

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 181 of 2015

STATE

V

SAULA VASU

Counsel : Mr. S. Seruvatu for the State.
: Ms. V. Narara for the Accused.

Dates of Hearing : 5, 9 November, 2018
Closing Speeches : 9 November, 2018
Date of Summing Up : 9 November, 2018

SUMMING UP

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a

certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

8. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
9. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this court room.
10. You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

AMENDED INFORMATION

12. The accused is charged with the following offences: (a copy of the amended information is with you).

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

SAULA VASU, on the 2nd day of November, 2015 at Nadi, in the Western Division, penetrated the vagina of **TALEI SENIROSI** with his penis, without her consent.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009

Particulars of Offence

SAULA VASU, on the 2nd day of November, 2015 at Nadi, in the Western Division, penetrated the anus of **TALEI SENIROSI** with his penis, without her consent.

13. To prove count one the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant Talei Senirosi with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

14. In this trial the accused has denied committing count one offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent.

15. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.

16. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.

17. The second element is the act of penetration of the complainant's vagina by the penis.
18. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
19. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
20. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
21. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
22. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offence he is charged with.
23. To prove count two the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the anus of the complainant Talei Senirosi with his penis;

(c) Without her consent;

(d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

24. In this trial the accused has denied committing count two offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the anus of the complainant with his penis without her consent.
25. The slightest of penetration of the complainant's anus by the accused penis is sufficient to satisfy the act of penetration.
26. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
27. The second element is the act of penetration of the complainant's anus by the penis.
28. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
29. If you are satisfied that the accused had penetrated the anus of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
30. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.

31. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's anus without her consent then you must find the accused guilty as charged.
32. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offence he is charged with.
33. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
34. In this case, the accused is charged with two offences, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
35. You must be satisfied that the prosecution has proved all the elements of all the offences beyond reasonable doubt in order for you to find the accused guilty of either or all the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or all the offences, then you must find the accused not guilty.

ADMITTED FACTS

36. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.

37. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
38. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

39. The prosecution called three (3) witnesses to prove its case against the accused.
40. The complainant informed the court that on Sunday 1st November, 2015 at about 11.00pm she met her uncle Jolame at the 'Ice Bar' Night Club. She joined her uncle who was drinking with one of his friends from Vanuatu.
41. At about 1.00am the next morning the complainant's uncle asked her to accompany his friend to the Martintar Hotel to help him pack his luggage for his flight the next morning. The complainant obliged.
42. On the way to the hotel three cans of Woodstock beer were purchased. In the hotel room the door was left open the complainant continued drinking alone. The complainant finished two cans of beer at this time she saw a man going past the room.
43. The complainant called out and asked this man the accused to join her. She did not know the accused both started to drink the third can of beer. After the beer finished some more beer was purchased.

44. After purchasing seven cans of beer the complainant returned to the hotel room she saw the accused and his wife in the room. As the drinking continued the complainant started feeling drunk she does not know where the accused's wife went to.
45. After a while the accused told the complainant that he wanted her. The complainant replied that can't be since his wife was around. The accused upon hearing this punched her, she stood up and went outside the room the accused came and pulled her neck from behind and forcefully took her to his room which was room no. 4.
46. The complainant did not want to go into the room so she pushed him but the accused managed to pull her into his room. In the room the accused pushed the complainant on the bed and pushed her down. The accused pulled up the complainant's dress, she was screaming for help and pushing the accused he then locked the door of the room.
47. After pulling down her under wear the accused had sexual intercourse with the complainant. The complainant did not consent to what the accused had done to her. According to the complainant she was turning, twisting and screaming for help and pushing the accused at the same time.
48. The accused held the complainant's throat with one hand and with the other blocked her mouth. As the complainant was trying to free herself the accused turned her around, pulled her bra and then inserted his penis into her anus. The complainant was crying and calling for help. She did not consent to what the accused had done to her.
49. The accused took the complainant to the bathroom here she was able to free herself and run out of the room. The accused also ran after her. At the hotel reception the police came and arrested the accused.

50. The complainant after giving her police statement was taken to the hospital for a medical examination the same day. The complainant identified the accused in court.
51. In cross examination the complainant denied while she was drinking with the accused she wanted to her sex with him she also denied that after her uncle's friend had fallen asleep both went to the bathroom.
52. In the bathroom she also denied taking off her clothes. The complainant maintained that she was pulled from the bed on to the floor by the accused.
53. The complainant denied she had taken the phone of the accused and had put it inside her bra as a result the accused tried taking it away and in the process damaged her bra. She also denied struggling with the accused because he was trying to get his phone back.
54. The second prosecution witness was Police Constable Akuila Maki on 2 November, 2015 in the early hours of the morning while returning after attending to a report at Martintar the witness saw a crowd gathered outside Hotel Martintar. The witness went to check, he saw the accused at the drive way of the Hotel, the accused told him a lady had stolen his phone.
55. The accused took the witness to room no. 3 where they were drinking. In this room the witness saw empty cans of beer and some blood stains on the bed sheets. From there the witness was taken to room no. 4, he saw the room was not in order, the bed sheet was in a mess, which had some blood stains, also some blood stains were on the floor with a lady's bra.
56. According to the witness he noticed there were signs of struggle in the room because the bed was not in order and the blood stains were like a splash not droplets.

57. The accused stated that the lady who had stolen his phone was at the reception. At the reception the complainant told him that the accused had raped her. By this time police officers from Namaka Police Station arrived and the accused was handed over to them.
58. In cross examination the witness agreed the signs of struggle he had seen could be a result of a wild party or wild sex on the bed. In respect of blood stains in the room the witness agreed it could have been someone getting injured after a wild party but according to him there was no wild party in the room. The witness agreed he could not confirm if there was no wild party because he was not the investigating officer.
59. The final prosecution witness was Dr. Salma Sandhya. She graduated with a MBBS degree from the University of Fiji in the year 2013, she did her internship at the Lautoka Hospital in year 2014. Dr. Sandhya has served the Nadi Hospital for 2 years and is currently at the Lautoka Hospital.
60. The witness recalled examining the complainant on 2nd November, 2015. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no.1. There are some parts of the medical report which have been blacked out. You are not to speculate about the reasons for this, just concentrate on what is legible.
61. The specific medical findings of the doctor were:-
- (a) The patient had vaginal tears that were noted on the vaginal opening that is the introitus; and
 - (b) She also saw anal tears.

62. According to the doctor the vaginal tears meant there was forceful penetration of the vagina. Furthermore, the tears of the anus also showed penetrative injury. The doctor explained that tears were evidence of forceful intercourse, when there is consensual sex the body and mind are in a state of preparedness so tears were unlikely. If the vagina was well lubricated tears were also unlikely.
63. The doctor further explained that the concept of anal tears was the same as consensual sexual intercourse if a woman was relaxed there would be easier penetration however if she is not consenting then she will try to constrict it by not allowing it to happen therefore tears were more likely. The professional opinion of the doctor was that there was evidence of forceful vaginal and anal penetration.
64. The witness in cross examination agreed that according to her specific medical findings she saw tears in the vagina and anus of the complainant. The vaginal tears could have been caused by lack of lubrication. The doctor also explained that it was not possible to have lack of lubrication if there was consensual sex since the woman's mind would be in a state to release the hormones that were needed for the vagina to be well lubricated. The doctor agreed that the vaginal tears could have been caused by wild consensual sexual intercourse.
65. The doctor also agreed she should have noted the injuries on the diagram in the appendix of the medical form but did not.
66. In re-examination the witness clarified that she did not note the vaginal and anal tears in the diagram in the appendix of the medical form because she had provided the details in the physical examination section of the medical examination form.

Ladies and Gentleman Assessors

67. You have heard the evidence of Dr Sandhya who was called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.
68. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
69. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
70. This was the prosecution's case.

DEFENCE CASE

Ladies and Gentleman Assessors

71. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains

on the prosecution at all times. The accused chose to remain silent and call one witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent. You must take into account what the defence adduced in evidence through the defence witness when considering the issues of fact which you are determining.

72. The defence called Taraivosa Baleisuva who informed the court that she had come to Nadi on the 1st November, 2015 with the accused in the afternoon. Both checked in at Martintar Hotel when she woke up the next morning she could hear noise coming from another room. When she went to check she saw the accused with a girl and another man drinking beer. The witness also joined them. After a while the other man left the room.
73. Shortly after the accused and the girl started to argue with each other, the accused was asking about his phone. The girl replied she did not know. During the argument the accused punched the witness on her nose, blood started coming out and she blacked out. The blood had spilled on the bed since at this time she was standing near the bed.
74. After regaining consciousness the witness went to the bathroom to wash her face which took a while, by the time she came out of the bathroom the accused and the girl were not in the room. When she came out of the room she heard the accused and the girl fighting in her room. The witness went and knocked on the door which was locked so the witness went to the reception to get the receptionist again she knocked on the door but it was locked.
75. The witness heard the accused asking for his phone the argument was loud both were shouting at each other the accused was asking for his phone and the girl was saying she did not know. The witness got scared she also heard the accused saying take off your under garments what's there.

76. The witness saw the accused and the girl standing in the room through the glass door since the curtains were open. The witness left with the receptionist and called the police.
77. In cross examination the witness agreed that the accused and the girl were drinking and making noise in another room as a result she woke up to check. The witness did not know why the accused had punched him on the nose. She blacked out for about 30 minutes then she spent about one hour washing the blood stain. After cleaning the blood she was still in the room when she heard the accused and the girl shouting. She heard the accused was asking for his phone and the girl saying she did not know.
78. The witness did not know what happened in the room the accused and the girl were in.
79. In re-examination the witness clarified that she had blacked out for about 20 to 30 minutes but she was not sure how long she took when she was washing her nose after regaining consciousness.
80. According to the line of cross examination the accused takes up the position that the accused had penetrated the complainant's vagina and anus with his penis with her consent. The complainant had invited him to join her for drinks after a while she wanted to have sex with him since her uncle's friend was asleep on the bed they went into the bathroom. Thereafter the accused realized his phone was missing the complainant had hidden the phone inside her bra. There was a struggle between the two resulting in the bra of the complainant being damaged.
81. This was the defence case.

ANALYSIS

82. The prosecution alleges that on 2nd November, 2015 the complainant went to the Martintar Hotel with her uncle's friend so that she could assist him in packing his luggage for his flight.
83. In the hotel room the door was left open the complainant saw the accused going past the room. She called out and asked the accused to join her. The complainant did not know the accused but both drank beer after it finished some more beer was purchased.
84. After a while the accused told the complainant that he wanted her. The complainant refused the accused upon hearing this punched her, she stood up and went outside the room the accused came and pulled her neck from behind and took her to his room which was room no. 4.
85. The complainant did not want to go into his room so she pushed him but the accused managed to pull her into his room. In the room the accused pushed the complainant on the bed and pulled her dress up. The complainant was screaming for help and pushing the accused he then locked the door of the room.
86. After pulling down her under wear the accused had sexual intercourse with the complainant. The complainant did not consent to what the accused had done to her. According to the complainant she was turning, twisting and screaming for help and pushing the accused at the same time.
87. The accused was holding the complainant's throat and using another hand to block her mouth. As the complainant was trying to free herself the accused turned her around, pulled her bra and then inserted his penis into her anus. The complainant was crying and calling for help. She complainant did not consent to what the accused had done to her.

88. Police Constable Akuila Maki on 2 November, 2015 in the early hours of the morning while returning after attending to a report at Martintar saw a crowd gathered outside Martintar Hotel.
89. The witness saw empty cans of beer and some blood stains on the bed sheets in the room where both the complainant and the accused were drinking. From there the witness was taken by the accused to room no. 4, he saw the room was not in order, the bed sheet was in a mess, the bed sheet had some blood stains, also some blood stains were on the floor with a lady's bra.
90. According to the witness he noticed there were signs of struggle because the bed was not in order and the blood stains were like a splash not droplets.
91. Dr. Salma Sandhya recalled examining the complainant on 2nd November, 2015. She noted that the complainant had vaginal tears on vaginal opening that is the introitus and anal tears. The professional opinion of the doctor was that there was evidence of forceful and anal penetration.
92. The defence on the other hand denies the allegations the accused takes the position that the accused had penetrated the complainant's vagina and anus with his penis with her consent. The complainant had invited him to join her for drinks after a while she wanted to have sex with him since her uncle's friend was asleep on the bed they went into the bathroom.

Ladies and Gentleman Assessors

93. You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence. In testing the credibility

of a witness, you can consider whether there is a delay in making a complaint to someone or to an authority or to Police on the first available opportunity about the incident that is alleged to have occurred. If the complaint is prompt that usually leave no room for fabrication.

94. Bear in mind a late complaint does not necessarily signify a false complaint any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether in this case the complaint made to Police Constable Maki is genuine and what weight you attach to this.
95. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
96. In deciding 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 be accurate in another.
97. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been

proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

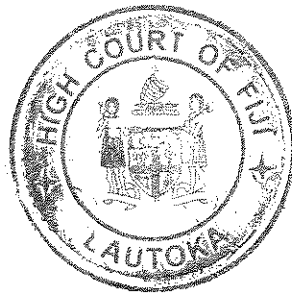
98. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
99. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
100. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
101. In this case the accused is charged with two (2) counts of rape, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
102. Your possible opinions are:-


COUNT ONE: **RAPE** ACCUSED - GUILTY OR NOT GUILTY

COUNT TWO: **RAPE** ACCUSED – GUILTY OR NOT GUILTY

Ladies and Gentlemen Assessors

103. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.
104. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.




Sunil Sharma
Judge

At Lautoka

9 November, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.