

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 48 of 2015

STATE

V

SERUPEPELI DAWAI

Counsel : Ms. R. Uce for the State.
: Ms. J. Singh [LAC] for the Accused.

Dates of Hearing : 10, 11 April, 2019
Closing Speeches : 16 April, 2019
Date of Summing Up : 16 April, 2019

SUMMING UP

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. 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.
6. 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

7. 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.

8. 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 person'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.
9. 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 court room.
10. You must decide the facts without prejudice or sympathy to either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. 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

12. The accused is charged with the following offence: (a copy of the information is with you).

Statement of Offence

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

Particulars of Offence

SERUPEPELI DAWAI, on the 26th day of February, 2015 at Nadi, in the Western Division, penetrated the vagina of **LICE TINANIVALU** with his penis, without the consent of the said **LICE TINANIVALU**.

13. To prove the above count 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 Lize Tinanivalu with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
14. In this trial the accused has denied committing the offence of rape. 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 penis without her consent.
15. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
16. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
17. The second element is the act of penetration of the complainant's vagina by the penis.
18. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

19. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
20. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
21. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
22. 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 he is charged with.
23. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
24. 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 offence of rape. 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.

ADMITTED FACTS

25. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final admitted facts.
26. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
27. 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

28. The prosecution called two (2) witnesses to prove its case against the accused.
29. The complainant informed the court in the evening of 25th February, 2015 she went with her cousin sister Miriama to Nawaka. On the way to Nawaka Miriama purchased 6 cans of Rum and Cola.
30. At Nawaka the complainant drank grog with Miriama's aunt, after the grog finished she started drinking Rum and Cola with Miriama. At 9.30pm Miriama and the complainant went to Deep Sea Night Club.
31. At Deep Sea Night Club Miriama purchased 5 bottles of Fiji Bitter. Later they were joined by her cousin brother Waqa after the drinks finished it

was 1 am the next day, at this time Waqa left. Miriama then went to drink at the other table with her boyfriend the accused.

32. At this time the night club was closing so the complainant, Miriama, the accused and his three friends went to another liquor shop. Here the accused purchased 6 bottles of beer they all started drinking except the complainant.
33. From here all went to After Dark Night Club, they drank more beer until 5 am. While going home in a carrier Miriama informed the complainant that she wanted to accompany the accused to Dratabu. The complainant did not want to go but Miriama insisted that the complainant go with her. By this time it was Miriama, the accused, his friend Petero Yalimaiwai and the complainant.
34. All went to a house at Dratabu. It was dark inside, no lights were on. The house belonged to the accused. She further informed the court that they had reached the vacant house at around 5 am that morning. Miriama and the accused slept on the mattress which was on the floor while the complainant and Petero were talking on the wooden bed, after a while he left.
35. On the bed was a pillow the complainant laid down on the bed with her face resting on her both hands on the pillow. Miriama and the accused were sleeping on the mattress about 2 metres away from her.
36. The complainant was not sleeping but had closed her eyes. After a while she felt someone coming near her, this person came and used a white bed sheet to block her mouth and covered her eyes then turned her over and wrapped her hands with the same bed sheet. This person then started removing her pants and panty. The complainant was struggling to push him away but she couldn't, at this time he punched her thighs.

37. The complainant could not see anything she was crying calling Miriama, she was trying to push this person away by trying to free her hands but by this time he had pulled her panty and pants to her knees. At this time this person was trying to spread her legs but could not. After a while he inserted his penis into her vagina. The complainant was unable to move around and her thighs were very painful.
38. The complainant was crying this person had sexual intercourse with her which lasted for about 15 minutes. She was also having her menstruation she was lying down and could not do anything since her mouth was blocked and her eyes were covered. The complainant kept on trying to free herself until Miriama started calling her boyfriend the accused. The complainant was trying to breathe because the cloth around her face was tight when Miriama called out this person stopped.
39. The complainant smelt liquor on this person by this time the cloth around her face had gone loose. As soon as Miriama came and lifted the white sheet that was covering both of them this person stood up, she saw the accused Miriama's boyfriend Seru was wearing his pants and she knew he was the one who had sexual intercourse with her. Miriama then pulled the complainant who stood up and was crying. The complainant wore her panty and her pants at this time she saw blood stains on her pants and the bed as well.
40. The complainant left the house with Miriama they went to Nawaka since she wanted to change her blood stained clothes. After changing her clothes the complainant reported the matter to the police. The complainant also said when she entered the house it was dark, however, there is a corner of the house that was not in good condition through which light came inside so people can be seen clearly and it was day break at around 6 am.

41. In cross examination the complainant agreed the vacant house did not have any rooms, it was an open space. The complainant stated that Petero Yalimaiwai did not sleep with her, he only asked whether she was married or single when she told him she was married Petero gave her \$20.00 being for her fare home and he left.
42. The complainant stated that she had told the Police Officer who wrote her police statement that she wanted to go home but Miriama wanted her to go with her. She agreed when she gave her police statement everything was fresh in her mind she was referred to the first page, 4th paragraph last sentence of her police statement:

“At around 5.00am, myself, Miriama, Seru and three other friends (Seru’s friend) came out of the club, hired a van and went straight to Dratabu. After getting off at Dratabu Village, myself, my sister and her boyfriend and another iTaukei youth, we went straight to a open vacant house which is near the roadside to sleep.”

43. The complainant agreed it was not mentioned that she wanted to go home and that Miriama had insisted that she accompany them. The complainant agreed it was dark inside the house when she was talking to Petero.
44. Furthermore, the complainant was asked if she told the police the person in question had used a white bed sheet the complainant agreed she told the police this. The complainant was referred to the last sentence on the first page of her police statement:

“Whilst I was on that position, suddenly someone covered my mouth and face with a piece of cloth and tied it tightly, at that time, the said person was on top of my back and also tied my hands with the same piece of cloth.”

45. When the complainant was told that the police statement mentioned piece of cloth and not a white bed sheet, the complainant explained that she told the Police Officer writing her police statement about a white bed sheet and not about piece of cloth.
46. The complainant also stated that she forgot to inform the court that there were two white bed sheets one was used to tie her up and the other was used to cover her and the accused.
47. The complainant agreed it was dark inside the house and she could not see the person who was having sexual intercourse with her. The only time she saw it was the accused was when he stood up and was getting dressed.
48. The complainant agreed at about 6 am she could see light coming into the house and she was able to see inside of the house. The complainant maintained the accused had raped her and that Petero did not sleep with her he had left after she told him she was married.
49. The complainant did not fabricate a story against the accused she could see the accused because the cloth around her eyes was loose. When it was suggested the accused was standing and getting dressed near her bed because he was going to wake Petero, the complainant said that Petero was not there, it was only Miriama, the accused and her.
50. In re-examination the complainant clarified she started calling Miriama from the time her face was wrapped with the bed sheet when there was no response she cried.
51. In respect of her evidence given in court not being in the police statement the complainant said she told many things to the police which appeared not to be in her police statement.

52. The final prosecution witness Miriama Nayavusoata on 25th February, 2015 was with her boyfriend the accused, Lice, Petero and another man. They have been drinking and clubbing. It was in the early hours of the morning on the 26th that the witness and the group went from After Dark Night Club to Dratabu. At Dratabu the other man left them.
53. All went into the vacant house belonging to the accused. Petero and Lice sat on the bed while the witness and the accused went to sleep on the floor. She was sleeping with the accused behind the bed.
54. The witness woke up at about 6 am because someone pulled her hand, when she opened her eyes she saw her bag was open and her phone was missing. At this time she saw Petero standing she asked him about her phone. He denied taking her phone. At this time the phone alarm started ringing since she had set the alarm for 6 am it was coming from Petero. Petero threw the phone at her and ran outside.
55. After Petero left the witness started looking for the accused. As she turned around she saw the accused lying next to Lice, she heard Lice calling her name. The witness moved closer to the bed and saw the complainant and the accused having sexual intercourse.
56. The witness called the accused but he was not responding so she lifted the bed sheet, she saw Lice's eyes and mouth were covered with a bed sheet and her hands were tied. The accused then rolled over and started wearing his shorts. At this time Lice was crying she pulled the accused away from Lice who stood up crying and wore her clothes. The witness heard the accused was asking for forgiveness from Lice.

57. Since it was daylight, both left the house and went to Nawaka. Lice had her shower and changed her clothes since it was blood stained. Thereafter the complainant reported the matter to the Police.
58. In cross examination the witness agreed Lice and Petero went to the bed. When she lifted the bed sheet she saw Lice's eyes and mouth were tied with a cloth.
59. The witness was referred to her police statement dated 26th February, 2015 to the first sentence on second page:
- "I then pulled the bed sheet away, and could see a piece of cloth was tied on her face and mouth."*
60. The witness agreed she did not tell the police it was a bed sheet that was tied on the face and mouth of Lice. When it was suggested that Petero slept with Lice from the time they went into the house till morning the witness said that she did not know about that because she had fallen asleep. She only saw Lice and Petero sitting on the bed.
61. The witness maintained the accused and Lice were having sexual intercourse and that the complainant was calling her. She heard her name being called and that is why she went near the bed.
62. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

63. 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 guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent and call one witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent. You must take into account what the defence adduced in evidence through the defence witness when considering the issues of fact which you are determining.

64. Petero Yalimawai informed the court that on the night of 25th February, 2015 he was drinking with the complainant, the accused, Miriama and one Sailosi at Deep Sea Night Club, afterwards they went to a Liquor Shop to drink more and then finally ended up at After Dark Night Club. They left the After Dark Night Club at about 4am in the morning of 26th February.
65. From the night club they all went to Dratabu Village to a vacant old house. There was no electricity in that house so when they went inside it was dark. In the house was a wooden bed. The witness and the complainant went straight to the bed while Miriama and the accused went to sleep on the floor.
66. The witness asked the complainant if he could have sex with her the complainant refused thereafter both slept on the bed. The witness woke up at 7 am he then woke the accused and told him that he was going home and then he left for home.
67. In cross examination by State Counsel the witness said that he did not go to Deep Sea Night Club after midnight after knocking off from work. According to him he only worked from 6am to 2.30pm and he does not do afternoon shift.
68. The witness was referred to his police statement dated 27th February, 2015 second paragraph, first line:

“On 26th February, 2015 after 12am I was coming back after work to town. I then went straight to Deep Sea Night Club to have a few beers.”

69. The witness agreed he told the above to the police and that on this day he must have done overtime.

Ladies and Gentleman Assessors

70. You have seen the learned counsel for the accused had put to both the prosecution witnesses their police statements when cross examining the complainant Lice and Miriama about some inconsistencies in the statement they gave to the police after the incident when the facts were fresh in their minds with their evidence in court. You have also seen the learned counsel for the state also put to the defence witness Petero his police statement when cross examining the defence witness about some inconsistencies in the statement he gave to the police after the incident when the facts were fresh in his mind with his evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant, Miriama and Petero with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witnesses are believable and credible. However, the police statement itself is not evidence of the truth of its contents.
71. 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.
72. 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 in respect of the reliability of the witness you are considering.

73. Petero further stated that they left the night club after 4am and before 5am they reached Dratabu so it was just a few hours he was lying there on the bed so that he could catch the 7 am bus home. The witness maintained that he had slept with the complainant on the bed.
74. This was the defence case.

ANALYSIS

75. The prosecution alleges on 26th February, 2015 Lice, the accused, Miriama and Petero went to the house of the accused at Dratabu during the early hours of the morning at around 5 am. Miriama and the accused slept on the mattress on the floor while Lice and Petero were talking on the wooden bed, after a while Petero left.
76. On the bed was a pillow the complainant laid down on the bed face down on the pillow. Miriama and the accused were sleeping on the mattress about 2 metres away from her. The complainant was not sleeping but had closed her eyes.
77. After a while she felt like someone coming near her, this person came and used a white bed sheet to block her mouth and covered her eyes then turned her over and wrapped her hands with the same bed sheet. He then started removing her pants and panty. Lice was struggling to push him away but she couldn't at this time he punched her thighs.

78. By this time he had pulled her panty and pants to her knees after a while he forcefully inserted his penis into her vagina. The complainant was unable to move around and her thighs were very painful.
79. The complainant was crying, this person had sexual intercourse with the complainant for about 15 minutes it was only when Miriama started calling her boyfriend the accused that this person stopped.
80. By this time the cloth around her face had gone loose. As soon as Miriama came and lifted the white sheet that was covering both of them the complainant saw the accused stand up and wear his pants and then she knew it was the accused who had forceful sexual intercourse with her. The incident was reported to the police on the same day.
81. Miriama told the court during the early hours of 26th February, 2015 she was with her boyfriend the accused, Lice, and Petero. They all went into the vacant house belonging to the accused. Petero and Lice sat on the bed while Miriama and the accused went to sleep on the floor behind the bed.
82. Miriama woke up at about 6 am because someone had pulled her hand, when she opened her eyes she saw her bag was open and her phone was missing. At this time she saw Petero standing she asked him about her phone. At this time the phone alarm started ringing since she had set the alarm for 6 am. Petero threw the phone at her and ran outside.
83. After Petero left Miriama started looking for the accused. As she turned around she saw the accused lying next to Lice, she heard Lice calling her name. The witness moved closer to the bed and saw Lice and the accused having sexual intercourse.
84. Miriama called the accused but he was not responding so she lifted the bed sheet, she saw Lice's eyes and mouth were covered with a bed sheet and

her hands were tied. The accused then rolled over and started wearing his shorts. At this time Lice was crying so Miriama pulled the accused. Lice stood up crying and wore her clothes when Lice was crying the accused asked for forgiveness. The prosecution also says considering the evidence adduced and the conduct of the complainant she was not consenting to have sexual intercourse with the accused that early morning.

85. The defence on the other hand takes the position that the accused did not rape the complainant as alleged. She made up a story against him. Petero Yalimawai was sleeping with complainant when all of them were in the house during the early hours of the morning. Petero had asked the complainant if he could have sex with her but she refused thereafter both slept on the same bed. Petero woke up in the morning at about 7 am he told the accused that he was going home and then he left to catch the 7 am bus for home.

Ladies and Gentleman Assessors

86. 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.
87. 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.

88. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge 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 other witnesses who gave evidence or with their police statements given to the police. 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.
89. 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.
90. 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.
91. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
92. Your possible opinions are:-

COUNT ONE: **RAPE** ACCUSED - GUILTY OR NOT GUILTY

Ladies and Gentleman Assessors

93. 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.
94. 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

16 April, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.