

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 316 of 2011

[CRIMINAL JURISDICTION]

STATE

V

RAVINDRA DEO

Counsel : Ms. S. Sharma and Mr. S. Shah for State
Mr. J. Reddy and Mr. Vulakouvaki for Accused

Hearing on : 31st January - 01st February 2018

Summing up on : 02nd February 2018

(The name of the complainant is suppressed. The complainant will be referred to as "GD")

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard,

read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of his/her the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it 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. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may

ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
13. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
14. In order to prove that the accused is guilty of an offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of an offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
15. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.

16. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
17. Let us now look at the Information filed by the Director of Public Prosecutions. After the prosecution case was closed it was decided to proceed only on the first count which reads thus;

FIRST COUNT

Statement of Offence

SEXUAL ASSAULT: contrary to section 210(1)(a) of the Crimes Act 2009.

Particulars of Offence

RAVINDRA DEO on the 26th day of September 2011 at Kanavi Street, Samabula in the Central Division, unlawfully and indecently assaulted **GD**.

18. To prove the offence of sexual assault, the prosecution should prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) unlawfully assaulted the complainant; and
 - c) the said assault is indecent and sexual.
19. The first element involves the identity of the offender who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence.
20. Assault is the use of unlawful force. A physical contact like touching constitutes an assault if it is done without a lawful excuse. It should be intentional.
21. The word "unlawfully" simply means without lawful excuse. Therefore, the consent of the complainant would be a defence to this offence.
22. The prosecution should prove that the complainant did not consent for the alleged act of the accused and the accused knew or believed that she was not consenting or was reckless as to whether or not she was consenting. If the

accused was aware of the risk that the complainant may not be consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and go ahead and do what he has been alleged to have done, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.

23. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
- a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
24. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. You should also ask yourself, firstly, whether you consider that indecent assault could also have been sexual because of its nature; and if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.

Prosecution case

25. The complainant said in her evidence that;
- a) *She is 23 years old and was 16 years old in 2016. She did not go to school on 26/09/11. She did not go to school because she had school problems and her parents knew that she is not going to school that day. She was not sure how they knew that she was not going to school. On 26/09/11 she left the house around 7.30am in her school uniform and she also had one dress, one blue jeans and one green top with her. She said she had no idea why she took those clothes with her. She went to the bush beside her house and stayed there till 5.30pm.*

- b) When she was going back home at 5.30pm the accused called her on her phone and told her that if she does not come to his place he will tell her parents that they are having an affair. She said the accused forced her to come to his house by saying that. She said they were not having an affair. The accused was just a friend and by that time she had known the accused for six months. The accused had her number because he gave his number to her and then she called on that number. She said she had called the accused only once but the accused had called her so many times.
- c) She then went to his house and sat in the sitting room. She said the accused's house was opposite her house and it took 20 minutes to walk from the bush to the accused's house. She reached the accused's house around 6.00pm. It was a three storey house and there were three houses around it. She said she had never gone to the accused's house.
- d) When she was sitting in the sitting room the accused was also sitting with her and he asked her age and which school she is attending. They did not talk about anything else. Thereafter the accused tried to kiss her. She was pushing him with her hands.
- e) She then went to the bedroom and sat on the bed. She said she went to the accused's bedroom because she was scared and then said she does not know why she went there. The accused was seated next to her and was trying to kiss her. The accused was kissing her on her lips and she did not like what he was doing. She said the accused was forcing her. She was pushing him and was yelling 'don't do it'. The accused kissed her for 3 minutes.
- f) After that the accused took off her uniform. Then the accused sucked her left nipple. She was pushing him and yelling but he was still doing it. When this was happening she was lying down and the accused was on top of her. Thereafter he kissed her all over and also started sucking her 'main part'. She said the main part is down below and she does not know any other name for it. She said the accused pushed his middle finger inside her main part and felt his finger going inside. He did this for 2 minutes and she was pushing him while he was doing this. After that the accused went to sleep and she sat on the same bed and was awake till the following morning.
- g) She did not go home because her phone was off and the main door was locked. She said she was sitting on the same bed the accused was sleeping though she was scared. Next morning around 7.30am the accused told her to go home. Then her parents came to the accused's house and took her. She said her father came inside and took her. From there she went to the police station. Her parents told her to report all what the accused did.
- h) When she was asked to stand up and show where her main part is, she said 'no'. She said she can't show it. When she was asked what she does with the main part, she said she doesn't know. When she was asked by the court whether she does not understand the question or she does not want to answer, she said she does not want to answer.

- i) When she was asked whether she can recognise the accused if she sees him again she said 'no'. Then the same question was asked again and she said 'yes'. She pointed at the accused.
- j) During cross examination she said she is married but her husband stayed with her only for one year. She said at that time she used to live with her mother, father, brother, uncle and her grandfather.
- k) When she was asked what the school problems she was referring to were, she said teacher problems and homework. When she was asked how far was the accused's house from her house she showed the distance of 8 metres. But thereafter she agreed that it is not 8 metres and it is very far from her house.
- l) She agreed that after going out of the house in her school uniform she came back to her house from the bush around 9.30am. She also agreed that she packed the dress, blue jeans and the green top in her school bag when she came home at 9.30am. She said she called the accused around 7.30am on 26/09/11. The accused called her around 6.00am that day and she did not answer. The accused again called her at 12.30pm and while she was talking to the accused the phone got switched off.
- m) She said when the accused called her and forced her to come it was 7.30 am and only her grandparents were at home that time. She was afraid of her parents, uncle and the grandparents and that is why she did not tell anyone of them regarding the accused forcing her to come to his place.
- n) She agreed that she called the accused at 10.30am that day and there was no answer as she had stated in her statement to the police. She said she called him that time because the accused messaged her and she admitted that she did not mention about the accused messaging her in her statement to the police or during her evidence in chief. She agreed that she told the police that the accused called her around 12.30pm and told her that if she does not come he will tell her father that they are having an affair.
- o) When it was pointed out to her that during the evidence in chief she said that the accused called her on her phone at 5.30pm that day whereas during the cross examination she said that her phone was switched off from 12.30pm until she reached the accused's house; she said he was calling her but her phone was switched off.
- p) She said she did not change her school uniform till the next morning. When she was asked what she meant when she said she did not feel good when the accused was sitting about ½ a metre away from her in the sitting room she said "I don't know". Again when she was asked what she was scared about she said "I don't know". She said she moved into the bedroom when the accused was trying to kiss her in the sitting room because she could not go home as the main door was locked. She admitted that she did not try to open the door.
- q) She denied that she ran back towards the creek when she saw her father next morning. She also denied that thereafter when she was lying down in the bush her uncle found her.

26. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence and call one witness.
27. The accused said in his evidence that;
- a) *He denies the allegations against him. He was working as a mechanic in September 2011. On 26/09/11 he went to work around 7.00am and came back home around 6.00pm. He said throughout that day he did not receive any call from the complainant. He denied telling her to come home. He said they were talking to each other for about six months before that day and there were in love.*
 - b) *He reached home that day around 6.00pm and when he was opening the door he saw the complainant standing behind him. He was surprised to see her. When he asked her why she came, she told him that it is just to stay at his place. He denied asking her age and her school that day because he got to know her age and the school when they started talking to each other six months ago.*
 - c) *He said they used to talk about their marriage over the phone. When the complainant came to his place that day, both of them were happy to meet each other. They went to the sitting room and then embraced each other and kissed each other on the lips. Then the complainant told him that it is not the right time and to wait till she finishes her Form 7 exam. He agreed with her and did not do anything after that.*
 - d) *Thereafter the complainant asked him for a towel and she had a shower. Thereafter he had his shower. While he was cooking dinner they had a conversation about how they will get married and the complainant told him to talk to her parents. He said she did not have dinner that night saying that she just had the lunch she brought with her. He said they slept on the same bed and they woke up around 6.30am next morning. He said the complainant wore the school uniform to go to school and when they were going out of the house they met the complainant's father who was standing in front of the house.*
 - e) *When the complainant saw the father she ran away back to the bush. Then the complainant's father told him to come to the police station with him. The complainant was not there when he reached the police station.*
28. The second witness for the defence said that;
- a) *The complainant is his brother's daughter. In 2011 they lived together. He said the complainant did not come home after going to school on 26/09/11 and the complainant's father made a complaint to the police around 8.00pm. Next morning*

he went to the bush opposite his house to look for the complainant. He called her name but there was no response. He saw some trees shaking and when he went closer, he saw the complainant who was 'almost' lying down. He carried her and asked her what happened but she did not answer.

b) Thereafter she was taken to the Samabula Police Station. He said the complainant just wanted to go home when she was taken to the Police station. It was around 8.30am when he found the complainant in the bush. He said when he found her she was wearing the school uniform and it was almost clean. He was not cross examined by the prosecution.

29. Please note that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I have not referred to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
30. The defence says that there are inconsistencies in the evidence given by the complainant and she was not a credible witness. According to the defence, the accused and the complainant embraced each other and then kissed each other in the sitting room as both of them were happy to see each other. But because the complainant said that they should wait till she finishes her exam, he did not do anything else.
31. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
32. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

33. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;

- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
- (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
- (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

34. Any re-directions?

35. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

36. Your possible opinion should be as follows;

1st count (sexual assault) - guilty or not guilty



Vinsent S. Perera

JUDGE

Solicitors for the State
Solicitors for the Accused

: Office of the Director of Public Prosecutions, Suva.
: Jiten Reddy Lawyers, Nakasi.