

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 178 of 2017

STATE

V

ENERIKO NAIKELEKELEVESI also known as
EPINERI NAIKELEKELEVESI

Counsel : Mr. J. Niudamu for the State.
: Ms. J. Singh [LAC] for the Accused.

Dates of Hearing : 11 and 12 September, 2018
Closing Speeches : 13 September, 2018
Date of Summing Up : 13 September, 2018

SUMMING UP

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

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.
6. 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.
7. 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

8. 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.

9. 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'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.
10. 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 courtroom.
11. 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.
12. 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.

INFORMATION

13. The accused is charged with one count of rape. (A copy of the information is with you).

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.

Particulars of Offence

ENERIKO NAIKELEKELEVESI a.k.a **EPINERI NAIKELEKELEVESI**, on the 30th day of August, 2017 at Rakiraki in the Western Division penetrated the vagina of **ASB**, a 5 year old child with his finger.

14. 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 "ASB" with his finger;
 - (c) "ASB" was below the age of 13 years.
15. The slightest of penetration of the complainant's vagina by the accused's finger is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case the complainant was 5 years of age during the period of the alleged offence. I therefore direct you that consent of the complainant is not an issue in this trial.
16. The first element of the offence is concerned with the identity of the person who allegedly committed the offence. The defence did not dispute this element therefore you can accept this element as proven beyond reasonable doubt.
17. The second element is the act of penetration of the complainant's vagina by the accused with his finger. The accused denies this element of the offence.
18. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was 5 years of age at the time of the alleged offending which establishes that she was below the age of 13 years at the time of the alleged incident.
19. If you are satisfied that the accused had penetrated the vagina of the complainant with his finger then you must find the accused guilty of rape. 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 of rape.

20. In this trial the accused has denied committing the offence of rape he has been charged with. 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 finger.
21. You must be satisfied that the prosecution has proved all the elements of the offence beyond reasonable doubt in order for you to find the accused guilty of the count. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused not guilty.
22. Furthermore the law provides that when a person is charged with rape and the court is of the opinion that he is not guilty of rape but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard I direct you that if you find the accused not guilty of the offence of rape that is you are not sure whether the accused had penetrated the vagina of the complainant with his finger then you should consider the offence of sexual assault.
23. The elements of the offence of sexual assault are:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant.
24. The first element of the offence is concerned with the identity of the person. The defence did not dispute this element so you can accept this element as proven beyond reasonable doubt.
25. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act

has some elements of indecency that any right minded person would consider such conduct indecent.

26. Assault is the unlawful use of force on the complainant by the act of poking her vagina. You should ask yourself:
 - (a) Whether you consider the force which as used could have been sexual because of its nature; and
 - (b) 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 in nature.

27. If you are satisfied that the prosecution has proved all the above elements of the offence of sexual assault beyond reasonable doubt, then you must find the accused guilty of the lesser offence of sexual assault. However, if you have a reasonable doubt in respect of any element of the offence of sexual assault then you must find the accused not guilty of the offence of sexual assault.

ADMITTED FACTS

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

29. From the admitted facts you will have no problems in accepting the above as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.

30. 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

31. The prosecution called 4 witnesses to prove its case against the accused.
32. The complainant "ASB" who was 5 years at the time informed the court that in August 2017 her grandmother had told her to bring the cow's feet from the house nearby. She went with her younger sister, upon reaching the house the accused was in the kitchen boiling water.
33. The complainant was asked to come inside the kitchen. In the kitchen the accused removed her trousers, kissed her stomach and then poked her "mako" with his pointer finger.
34. The complainant cried as a result of what had happened to her. Her grandmother after hearing the cry came. The complainant told her grandmother what had happened to her. The accused was in the kitchen at the time her grandmother came.
35. In cross examination the complainant stated that she did not know the person who had poked her "mako" she explained when she went to get the cow's feet this person told her to go inside the kitchen, he removed her trousers, panty kissed her stomach and poked her "mako" making her cry. She did not see this person after the incident. Thereafter her grandmother came saw her trousers on the floor. She was told to wear her trousers and was carried home by her grandmother.

36. The complainant agreed when her grandmother came this man wasn't there. At home her grandmother asked her about what had happened. When asked to show her "mako" the complainant pointed to her private part.
37. The second prosecution witness was the grandmother of the complainant Alesia Nasau. On 30 August, 2017 Alesia was at home with her 2 grandchildren namely the complainant who was 5 years of age at the time and the complainant's sister Mereia Lewaniu. She had sent the complainant and her sister to bring the cow's feet from the house of her younger sister.
38. After a while the witness heard the sound of someone crying coming from the house the complainant had gone to.
39. The witness ran and upon reaching the kitchen she saw the complainant crying. She saw the complainant's trousers and panty down to her thighs. When she arrived at the kitchen the accused was standing inside the kitchen. Alesia asked the accused what he had done to her granddaughter he denied doing anything. The witness responded by saying that he had done something because the complainant's shorts were down to her thighs.
40. When the witness saw the complainant she was shivering she got hold of her and went home. At home the witness asked the complainant what had happened to her. The complainant told her that the accused removed her shorts, kissed her stomach and poked her "mako".
41. The witness also stated that when she went to the house where the complainant was, the only person in the kitchen was the accused. The witness knows the accused who calls her aunty she identified the accused in court. The witness stated that the word "mako" referred to by the complainant meant female private part.
42. In cross examination the witness agreed that when she reached the house where the complainant was she was very concerned by what she saw. The

accused was there boiling water, he stood up and was pushing the complainant out of the house.

43. The witness agreed when she asked the complainant what had happened she was told that the accused had poked her vagina meaning her “mako” with his finger but the complainant did not take the name of the accused. The witness agreed that as a concerned grandmother at home she had questioned the complainant about the place where the accused had poked her and the complainant showed her vagina.

44. The witness was referred to her police statement dated 30 August 2017 in particular to the second last paragraph which was read as:

“ASB” told me that one boy from Analaisa’s house touched her “mako”, vagina. I asked her did he poke it or massage it, “ASB” stated he poked it. I asked it is paining. She stated yes.”

45. The witness stated that she had not said this to the police officer who was writing her police statement. She signed the statement because the police officer told her to sign she did not explain anything to the police it was the complainant who was doing the explanation.

46. When it was suggested that the complainant never told her it was the accused who had poked the vagina the witness stated that her granddaughter had informed the police and the police told her.

Ladies and Gentleman Assessors

47. The learned counsel for the accused in this regard was cross examining the witness about some inconsistencies in the statement she gave to the police immediately after the incident when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the grandmother with her evidence given in

court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.

48. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
49. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then 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 the witness.

Ladies and Gentleman Assessors

50. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
51. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in this case did not mention to her

grandmother the name of the accused immediately after she was taken by her grandmother from the house where the alleged incident took place.

52. This is commonly known as recent complaint evidence. The evidence given by Alesia is not evidence of what actually happened between the complainant and the accused since Alesia was not present and did not see what had happened between them.
53. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant complained to her grandmother immediately after she was carried out of the kitchen and taken home about what the accused had done to her and therefore she is more likely to be truthful. On the other hand, defence says the complainant did not complain to her grandmother according to the evidence of the grandmother the complainant had told everything to the police officer who then relayed the information of what had happened to the grandmother.
54. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.
55. The third witness was Dr. Emele Bolakoro who obtained her MBBS Degree from the Fiji School of Medicine. After internship at Lautoka Hospital, the witness was transferred to Nanukuloa Health Centre where she is serving for the past 3 years.
56. The doctor recalled examining the complainant on 30 August, 2017 she recorded her findings in the Fiji Police Medical Examination Form which was marked and tendered as prosecution exhibit no. 1.

57. Upon physical examination of the complainant the doctor's specific medical findings were bruising noted on the right side of the labia minora. According to the doctor labia minora was part of the female reproductive system the bruise was outside the female reproductive organ. In her professional opinion the bruise noted may have been from a blunt object or blunt trauma such as a finger.
58. The doctor referred to the diagram she had drawn in the Medical Examination Form and whilst explaining the diagram stated that on the right labia minora was a bruise which she had marked in the diagram.
59. In cross examination the doctor stated that when she examined the private part of the complainant she noticed there was a discoloration which was a bruising. Furthermore, it was also possible that the labia minora may get bruised if washed very vigorously since it was very tender. The doctor agreed the labia minora was like a pinkish lip type of the skin hanging on the female reproductive organ.

Ladies and Gentleman Assessors

60. You have heard the evidence of Dr. Bolakoro who had been 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.
61. 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.

62. 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.
63. The final prosecution witness was Constable Litiana Sevai who recorded the statement of witnesses and had conveyed the victim to the hospital. This officer had attended to the report of 30 August, 2017 the same day it was received.
64. The crime scene was about 10 to 15 meters away from the victim's house. During investigation the complainant had pointed out the accused in the village.
65. In cross examination the witness stated that she had recorded the statement of the complainant's grandmother Alesia Nasau. Whatever was stated in the police statement was mentioned by the person whose statement she had recorded.
66. The report was made by the Turaga ni Koro on behalf of the complainant that one boy from Raviravi village had sexually assaulted the victim.
67. This was the prosecution case.

Ladies and Gentleman Assessors

68. 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 not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent.

DEFENCE CASE

69. According to the line of cross examination the accused takes up the position that he did not penetrate the vagina of the complainant with his finger as alleged. Although the accused had met the complainant at Analaisa's kitchen door on 30 August, 2017 he did not do anything to the complainant.
70. This was the defence case.

ANALYSIS

71. The prosecution alleges that the complainant after being asked by her grandmother went to a nearby house to bring the cow's feet, upon reaching the house the accused was in the kitchen boiling water.
72. The accused asked the complainant to come inside the kitchen. In the kitchen the accused removed the complainant's trousers, kissed her stomach and then poked her "mako" meaning her vagina with his pointer finger.
73. The complainant cried as a result of what the accused had done. After hearing the cry the complainant's grandmother came. The complainant told her grandmother what had happened to her.
74. The grandmother of the complainant Alesia Nasau had sent the complainant and her younger sister to bring the cow's feet from the house of her younger sister. After a while the witness heard the sound of someone crying coming from the house the complainant had gone to.

75. The witness ran and upon reaching the kitchen saw the complainant crying, the complainant's trousers and panty were down to her thighs. When she arrived at the kitchen the accused was standing inside the kitchen. When Alesia saw the complainant she was shivering, at home the witness asked the complainant what had happened to her. The complainant told her that the accused removed her shorts, kissed her stomach and poked her "mako".
76. Dr. Emele Bolakoro who had examined the complainant on the day of the alleged incident noted upon her physical examination of the complainant bruising on the right side of the labia minora. In her professional opinion the bruise noted may have been from a blunt object or blunt trauma such as a finger.
77. The defence on the other hand denies the allegation. The accused takes up the position that he did not penetrate the vagina of the complainant with his finger as alleged although he had met the complainant at Analaisa's kitchen door on 30 August, 2017 he did not do anything to the complainant.

Ladies and Gentleman Assessors

78. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
79. 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.

80. 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.
81. 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 his or her previous statement 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.
82. 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.
83. 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.
84. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

85. Your possible opinions are:-

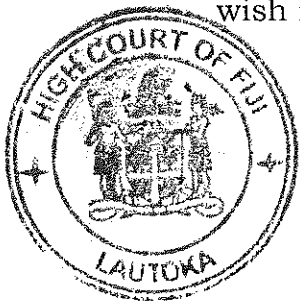
1. Count One: **RAPE**: GUILTY OR NOT GUILTY.


2. If you find the accused not guilty of Rape then you are to consider whether the accused is guilty or not guilty of the lesser offence of **SEXUAL ASSAULT**.

Ladies and Gentleman Assessors

86. 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.

87. 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
13 September, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.