

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 011 of 2018

STATE

v.

AB

Counsel: Ms. L. Bogitini for State
Ms. S. Prakash for Accused

Date of Hearing: 04th June 2018

Date of Summing Up: 06th June 2018

SUMMING UP

1. The name of the Complainant and the accused are 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.
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 and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel for the prosecution is not evidence. The purpose of the opening address is to outline the nature of evidence intended to be put before you. 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 find 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 person.

Information and elements of the offence

12. The accused is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offence are before you. Please take your attention to it, as I do not wish to reproduce it in my summing up.
13. The main elements of this offence of Rape as charged are that:
 - i) The Accused,
 - ii) Penetrated into the anus of the complainant with his penis,
 - iii) The complainant did not consent to the accused to penetrate into his anus with the penis of the accused,
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.

Agreed Facts

14. I now take your attention to the agreed facts, which are before you. They are the facts that the prosecution and the defence have agreed upon without any dispute. Hence, you can take them into consideration as the facts that are proven beyond reasonable doubt.

The Accused

15. According to the agreed facts, the Complainant knew the accused as they are related to each other.
16. The prosecution presented the evidence of the Complainant to establish that it was the accused who came into the room while the Complainant was sleeping and then penetrated into the anus of the Complainant with his penis. The defence suggested to the Complainant during the cross examination that the Complainant has mistakenly recognised the accused as the perpetrator.

Penetration

17. Evidence of slightest penetration of the penis of the accused into the anus 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

18. Let me now draw your attention to the issue of consent. 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 he 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. If you are satisfied, that the accused had inserted his penis into the anus of the Complainant and he had not given his consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or reckless that the Complainant was freely consenting for this alleged sexual encounter. 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 encounter. 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.

Corroboration

20. 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.
21. 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.
22. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You heard that the accused is the uncle of the Complainant. As I said above, it is your duty to determine the legal culpability of the alleged act committed by the accused according to law and not the moral or emotional culpability. 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 and the exhibits during the course of the hearing.

23. 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. Demeanours of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

Evidence of the Prosecution

24. Let me now remind you briefly the summary of the evidence presented by the prosecution during the course of the hearing. This is a fairly short hearing and lasted only for a day. Therefore, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
25. According to the evidence given by the Complainant, he had gone to his grandparent's place to celebrate the Christmas and New Year of 2018. His small father had come from England, that made the celebration more special. He was fifteen years old at that time.
26. On the evening of the 31st of December 2017, the elders of the family started to drink grog at the porch of the grandparents' house. The Complainant was with them till about 11 p.m. He then went into the house to sleep. He was using the bedroom at the back of the house. It is bit away from the porch. The passage of the laundry area is situated beside this bedroom. The laundry area has a white fluorescent bulb. When he went to the room, he found his cousin Levi was also sleeping on the mattress. Levi is seventeen years old. The Complainant laid down beside Levi. He was lying on sideways, facing Levi. The bed is placed, facing the door. The room had two windows. It had curtains made with see-through materials. The leg side of the bed was facing the windows, while other side of the bed faces the wall. The two windows are facing the laundry area.
27. The Complainant said that when he entered into the room, the light of the room was on. In a while, after he went to sleep, he felt that someone walked into the room and switched off the light and closed the door. He then felt that someone was standing

beside him. He then saw that it was the accused who was standing beside him. You may recall that the Complainant explained in his evidence how he managed to recognise the accused.

28. The accused is one of his uncles, as the accused is related to his father as one of his cousins. The Complainant knows the accused. The accused had also come to the grandparents place to celebrate the New Year. The Complainant said that the light of the laundry area was on and it shined directly inside the room through the see-through curtains of the windows. The light was situated just above the wall of the room. The Complainant said that he had no obstruction when he saw the accused.
29. The accused then pulled the Complainant down to the floor from the bed and covered his mouth with his hands. He squeezed the mouth of the Complainant. He felt pain on his head and could not shout to his cousin Levi who was sleeping on the mattress as his mouth was in pain. The accused then went and took the petroleum jelly and rub it on his penis. The Complainant was lying on the floor, facing his head down. He then turned his head and looked at the accused and saw that the accused had taken his penis out and rubbing it with the petroleum jelly. The accused was standing in front of the Complainant, while he rubbed his penis with the petroleum jelly. The accused then came and removed the t-shirt, the short and underwear of the Complainant. The accused then inserted his penis into the anus of the Complainant. The Complainant said that he did not consent or agreed with the accused, for the accused to penetrate into his anus with the penis of the accused. The Complainant said that he felt pain when the accused inserted his penis into his anus. The accused put his penis into his anus five to six times. He felt that it was the penis of the accused as he felt the thickness of it. He tried to struggle and to reach to his cousin and alert him. But he couldn't shout as his mouth was covered by the accused with his hands. The Complainant said that he couldn't escape as the accused was lying on top of him and he was heavy.
30. The accused did this for about five minutes. He then told the Complainant to wear his clothes. The accused had threatened the Complainant not to tell anyone else. The accused had threatened him that if he tells anyone else about this incident, the accused will kill him. The Complainant said that he was really scared and shocked. The

Complainant further said that he could recognise the accused from his voice as it is bit heavy than others in the house. The Complainant then went back to the porch and sat beside his two cousins Diama and Iva. He cried and told them what the accused did to him. The cousins went and told that to his aunty.

31. Doctor Adriel Nicolas Rageci in his evidence explained the medical findings that he noticed during the medical examination of the Complainant. He then tendered the medical examination report as exhibit one of the prosecution.

Case of the Defence

32. You may recall that the learned counsel for the defence cross examined the Complainant. The Complainant said that he saw the accused inside the sitting room, looking for his bag, when he went to sleep. When the Complainant came into the house, there were no one inside the house. The Complainant further said that people were not coming in and out from the house.
33. The learned counsel for the defence suggested to the Complainant that he was mistaken in recognising the accused as the perpetrator who committed this crime. However, the Complainant said that he clearly saw and recognised that it was the accused who penetrated into his anus with the penis of the accused.

Right to Remain in Silence

34. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted not to give evidence. The accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

Analysis and Directions

35. You heard the evidence presented by the prosecution. The defence presented their case by cross examined the witnesses of the prosecution. The prosecution and the defence

have conflicting versions of events. The prosecution alleges that the accused came into the room while the Complainant was sleeping, and pulled him down to the floor. The accused then penetrated into the anus of the Complainant with his penis without the consent of the Complainant.

36. The defence suggested to the Complainant that it was not the accused who actually committed this crime to the Complainant. The defence suggested that the Complainant was mistaken in recognising the accused as the perpetrator of this crime.
37. The case against the accused depends upon the correctness of the recognition made by the Complainant. You may recall that the Complainant explained in his evidence how he recognised the accused as the perpetrator of this crime.
38. When you are considering the evidence given by the Complainant, explaining how he recognised the accused, you need to exercise special caution. The reason for this is that experience tells us that honest and impressive witnesses, genuinely convinced of the correctness of their identification, have in the past made mistakes. You cannot convict the accused unless you are sure that the Complainant's recognition was accurate and, in making that judgment, you need to look carefully at the circumstances in which it was made and at any other evidence in the case which may support it. Let us consider the circumstances in which the recognition took place.
 - i) The Complainant knows the accused as the accused is related to him as his uncle,
 - ii) The Complainant saw the accused was in the sitting-room, looking for his bag when the Complainant went to sleep,
 - iii) The light of the laundry area shined directly to the place where the Complainant was sleeping,
 - iv) The two windows of the room are facing the laundry area, and had curtains made with see-through materials,
 - v) The light of the laundry area is situated at a place which is above the wall of the room.

- vi) The Complainant recognised the voice of the accused when he threatened the Complainant.
 - vii) The aunty of the Complainant, in her evidence explained about the settings of the house, specially this particular bedroom where this incident took place.
39. The learned counsel for the defence suggested to the Complainant that he has mistakenly recognised the accused as the perpetrator of this crime, which the Complainant denied and said that he clearly recognised that it was the accused who committed this crime to him.

Presentation of the Evidence of the Child Complainant

40. You have seen that the Complainant gave evidence behind a screen. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the accused.

Expert Evidence

41. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.
42. In this case you have heard the evidence of Dr. Adriel Nicolas Rageci. He is a medical doctor and gave his professional opinion about the observations and the findings that he noticed at the medical examination of the Complainant.

Evaluation of Evidence

43. Ladies and Gentleman assessors, I now kindly request you to draw your attention to the directions on evaluation of evidence. It is your duty to determine this case based on the evidence. In doing that, you are required to evaluate the evidence in order to determine the credibility, reliability and truthfulness of them. That will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, 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 has testified.
44. Moreover, you must bear in your mind that 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.
45. 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 talking about in the evidence. You should then 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.
46. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.

Evidence of the Child Complainant

47. The most important part of your task is to judge whether the Complainant, who is a fifteen years old child, have told the truth, and has given a reliable account of the events that he was describing. Children do not have the same life experience as of adults. They do not have the same standards of logic and consistency. Their understandings of event may be severely limited for a number of reasons, such as their age and

immaturity *etc.* Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult.

48. 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 Complainant. All decisions about the evidence are for you to make.

Inconsistencies and omissions

49. Madam and Gentleman assessors, you have heard that the learned counsel for the defence, in her closing address, suggested to you to take into consideration that the Complainant in his evidence said that when he went into the house to sleep, no one was in the sitting-room. However, the evidence of Mereoni says that some people were sleeping in the sitting-room while others were drinking groggs at the porch.
50. You are allowed to take into consideration about such inconsistencies when you consider whether the Complainant is believable and credible as a witness. 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.
51. 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.

Final Directions

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

53. Having considered 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 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 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.D.R.T. Rajasinghe
Judge

At Suva
06th June 2018

Solicitors
Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the Accused.