

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

High Court Criminal Case No. HAC 182 of 2015

BETWEEN : STATE

AND : VILIAME NATABE

Counsel : Mr Niudamu for the State
Ms Vulimainadave for the Accused

Dates of Hearing : 01 & 02 April 2019

Closing Speeches : 03 April 2019

Date of Summing up: 04 April 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 in respect of each count.

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, arguments and comments made by the counsel and this summing up are not evidence.
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 of the counsel 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 offences. You must not form your opinions 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. In this summing up 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 and it is also likely that some may perceive the same incident differently and narrate differently. 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. Also, it should be noted that signs of distress by a witness does not necessarily confirm 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. 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.
13. Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next, about the same matter is called into question.
14. In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Credibility concerns honesty. Reliability may be different. A witness may be honest enough but have a poor memory or otherwise be mistaken.
15. Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear,

or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.

16. I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.

17. When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as assessors, in determining a question of fact, should utilise your common sense and wide experience which you have acquired living in this society.

18. In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of Primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.

19. But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences - that is, deductions or conclusions - from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and

rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.

20. In order to illustrate this direction, I will give you an example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that you will understand the relationship between primary facts and inferences that could be drawn from them.

21. 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 offences beyond reasonable doubt.

22. The Accused need not prove his innocence. The fact that the Accused did not give 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 offences you must find him guilty.

Ladies and gentleman assessors,

23. We will now look at the offences that the Accused is indicted for. There are two counts of rape in the Information filed by the Director of Public Prosecutions;

First Count

Statement of Offence

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

Particulars of Offence

Viliame Natabe on the 4th day of November 2015, at Nadi in the Western Division, penetrated the anus of Neori Tuvita with his finger, without his consent.

Second Count

Statement of Offence

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

Particulars of Offence

Viliame Natabe on the 4th of November 2015, at Nadi in the Western Division, penetrated the anus of Neori Tuvita with his penis, without his consent.

25. You should consider each count separately. You must not assume that the Accused is guilty of one count just because you find him guilty to the other.

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

- a. the Accused;
- b. penetrated the anus of the complainant with his finger;
- 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 he was consenting.

27. 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.

28. The second element involves the penetration of the complainant's anus with the finger. The prosecution must prove beyond reasonable doubt that the Accused penetrated the anus of the complainant with his finger.

29. 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 anus without his consent.

30. 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 he 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.

31. The complainant must have the freedom to make the choice. It means he 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 it is revocable once given.

32. In addition to proving that the complainant did not consent to the Accused to insert his finger into his anus, 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.
33. The Accused was reckless, if the Accused realised there was a risk that he was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the anus, 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.
34. The second count is also rape. However, the only difference is the second element where the prosecution has to prove beyond reasonable doubt that the Accused penetrated the anus of the complainant with his penis instead of his finger. All the other elements are similar for the second count. Therefore, everything else I have stated earlier are applicable to the second count as well.
35. If you believe that the prosecution proved the relevant elements in respect of each offence you must find the Accused guilty for that offence or offences. Likewise, if you believe that the prosecution failed to prove the relevant elements of any offence you must find the Accused not guilty for that offence or offences.

Ladies and gentleman assessors,

36. 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 three witnesses to prove the case against the Accused.

37. The first prosecution witness was the complainant in this case. Neori Tuvita gave evidence that on the 4 November 2015 he was babysitting at his neighbour's house. He said that around 12.30 pm he saw the Accused going to his house which is about 50 meters away from the neighbour's house where he was babysitting. Then he had realized that the door was not locked. He had given the baby to one of the baby's aunties and had left. The complainant said that when he pushed the door of his house, he realized that someone had locked it from inside. He had called the Accused's name. When the door was opened he had pushed the door to open widely and he had seen the Accused sitting in the sitting room.
38. The complainant said the Accused was wearing a black T shirt with red stripes and a ¾ pants. He said that the Accused was not normal, and he smelt liquor. The complainant had informed the Accused that he needs to clean the house and the Accused had informed him then that he wants to sleep. The complainant said that he was wearing a black T shirt and a wraparound blue sulu without an underwear. He said that he was not wearing an underwear as he was about to go and do washing.
39. The complainant further gave evidence that he told the Accused to sleep in the sitting room and when the complainant was on his way to his brother's room the Accused came and told him that he wants to sleep in the brother's room. The complainant said that when he was going to open the louvers he was told by the Accused not to open them as some boys were moving around, outside the house. Then the complainant had gone to his room and had lied down on his bed as he was feeling sleepy. The Accused had then come to his room and requested him to come to his brother's room to tell some stories for the Accused to sleep. The complainant said that he didn't go to the brother's room. But again, he said that he went to that room. He said the Accused pulled his hand from the back and he fell backwards, facing upwards.
40. He testified that the Accused did the alleged acts afterwards. The evidence given by the complainant regarding the alleged two incidents was as follows;

Q: After you had lied down facing upwards what did you do?

A: He came my Lord then he pulled my sulu. Then he told me to suck him my Lord.

Q: Then what did you tell him?

A: Then I told him my Lord that I don't do such a thing. Then he came and spread both legs. Then he used his finger and inserted into my anus my Lord.

Q: How did you feel when he inserted his finger into your anus?

A: It was very painful.

Q: Can you still recall which finger Mr Tuvita?

A: pointing finger (index finger)

Q: What else did you do Mr Tuvita ?

A: Then he inserted his penis into my anus

Q: How long was he doing that act to you?

A: For quite sometimes my Lord.

Q: What else did he do to you?

A: Then he told me to sit on him. Then I told him that I can't do it. Then he inserted his penis again into my anus my Lord. He pulled my hand at the same time I came on top of him.

Q: How did you feel on your body from this ordeal?

A: It was painful, and my leg also cramp my Lord.

Q: Any other injuries you faced from this act?

A: My Lord he pushed me then my head was hitting the drawer, I received injuries my Lord.

Q: Why you didn't do anything?

A: I was weak my Lord.

Q: Then what happened once he pulled you as described?

A: When I was sitting on top of him, his penis was not erected.

Q: And then?

A: I told him my Lord to make his penis erected and at the same time my Lord he fall to sleep.

Q: Mr Tuvita why did you tell him to make his penis erected after you were suffering those ordeals, why did you tell him that ?

A: The reason being my Lord is that I want him to leave me. I tapped him my Lord at the same time he fall to sleep and then I leave the room.

Q: The question again listen, Mr Tuivita? Why did you tell him to make his penis erected after you were suffering those ordeals. Can you explain clearly?

A: The idea was to make him happy, just to make his penis erected so that I can escape my Lord.

41. That is an excerpt from the complainant's evidence. The complainant further said that then he left the room and when he went outside he met one Iiaseri. The complainant said that he informed Iiaseri about the incident and told him to go to the room and check the Accused.

42. When the complainant was asked as to why he did not shout or do anything he said that while the Accused was doing some of the acts he was pressing on his neck and he was worried that he would choke.

43. The complainant identified the Accused as Viliame Natabe.

44. During the cross examination the complainant was asked whether he went to the neighbour's house for babysitting without an underwear. The complainant said that "I was wearing my underpants when I move to Vani's house but as soon as I came back I took it off because I was supposed to do my laundry in the river." He said that he took it off in his room before he went to the brother's room. But later he admitted that he previously said that he went straight to the brother's room from the sitting room. The complainant also said under cross examination that the main door was opened after he entered the house and he cannot remember who closed it.

45. During the cross examination the complainant admitted that he went to the brother's room again when the Accused requested him to tell stories. He said he went with the Accused without knowing what the Accused's intention was.
46. Although the complainant said in the examination in chief that there were some boy's moving around outside his house, under cross examination he denied that there were people inside Vani's house or outside his house. He said he did not shout as he was totally in danger and if he shouted the Accused would have pressed his neck so hard and killed him. The complainant admitted that it is not recorded in his statement about the Accused pressing his neck. But he said that he disclosed everything to the police.
47. The complainant also said under cross examination that he did not use power on the Accused as if he hurt the Accused he would also get into trouble. He said therefore he did it in an easy way and left the room as soon as the Accused fell off to sleep.
48. The complainant answered the questions put by the defense counsel about erecting the Accused's penis as follows;

Q: When you give evidence about Mr. Natabe's penis not erected, it was you who then helped him to try and get his penis erected?

A: No, my Lord. I just want to add more. I do, if I helped him to make his penis erected I would have either the one who is going to bear the trouble because he will have the pleasure, I will have the risk. So, what is the purpose of me making his penis erected because I was the one who is going to suffer more than him.

Court: But the question is not that. When you gave evidence before, you said that his penis was not erected and that is why the counsel says that you wanted to have him get his erection?

A: I said that, but not in the sense really to erect his penis. I tap him but I tap him on his abdomen. So tapping, I thought it might erect

but it was not erected. So instead of erecting he felt asleep. So I was finding a passport out of the house from his grasp My Lord.

49. Later the complainant said that the penis was not erected as the Accused ejaculated. But when the defence counsel asked him as to why he did not mention that to the police, he said he does not know whether the Accused released semen inside him or not.

50. Under cross examination the complainant said that he went to the river to have a bath and later in the night one Apimeleki came and informed him that one Pastor Jope wants to talk to him. He said that the Pastor took him to the Police Station.

51. During the re-examination the complainant said that the Accused wanted him to touch his penis, but he touched the abdomen instead. He said when he was massaging the abdomen he saw the Accused dozing off and kept on massaging until he fell off to sleep and slowly left the room once the Accused fell asleep.

52. The second prosecution witness, Dr Sainimili Bulatale gave evidence that she graduated from the Fiji School of Medicine in the year 2013. She said that on 5 November 2015 she was working at Nadi hospital and around 2.30 am she examined one Neori Tuvita. She said that the person she examined seemed a bit quite and a bit ashamed. She has recorded that the anal area was a bit swollen and a fluid was seen. Further she has observed slight tenderness on the right side of forehead and a bruise on the right side of the neck. She tendered the medical report as prosecution exhibit 1.

53. Under cross examination the medical officer admitted that she did not record the summary and conclusions as the medical examination was incomplete. Further she said that anything ranging from an irritation to penetration of anus can result in swelling around anal area.

54. In re-examination she explained that she said the report was incomplete as she could not examine the fluid from the anus as she was not provided with any swabs.

55. The third prosecution witness, Iliaseri Nakoro testified that on 4 November 2015 he met the complainant outside the complainant's house around 2 pm to 3 pm. He said that the complainant told him to check on Viliame as he wanted to go and have his bath. The witness said that the Accused was lying down inside a room. He said that the Accused was wearing a T shirt and he cannot remember what else he was wearing.

56. During cross examination the witness said that a towel was hanging around the neck of the complainant when he met him outside the house.

57. That was the case for the prosecution.

58. After the closure of the prosecution case the Accused was explained his rights. 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. The Accused opted to remain silent and no witnesses were called for the defence.

Ladies and gentleman assessors,

59. 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.

60. The prosecution case was that the Accused raped the complainant once by inserting his finger in the complainant's anus and again by inserting the Accused's penis in the complainant's anus.

61. The Accused opted to remain silent. I must remind you that you must not draw any adverse inference from the fact that the Accused remained silent. It is his right.

62. However, the position of the defence as per the line of cross examination was that the allegations are false, and it was the complainant who tried to take advantage of the Accused.

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

64. 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.

65. If you believe that the prosecution has proved beyond reasonable doubt the elements of rape in respect of each count, you may find the Accused guilty to each respective count.

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

67. Finding the Accused guilty to one count does not automatically make him guilty to the other count. You must consider relevant evidence separately for each count when arriving at your opinion.

68. If you have a reasonable doubt in respect of any count, then you must find the Accused not guilty to that count or counts.

69. Your possible opinions are;

Count 1 rape -

guilty or not guilty

Count 2 rape-

guilty or not guilty

70. 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?

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



Rangajeeva Wimalasena
Acting Judge

Solicitors

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

Solicitors for the Accused: Legal Aid Commission