

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 55 of 2016

BETWEEN : STATE

AND : GABIRIELI RAVALAWA

Counsel : Mr Seruvatu for the State
Ms Volau and Ms Raman for the Accused

Dates of Hearing : 03 & 04 October 2019

Closing Speeches : 04 October 2019

Date of Summing up: 04 October 2019

SUMMING UP

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You are to decide the facts of the case, based on the evidence that has been led before this court. You will then apply

those directions to the facts and give me your opinions as to whether the Accused person is guilty or not guilty.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going through evidence. If you do not agree with that opinion you will ignore it and form your own opinion with that evidence.
3. You must base your opinion only and only on the evidence given by the witnesses. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence. A suggestion put to a witness is not evidence. I must say that the purpose of the closing speech is to outline the evidence that each party rely on to fall in line with their respective arguments. It is not an exercise to introduce new evidence or to give evidence from bar table. If you heard any new information which you did not hear in the evidence given by the witnesses in this case, you must disregard such information.
4. You may act only upon the evidence given by the witnesses in this case and nothing else. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so is entirely a matter for you.
5. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinion. You will also not let any sympathy or prejudice sway your opinions. Emotions has no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of each element of the offence. You must not form your opinion based on the emotions, sympathies, prejudices,

speculations and morality. As I said before you only have to consider the evidence given by the witnesses in this case and nothing else to form your opinion.

6. I will give you only a summary of evidence. I will not go through every word uttered by the witnesses in this case, and if I leave out something that seems to be important, nothing stops you from taking that into account. Because you decide the facts.
7. After this summing up, you may give your individual opinions as the representatives of the community. You may reject or accept any evidence in forming your opinion. Your opinions need not be unanimous. And you need not give reasons for your opinions.
8. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Ladies and gentleman assessors,

9. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated them.
10. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail. You have to use your common sense in assessing the reliability and credibility of witnesses. Remember, that

many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.

11. Generally, complainants of sexual offences react differently when they got to narrate the traumatic experience they have gone through. Some may display obvious signs of distress, anxiety and restlessness, but some may not. Every witness has their own way of expressions when they give evidence about an experience, specially a traumatic one. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
12. Subsequent conduct of complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may react instantly and report because of their maturity, education level, social status, and for other similar reasons. Some may not complain at once due to immaturity, lack of education, and for other similar reasons. A complainant's reluctance to report an incident could be due to many reasons. Some may not even complain at all due to the fear that it may damage family ties. A complainant may not be comfortable to report a matter to close family members due to the respect, fear, or due to the reluctance to openly discuss matters relating to sex with elders.
13. A late complaint does not necessarily signify a false complaint. Similarly, an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to decide what weight should be attached to the promptness or the lateness of the complaint.
14. It must be noted that according to the law sexual offences do not require other evidence to corroborate the evidence of the complainant. Which means you can even solely rely on the evidence of the complainant without any other evidence to support it.

15. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the prosecution must prove every element of the offence beyond reasonable doubt.

16. The Accused need not prove his innocence. The fact that the Accused gave evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence. The burden is on the prosecution to prove the guilt of the Accused. That means you must be satisfied that the state has proved every element of the offence beyond reasonable doubt. That doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of the offence, you must find him guilty.

Ladies and gentleman assessors,

17. We will now look at the offence against the Accused. The Accused is charged for one count of rape in the Information filed by the Director of Public Prosecutions as follows;

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 44 of 2009.

Particulars of Offence

Gabirieli Ravalawa on the 19th day of February 2016, at Nadi in the Western Division, penetrated the vagina of Paulini Elesi Ratu, with his finger without her consent.

18. Now I will explain what matters you must take into consideration to determine whether the offence of rape is proved by the prosecution. The prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vagina of the complainant with his fingers;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complaint was not consenting; or the Accused was reckless as to whether or not she was consenting.

19. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the Accused and no one else committed the offence. The identity of the Accused is not disputed in this case.

20. The second element involves the penetration of the complainant's vagina with his fingers. The law states that even the slightest penetration of the vulva or vagina is sufficient to constitute the offence of rape. The vulva includes the rounded fleshy protuberance situated over the pubic bones that is covered with pubic hair, outer lips, inner lips, clitoris and the external openings of urethra and vagina. The vagina, also known as the birth canal is inside the body. Only the opening of the vagina can be seen from outside. Therefore, one has to necessarily enter the vulva before penetrating the vagina. Any kind of intrusive violation of the complainant's sexual organ, may it be vulva or vagina constitute the offence of rape.

21. As per the offence that the Accused is charged with in this case, the penetration is not by a penis. The offence is constituted by penetration of the vagina with a thing or a part of the body of the Accused that is not a penis. Therefore, the prosecution must prove beyond reasonable doubt that the Accused penetrated the vulva or vagina of the complainant with his finger to any extent.

22. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the Accused penetrated the complainant's vagina without her consent.
23. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. For the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. Consent obtained through force, threat or intimidation, fear of bodily harm, or by use of authority is not considered as consent given freely and voluntarily. Submission without physical resistance by the complainant alone, to the act of the other person will not constitute consent.
24. The complainant must have the freedom to make the choice. It means she must not have pressured or forced to make that choice. The complainant must have mental and physical capacity to make that choice. Further, the consent given by the complainant may have been limited to a particular sexual activity and not for another sexual activity. Also, the consent can be withdrawn at any time. It is an ongoing state of mind and its revocable once given. Consent of a person for sexual intercourse cannot be assumed.
25. In addition to proving that the complainant did not consent to the Accused to insert his fingers into her vagina, the prosecution should also prove that, either the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
26. The Accused was reckless, if the Accused realised there was a risk that she was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the vagina, you may find that the Accused was reckless as to whether or not the complainant was consenting. In other words, you have to see whether the Accused did not care whether the complainant was consenting or not. Determination of this issue is

dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

27. If you believe that the prosecution proved all the elements of the offence you must find the Accused guilty to that offence. Likewise, if you believe that the prosecution failed to prove all the elements of the offence you must find the Accused not guilty to the offence of rape.

28. The prosecution and the defence agreed to certain facts. Those facts are before you in a document titled as admitted facts. Those facts need not be proved again by the prosecution and you can use those facts to make your opinions without any further proof.

Ladies and gentleman assessors,

29. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions. The prosecution called the complainant to prove the case against the Accused. After the prosecution case was closed the Accused gave evidence for the defence.

30. The complainant, Paulini Elesi gave evidence that on 16 February 2016 she was alone at home. She said that she was 5 months pregnant at that time and she was sleeping on her bed. She said that she woke up when she heard someone walking into her bedroom. It must be noted that the interpreter translated what the complainant said as "I stood up then I saw Gabiriel". However later it was verified as per the audio recording that the correct translation should be woke up and not stood up.

31. The complainant said that the Accused told her that he wants to have sexual intercourse with her. The complainant had refused to have sexual intercourse. Then the Accused had lied on top of her and had kissed on her mouth according to the complainant's evidence. The complainant said then the

Accused touched her breasts and put his hands inside her trousers. She said that she was wearing $\frac{3}{4}$ Lee pants. She said that the Accused put his hand inside her trousers forcefully. The complainant said that the Accused put his fingers inside her panty and then he inserted a finger inside her vagina. She said that she felt his finger inside her vagina.

32. The complainant said that she told the Accused not to do that and she pulled his hand. She also said that she pushed him, and he fell off the bed. The Accused had then gone away. She complained about the incident to her parents on 25 February 2016. She said that she complained about it as she did not like what the Accused did to her.

33. During the cross examination by the defence counsel the complainant denied that the Accused came to her house that day to clean the compound. She denied that she had any sexual relationship with the Accused in the year 2015. She was asked as to why she did not run away when the Accused came and asked her to have sexual intercourse with her. In response the complainant said that she was pregnant at that time. The complainant denied that she laughed at the Accused when he asked her to have sexual intercourse. She admitted that she did not push him when he kissed her. The complainant denied that the Accused sucked her nipples. However, she admitted that the Accused fondled her breasts. When it was suggested to the complainant that the Accused gently put his hands inside her pants, the complainant confirmed that he forcefully put his hand.

34. The complainant was questioned by the defence counsel as to how the Accused put his hand inside the pants which had buttons and a zipper. She said that the Accused forcefully put his hand inside her pants. She denied that she unzipped her pants. The complainant reiterated that she pushed the Accused when he inserted his finger into her vagina. During the cross examination the complainant said that she was lying sideways when the Accused did those acts to her.

35. It was suggested to the complainant that a lady called Wati was outside the house when the alleged incident took place. The complainant denied the suggestion and said that Wati was at the farm which is about 15 minutes away. The complainant denied that the Accused was at home when her father came back.

36. It was suggested to the complainant that the Accused fondled the outer part of the complainant's vagina and he used his fingers to touch the tips of her vagina as follows;

Q: I put to you Paulini that at the the time Gabrieli inserted his finger to your private part he was fondling the outer part of your private part isn't it?

A: No my Lord, inside.

Q: No Paulini you agreed that Gabriel was playing with your vagina, correct?

A: But I didn't agree.

Q: When I say playing with your vagina Paulini, Gabrieli playing with your vagina with his finger, he was using his finger to touch the tips of your vagina isn't it?

A: Not true.

37. Under cross examination the complainant admitted that she did not complain about the incident on the same day. Further she admitted that on 25 February 2016 she complained to her father that the Accused tried to have sexual intercourse with her. During cross examination the complainant said that she went to the Police Station to report the matter with her stepmother. She said that she was scared to complain to her father on the 19 February 2016 when he returned home as she thought he might beat her.

38. It was suggested to her that she did not complain about the incident on the 19 February 2016 because she was having an intimate relationship with the Accused. However, the complainant denied the suggestion. It was suggested

that she finally complained only when she found out that she was pregnant. The complainant denied that suggestion too.

39. During re-examination the complainant said that she was five months pregnant by that time and she did not cry rape when she found out that she was pregnant. She denied that she had any sexual relationship with the Accused at any time.

40. That was the case for the prosecution.

41. After the closure of the prosecution case the Accused was explained his rights. The Accused decided to give evidence. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused and he need not prove his innocence.

42. The Accused gave evidence that on 19 February 2016 he was invited by the complainant's father to clean their compound. He said that around 3-4 pm there was no one at home apart from the complainant. He said that he went to the complainant's room and approached her to have sexual intercourse. He said that the complainant was in the bed. The Accused said that the complainant did not say anything at all when he asked her to have sexual intercourse. He said that he kissed her for about 5 minutes and the complainant did not push him or told him to stop. The Accused said that he then went straight to her nipples and started sucking them for about a minute. He further gave evidence that they were touching each other. When he was asked what he meant by touching each other, the Accused said that they were holding their hands.

43. The Accused confirmed the positions that they were in by showing with his hands that the complainant was lying down on her side and he was in front of her. The Accused further said that the complainant was wearing $\frac{3}{4}$ jeans and he went straight to her trousers. He said that her hands too came alone with his hand. The Accused said that the complainant unzipped her trousers. He said

that he thought that the complainant was going to push his hand away when she reached her trousers and unzipped it.

44. The Accused said then he put his hand inside and started touching the outer part. He said it was the outer part of Paulini's private area and not inside. The Accused further gave evidence that the complainant did not do anything when he touched her outer part and she did not even push him.

45. The Accused said that the complainant told him that her father is coming, and he thought that she was lying. He said that he went outside to clarify what she said and saw her father approaching house. The Accused said that he thought that the complainant would inform her father about the situation when her father came inside the house. He said that she should have informed her father that day and let them got caught to the father.

46. The Accused said that he did not have sexual intercourse with her because of her father's arrival. He said that he was talking with the complainant when he was in her room and he said " we were chatting about, I was asking if we can have sex and more than that, you should be not like this and because we have an intimate relationship."

47. During cross examination the Accused admitted that he went to the complainant's room when no one was at home. The Accused denied that he put his hand inside the trousers forcefully. Under cross examination the Accused denied that he penetrated his finger inside the vagina. The Accused admitted that when he said outer parts, he meant the outer parts of vagina. When the court asked him to clarify what he meant by outer part the Accused said that he touched the lips of the vagina.

48. During the re-examination he was asked as to how he knew that he was touching the lips of the vagina. In response the Accused said the he could feel it. However, he again said that he does not know the lips of the vagina.

49. That was the case for the defence.

Ladies and gentleman assessors,

50. It should be noted that in our law no corroboration is needed to prove a sexual offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, the prosecution can solely rely on the evidence of the complainant only without any supporting evidence whatsoever in sexual offences. It is for you to decide how credible and consistent is the evidence of the complainant.

51. You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or not reliable then you must find the Accused not guilty. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether the prosecution has proved the elements of the offence beyond reasonable doubt with that truthful and reliable evidence.

52. The prosecution case was that the Accused penetrated the vagina of the complainant with his finger without her consent.

53. The Accused contends that he did not insert his finger into her vagina and the acts that the Accused did were done with the consent of the complainant.

54. As it was said before, it is the duty of the prosecution to prove the elements the offence against the Accused. The Accused need not prove his innocence.

55. I have now given you the directions of law and summarized the evidence adduced in this case. Before I conclude my summing up let me remind you some points again.

56. If you believe that the prosecution has proved the elements of rape beyond reasonable doubt, you may find the Accused guilty.

57. If not, you must find the Accused not guilty.

58. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

59. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



Rangajeeva Wimalasena
Acting Judge

At Lautoka

04 October 2019

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Legal Aid Commission