has not given her consent to the accused to insert his penis into her vagina.

28. The Prosecution mainly relies on the evidence of the complainant. The complainant had met the accused at the Suva bus station on the 7th of August 2015. That was the first time she met the accused, though they had been communicating with each other on social media for few days. She then had lunch with him. During the lunch, the accused had suggested her to go to Peninsula Hotel to chill out, for which she had agreed. They then went to the hotel, where he went to the reception, while she was waiting at the lounge. The complainant had thought that they will go to the poolside or the bar of the hotel and have a drink. However, the accused had taken her into a room. The complainant was nervous and frighten, but she went to the room. According to the evidence given by the complainant, she was not forced or pressured by the accused to go into the room. It was her decision to go into the room. She had seen two beds inside the room and thought that she can chill out on one bed, while accused occupies other bed.
29. Once they entered into the room, the complainant had sat on the small bed. The accused took a chair and sat beside the bed. While they were talking, the accused had tried to kiss her. She had ducked her face to avoid it and said no. He then went to the double bed and asked her to come to his bed. When she was refusing to come over to his bed, the accused had told the complainant that she does not need to worry and nothing will happen. The complainant then came to his bed and sat on it while covering her chest with a pillow. He then started to touch her body and breast putting his hand under her shirt. The accused then pulled her pants down. She said no and tried to pull it up, but failed. The accused also removed his trousers and inserted his penis into her vagina. The complainant said that she was scared and shocked. She had thought that she could not resist as he is military officer and a strong person. He had sexual intercourse with her and ejaculated inside her vagina. The complainant had thought that he will hurt her if she tried to resist or try to escape from the room.

30. After the sexual intercourse, the accused had gone into the bathroom to have a shower, leaving her in the room. The complainant had not escaped from the room as she felt embarrassed and ashamed to walk out from a hotel room in the day time. She had waited until it gets dark to go out from the hotel. Once the accused came from the bathroom, they talked for a while. The accused then came to her when she was lying on the small bed. He had easily turned her and removed her pant. He then inserted his penis into her vagina and had sexual intercourse. The complainant had not told anything to the accused. She wanted to act normal as she did not want to alarm the accused. After that the accused fallen into sleep, but woken up whenever he heard any sound. Accordingly she had to keep on talking to him until he fallen into sleep. Once he fallen into sleep, the complainant managed to come out of the room. She left the room without closing the door. There is no evidence that the accused threatened or forced the complainant to have sexual intercourse with him. The complainant only said that the accused continued with his sexual act even though she said no to him.

31. The complainant in her evidence said that she met one of her friends, who is a doctor as she wanted to get some emergency pill in order to prevent any pregnancy after this unprotected sexual encounters. Few days later, the complainant had reported this matter to the Police.

Evaluation of Evidence

32. In order to determine whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent, you have to consider the credibility of the witness, and the reliability of her 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 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; she may be accurate in saying one thing and not accurate in another thing.

33. In assessing evidence of the witness, 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.

34. It is your duty as judges of facts to consider the demeanours of the witness, how she reacted while giving evidence, was she evasive, in order to decide the credibility of the witness and the evidence.

Delay in Reporting

35. You have heard the evidence of the complainant stating that she reported this matter to the Police after few days of this alleged incident. It would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, 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.
36. The complainant in her evidence said that she did not know that she was raped by the accused at that time. The complainant was advised by her coach that this alleged incident was a rape, when she related this incident to her coach. It is for you to determine whether the delay of reporting this matter to the police has affected the credibility of the evidence given by the complainant or not. In doing that you have to determine the explanation given by the complainant is probable or improbable.
37. Moreover, you have heard that the complainant had gone into the room without any force or pressure from the accused. The accused had not threatened her or forced her to have sexual intercourse. The complainant had gone to the double bed, where the accused was lying, when he asked her to come to the bed. There is no evidence that he forced or threatened her to do that. She had not shouted or screamed for help when this alleged sexual encounters took place. The complainant had not tell anything to the

accused when he inserted his penis into her vagina in respect of the second sexual encounter.

38. You have heard the evidence of the complainant, saying that she did not escape from the room, when the accused went into the bathroom to have a shower. She said that she felt embarrassed and ashamed to be seen walking out of a hotel in day time. The complainant had not complained to any one at the hotel, when she was going out. Neither she had complaint to her friend who is a doctor and helped her to get emergency pill. You have to consider these conducts of the complainant with care, when you determine whether the evidence given by the complainant is probable, true and credible. When you do this, you should not assume that there is any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the courts is that people who are being subjected to non-consensual sexual activity may respond in a variety of different ways.

Directions

39. 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 under the first count, you can find the accused is guilty for the said offence of Rape.
40. 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 under the first count, you must find the accused is not guilty for the said count of Rape.
41. 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 under the second count, you can find the accused is guilty for the said offence of Rape.
42. 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 under the second count, you must find the accused is not guilty for the said count of Rape.

43. 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 Sexual Assault as charged under the third count, you can find the accused is guilty for the said offence.
44. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged under the third count, you must find the accused is not guilty for the said count of sexual assault.
45. 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.
46. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R.D.R.T. Rajasinghe
Judge

At Suva
4th October 2017

Solicitor
Office of the Director of Public Prosecutions for the State