

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

Criminal Case No. HAC 224 of 2017[LTK]

BETWEEN : STATE

AND : SHANEIL REDDY

Counsel : Mr S Seruvatu for the State
Ms L David for the Accused

Dates of Hearing : 18 - 20 March 2019

Date of Summing Up: 21 March 2019

SUMMING UP

[1] Ladies and Gentleman Assessors, it is now my duty to sum up the case to you. We have differing roles in this trial. I have to give you directions on the law and you must accept those directions. You are to decide the facts applying those directions and to give me your opinions as to the Accused's guilt or innocence.

[2] In going through the evidence I may express an opinion. If you do not agree with that opinion, you are free to ignore it and to form another view of that piece of evidence. I may omit some evidence which you think significant. Nonetheless you may give that evidence such weight as you consider appropriate. You are free to form your own opinions.

- [3] At the end of this summing up, and after you have given your individual opinions, the final decision on the facts rests with me. I am not bound to conform to your opinions. However in arriving at my judgment I shall place much reliance upon your opinions.
- [4] The burden of proof rests throughout the trial upon the prosecution. In our system of justice there is a presumption of innocence in favour of an accused. The prosecution brings the charge against the Accused. Therefore it is for the prosecution to prove the charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.
- [5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty. If you entertain reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of that charge.
- [6] The Accused elected not to give evidence. That is perfectly his right. You must not assume that he is guilty because he has not given evidence. The fact the he has not given evidence proves nothing, one way or the other. You will have to decide whether, on the prosecution's evidence, you are sure of his guilt.
- [7] You must decide this case upon the evidence presented to you. If a witness was not called you must not speculate the reasons why the witness was not called. You must only consider evidence which were led in the trial.
- [8] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state his or her individual opinions orally on the charge against the Accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.

- [9] However it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions. Those opinions must be based solely upon the evidence, that is, the sworn testimony of the only witness that was called by the prosecution.
- [10] Neither speculation nor theories of one's own constitute evidence. Media coverage, idle talk, or gossip, are similarly not evidence. Put out of your mind when considering your opinions, anything you may have read in the newspapers about this case. Focus solely on the evidence which you have seen, heard, or examined in this court.
- [11] This summing up is not evidence either, nor are counsel's addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [12] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness's answer is evidence. If she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [13] In arriving at your opinions, use the common sense you bring to bear in your daily lives, at home and at work. Observe and assess the witness's evidence and demeanour. You can accept part of the witness's testimony and reject other parts. The witness may have told the truth about one matter and lie about another; or she may be accurate in saying one thing and be wide of the mark about another.
- [14] If you have formed a moral opinion on the conduct alleged in this case, put that to one side. Consistent with your oath, you should put away both prejudice and sympathy. Approach your assessment of the evidence dispassionately. Bring a cool detachment to your task of examining whether the case against the Accused has been proved before you, proved with evidence led by the prosecution.
- [15] I turn now to deal with what the prosecution must prove. The Accused is charged with three counts. But you must consider each count separately, when you examine the case in your deliberations. Look at the evidence as it affects each count separately. Your opinions about the charges could differ from one to the other,

depending on the view you took on each count and the evidence available on each count.

[16] On counts one and two the Accused is charged with rape of the same complainant. The only difference between the rape counts is the nature of penetration. Count one alleges penetration of genitals while count two alleges penetration of mouth. To prove rape, the prosecution must prove three elements.

[17] First, it must be proved beyond reasonable doubt that on count one the Accused had sexual intercourse with the complainant, that is, he penetrated her vagina with his penis, and on count two the Accused penetrated the mouth of the complainant with his penis. The prosecution does not have to prove that full penetration occurred nor does it have to prove that the Accused ejaculated.

[18] Second, the prosecution must prove beyond reasonable doubt that when the Accused penetrated the vagina and the mouth of the complainant with his penis, he did so without her consent. The term consent means consent freely and voluntarily given by the complainant to engage in the physical acts of sexual penetration. Consent can be given verbally, or expressed by actions. On the same note, absence of consent does not have to be in words; it also may be communicated in other ways. Consent obtained after persuasion is still consent. However, the law specifically provides that a person who does not offer actual physical resistance to sexual acts is not, by reason only of that fact, to be regarded as consenting to the sexual acts. A person who submits to sexual acts with another person as a result of threats or violence is, by law, not to be regarded as consenting to the sexual acts.

[19] Third, it must be proved that the Accused knew that the complainant did not consent. This is a subjective, and not an objective test. You might ask how, in the absence of an admission by the Accused, the prosecution can prove that the Accused was aware that the complainant did not consent. The prosecution asks you to infer from other facts which it has set out to prove, that the Accused must have known and that he did indeed know.

[20] The issues for you to consider on counts one and two in summary are:

1. Whether the Accused penetrated the complainant's vagina and mouth with his penis?
2. Whether the sexual acts were without the consent of the complainant?
3. Whether the Accused knew that the complainant did not consent to the sexual acts?

[21] On count three, the accused is charged with stealing a bank card and \$35.00 cash from the complainant. What amounts to stealing? The essential elements of that offence are:

1. that the property must belong to someone other than the accused.
2. it must be appropriated that is taken and carried away; and
3. the taking must be without the consent of the owner of the property .

[22] Beyond those three elements, there are an additional three elements which relate to the Accused's mental state at the time of the taking, namely-

1. the property must be taken with the intention of permanently depriving the owner of it;
2. the property must be taken without a claim of right made in good faith; and
3. the property must be taken dishonestly.

[23] Let me explain more on these elements.

When I direct you that the property must belong to someone other than the Accused, all that is required is that, at the time of the taking, it must be owned, controlled or possessed by someone other than the Accused. In the present case, there is no dispute that that the bank card and the cash subject of the charge belonged to the complainant. You must then consider whether the taking was without the complainant's consent.

[24] We come then, to the further three elements which relate solely to the Accused's mental state at the time of the alleged taking.

[25] It does not amount to stealing if the property is taken only for a temporary purpose, unless the person taking the property realizes at the time of taking that it is certain or almost certain that the result of his actions will be that the owner of the property will be permanently deprived of it. Finally, the property must be taken dishonestly.

[26] What this means is that the Accused, by the intentional taking of the property without mistake and with knowledge that the property of another person was being taken, acted dishonestly. Whether he was acting dishonestly is for you to determine, applying the current standards of ordinary decent people.

[27] The Accused has not made any claim that he was legally justified in taking the property. The defence case is that the Accused did not take the complainant's property at all. The issues for you to consider on count three in summary are:

1. Did the Accused take the complainant's property without her consent and with the intention to permanently deprive her of it?
2. Was the Accused dishonest in taking the complainant's property?

[28] I turn now to summarize the evidence. In doing this it would be tedious and impractical for me to go through the evidence in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

[29] The entire prosecution case is depended upon the evidence of the complainant. She is a young woman. Her first encounter with the Accused was on the evening of 30 November 2017 at Mecure Hotel in Nadi. She said she had been drinking liquor with her flat mates at their home when she decided to go and buy cigarettes. She walked down to a service station near her home. When she found out that the service station

did not have an eftpos machine she walked down to the Mecure Hotel to withdraw cash from an ATM machine situated at the hotel. After withdrawing \$30.00 she met some security officers at the hotel. She said she was depressed and suicidal because she was having problems with her boyfriend. While she was conversing with the security officers, the Accused joined in and invited her to accompany him. Initially, she was reluctant but when he returned with a woman described by the complainant as an European lady who was interested in listening to her problems, the complainant accompanied the couple to their room at the hotel. While inside the room, the Accused offered the complainant with a roll of marijuana and after taking two puffs she passed out. She said she knew it was marijuana because of its smell. She said she has seen people using marijuana.

[30] She said she was taken to an unknown place in a vehicle by the Accused. When they arrived at the destination the Accused carried her to a room and put her to a bed. He then left and returned to the room and lie beside her in the bed. He touched her vagina. She stood up and told him that she was not that type of girl. When she told him to let her go he told her that she had to pay for what she did that night. He told her he would get his cousin from the military to escort her home. She felt ashamed and scared. He told her to take off her clothes. She took off her clothes. She said she had no other option but to comply so that she could go home. She heard noises from the next door. She started to scream. He choked her by smothering her face with a pillow. She lost consciousness. She felt his penis inside her vagina. He penetrated her and told her that she would be pregnant with his baby. He got up, had a shower and told her that he was going to the bar. He left the room with her clothes.

[31] Now Ladies and Gentleman Assessors, this particular incident of sexual penetration and the evidence of the Accused being a marijuana user, (which is an illicit drug) is not subject of the charges contained in the Information. It is important that I explain to you the relevance of this evidence of other acts. It was admitted solely for the purpose of placing the evidence of the particular acts relied upon by the prosecution, to prove the charges in the Information, into a true and realistic context. It is confined, in other words, to making the circumstances of the particular offences

charged more intelligible. Otherwise, you may wonder about the likelihood of apparently isolated acts occurring suddenly without any apparent reason.

[32] Thus, it is open to the prosecution to lead evidence of other acts of sexual nature between the accused and the complainant and the circumstances under which the acts took place for instance after using an illicit drug. However, I must give you certain important warnings with regard to this evidence of other acts, which we can refer to as context evidence. You must not use this evidence of other acts as establishing a tendency on the part of the accused to commit offences of the type charged, and, therefore, it cannot be used as an element in the chain of proof of the offences charged. You must not substitute the evidence of the other acts for the evidence of the specific offences charged. You must not reason that, because the Accused may have done something wrong to the complainant on another occasion, he must have done so on the occasion charged. The only use you can make of this evidence if you accept it to be true is to place the charged acts into a realistic context.

[33] Now let me return to the evidence of the complainant as far as the charged acts are concerned. The complainant said when the Accused returned to the room, he forcefully told her to get down on her knees and to suck his penis. When she refused he pulled her hair and made her go down on her knees. He was forcing her to suck his penis. When she refused, he started hitting her in the face. She said she sucked his penis because he was hurting her. She said he was taking videos of her with his phone.

[34] The complainant said that the Accused after forcing her to perform oral sex on him, he pushed her to the bed and injected his penis into her vagina. She said she couldn't do anything or move. She felt weak. He was too heavy for her. After sexually penetrating her, he got up, had a shower, dressed up and told her that his mood was really off. He left the room telling her that he was going to the bar to get cigarettes. He took her clothes with him. She realized he did not go to the bar. She saw and heard him talking to the housekeeping lady on the corridors. She heard him saying to the lady that she (referring to the complainant) was after his money. He wanted the lady to come and see the complainant's face. He brought the lady inside the room but

the complainant hid herself inside the bathroom. The complainant said she was not wearing any clothes but had covered herself with the bed sheet. The house keeping lady left without seeing her.

[35] The Accused told the complainant to have a shower. While she was in the shower, he made a video of her with his phone and told her not to leave the room, or he would leak the video on internet. He left the room, leaving her clothes behind this time. She put on her clothes. She noticed that her house key, bank cards and the \$30.00 that she had withdrawn had gone missing. She said the Accused took the card to pay for the room which they were staying in that night. When the Court sought clarification from the complainant regarding her missing bank card and cash, she said the Accused took the card and cash from her saying she had to pay for what she did to him. When she asked him what he meant, he said to her that “she was acting like a cheap slut”.

[36] When the complainant heard a knock at the door saying housekeeping, she went into the bathroom. She saw the phone that the Accused used to take her videos. She went and opened the door for the housekeeping lady. She was told it was time to check out. She learnt that the Accused was no longer to be seen. She stepped out of the room with the phone. She came to know she was at Wailoaloa Beach Resort. She saw her videos were on the phone. She discarded the phone after taking out the battery. She walked from Wailoaloa to her home in Matintar.

[37] The complainant was cross examined on her reasons for not raising alarm or reporting the incidents when she was either left alone in the room or after she had left Wailoaloa Beach Resort. The complainant said she felt too weak to leave or call the reception using the landline from the room when she initially arrived at Wailoaloa Beach Resort. She admitted sharing her suicidal thoughts with the Accused when she was in the room at Wailoaloa Beach Resort. But she denied engaging in any form of consensual sexual acts with the Accused. She said she was threatened to be escorted home by a military officer or sent back to Labasa. She said she was scared and ashamed to raise alarm or report the incidents.

[38] The defence has argued that the delay by the complainant in making a complaint to a person whom she might reasonably have expected to complain is inconsistent with the conduct of a truthful person who had been sexually assaulted. The defence says that you should, therefore, regard the complainant's evidence that the Accused raped her as false. This is necessarily a matter which you should consider, but I must warn you that the delay or lack of a complaint does not necessarily indicate that the evidence of the complaint is false. It may indicate fabrication on the part of the complainant, but does not necessarily do so. There may be good reasons why a person who has been sexually assaulted hesitates in making a complaint. Do you accept the complainant's reasons that she was scared and ashamed to raise alarm or to complain to be reasonable in the circumstances of this case. That is a matter for you to consider.

[39] You will recall that in cross examination it was suggested to her that the two alleged sexual acts, that is sexual intercourse and oral sex were consensual. The complainant denied the proposition put to her. You may think that the physical acts of sexual intercourse subject of count one and oral sex subject of count 2 are not disputed by the Accused. The real issue for you to consider is whether the sexual intercourse and the oral sex were consensual. If they were, then the Accused cannot be guilty of rape as alleged on counts one and two. The resolution of this issue depends on whether you believe the complainant's evidence that her consent was obtained by way of force or threats by the Accused. If you believe her evidence as true and you feel sure that she did not consent to the sexual intercourse and oral sex with the Accused, then you may think that the Accused knew that she did not consent. If you feel unsure whether the complainant did not give consent or whether the Accused knew she did not consent, then the proper opinions on count one and two would be not guilty. If you feel sure that the Accused had sexual intercourse with the complainant by penetrating her vagina with his penis without her consent and that he also penetrated her mouth with his penis without her consent, and that he knew she did not consent to the two sexual acts, then you may find the Accused guilty on counts one and two.

[40] The resolution of count three also depends upon whether you believe the evidence of the complainant that the Accused dishonestly took her bank card and cash without her

consent and with the intention to permanently deprive her of the property. If you believe her evidence as true then the offence of theft has been committed and the proper opinion would be guilty on count three. But if you don't believe her evidence or if you are not sure whether the Accused dishonestly took the complainant's property without her consent and with the intention to permanently deprive her of the property, then you must find him not guilty.

[41] On each count, your opinions would be either guilty or not guilty. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them.

[42] Please now retire to deliberate on your opinions.



A handwritten signature in black ink, consisting of a stylized 'D' and 'G' followed by a horizontal line.

.....
Hon. Mr Justice Daniel Goundar

Solicitors:

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