

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 134 of 2017

STATE

V

SEREMAIA BATIALIVA

Counsel : Ms. L. Latu for the State.
: Ms. V. Narara and Ms. S. Ali [LAC] for the Accused.

Dates of Hearing : 17, 18 April, 2019
Closing Speeches : 23 April, 2019
Date of Summing Up : 23 April, 2019

SUMMING UP

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

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable,

what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. During the closing speeches the defence counsel had stated that police brutality was on the rise and had made reference to a Suva High Court case. I direct you to disregard this submission since there is no such evidence before this court you are to only concentrate on the evidence adduced in this trial and nothing else.
8. 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

9. 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.
10. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
11. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
12. 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.
13. 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

14. The accused is charged with one count of sexual assault and one count of rape. (A copy of the information is with you).

FIRST COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

SEREMAIA BATIALIVA, on the 24th day of June, 2017 at Matanagata, Vatukoula, in the Western Division, unlawfully and indecently assaulted “**JS**”.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SEREMAIA BATIALIVA, on the 24th day of June, 2017 at Matanagata, Vatukoula in the Western Division, penetrated the vulva of “**JS**”, a child under the age of 13 years, with his finger.

15. To prove count one the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant “**JS**”.
16. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offence.
17. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.

18. The final element of assault is the unlawful use of force on the complainant by the act of touching her thighs.
You should ask yourself:
- a) whether you consider the force which was used could have been sexual because of its nature; and
 - b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that use of force is in fact sexual in nature.
19. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual offence as explained above, then you must find the accused guilty of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused not guilty.
20. In this trial the accused has denied committing the offence of sexual assault he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently touched the thighs of the complainant on 24th day of June, 2017.
21. To prove count two the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
- (a) The accused;
 - (b) Penetrated the vulva of the complainant “JS” with his finger;
 - (c) “JS” was below the age of 13 years.
22. The slightest of penetration of the complainant’s vulva by the accused’s finger is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case the complainant was 7 years during the period of the alleged offending. I therefore direct you that consent of the complainant is not an issue in this trial.

23. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
24. The second element is the act of penetration of the complainant's vulva by the accused with his finger.
25. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was 7 years at the time of the alleged offending which establishes that she was below the age of 13 years at the time of the alleged incident.
26. If you are satisfied that the accused had penetrated the vulva of the complainant with his finger then you must find the accused guilty of rape. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape then you must find the accused not guilty of the offence of rape.
27. In this trial the accused has denied committing the offence of rape he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vulva of the complainant with his finger.
28. You must be satisfied that the prosecution has proved all the elements of the offence beyond reasonable doubt in order for you to find the accused guilty of the count. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused not guilty.
29. 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.

30. In this case, the accused is charged with one count of sexual assault and one count of rape, you should bear in mind that you are to consider the evidence in each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

ADMITTED FACTS

31. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
32. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
33. 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

34. The prosecution called 6 witnesses to prove its case against the accused. The first witness Siteri Nabite the mother of the complainant informed the court that she has three children the eldest being the complainant who was 7 years of age in 2017 and a class 3 student at that time. The birth

certificate of the complainant was marked and tendered as prosecution exhibit no. 1.

35. The witness recalled on 25th June, 2017 the complainant came and told her that when she visited the washroom it was painful. The witness did not think it was something serious she thought it was due to stomach ache so she told the complainant to take panadol.
36. At 3pm the accused the uncle of the witness left her home having arrived home a few days ago on the 23rd when he left the complainant came and sat beside the witness. The witness noticed the complainant's reaction was as if she was trying to tell her something. The complainant said *Tatai* referring to the accused did something to her. When the witness heard this it made her really scared so the witness asked the complainant nicely what had happened.
37. The complainant responded by saying *Tatai* had put his fingers inside her panty. The witness asked again and the complainant said *Tatai* put his fingers inside her panty in the morning when she was reading on the settee.
38. When the witness heard this she was lost she did not know what to do she wanted to cry. She tried to call her husband despite knowing the fact that he will not answer the phone since he was working in the mine underground.
39. The witness then called her sister in Sigatoka and told her what the complainant had told her. Her sister reported the matter to the police. After 1 day nothing happened on the 26th she went and reported at the Vatukoula Police Station. The witness identified the accused in court.

Ladies and Gentleman Assessors

40. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not

complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

41. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant who was 7 years of age told her mother the accused had put his fingers inside her panty immediately after the accused left her house in the afternoon of the alleged incident.
42. This is commonly known as recent complaint evidence. The evidence given by Siteri is not evidence of what actually happened between the complainant and the accused since Siteri was not present and did not see what had happened between the complainant and the accused.
43. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told her mother the accused had inserted his fingers inside her panty in the morning and therefore she is more likely to be truthful. On the other hand, defence says Siteri did not mention anything about the accused putting his fingers into the complainant's panty to the police since it was not mentioned in her police statement which was given by her when the facts were fresh in her mind since nothing had happened.
44. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.

45. In cross examination the witness was referred to her police statement dated 26th June, 2017. The witness agreed that her police statement did not mention anything about the accused putting his fingers into the complainant's panty.
46. When it was suggested the reason it was not mentioned in her police statement was because the complainant had not told her that *Tatai* had put his fingers into her panty, the witness stated that the complainant told this to the police. In explaining this further, the witness said at that time she did not want to hear anything more from the complainant because something had happened to her daughter and as a mother she could not take it.

Ladies and Gentleman Assessors

47. The learned counsel for the accused in this regard was cross examining the witness about some inconsistency in the statement she gave to the police immediately after the incident when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the witness with her evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
48. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
49. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the

underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.

50. In re-examination the witness clarified that her police statement was written by a police officer and she had told the police officer that the complainant had told her *Tatai* was touching her private part.
51. The complainant recalled on 24th June, 2017 her *Tatai* touched her thighs and then put his right hand right up to the part of her body pointing towards her private part. When he touched with his hand her private part it was very painful.
52. The complainant was wearing shorts *Tatai* then put his hands inside her pants in the front. She does not know the name of this part of the body. The hand touched right inside where she always go to the washroom.
53. The complainant then put *Tatai's* hand away and ran to her mother's room. After *Tatai* left she told her mother everything that happened. The complainant also stated that *Tatai* touched her thighs as well.
54. The complainant also stated that she was not wearing anything under her shorts. She waited for *Tatai* to leave because she was scared of him. The complainant identified the accused in court.
55. In cross examination the complainant stated she went in the room sat on the couch to read then *Tatai* came and touched her. The part where she goes to the washroom was paining as a result of what *Tatai* had done to her. The complainant maintained *Tatai* did what she told the court.
56. The third witness Dr. Nikish Narayan graduated with an MBBS degree from the Fiji School of Medicine in 2014. This is his 5th year of practice, on 26th June, 2017 the doctor examined the complainant at the Tavua Hospital.

The Fiji Police Medical Examination Form of the complainant dated 26th June, 2017 was marked and tendered as prosecution exhibit no. 2.

57. The specific medical finding of the doctor was:
- a) Hymen was intact there was no discharge from the vagina, no bleeding, the mucosa which is the skin of the vagina appeared pink and;
 - b) some excoriation on the left labia on the lower side was seen with no bruise.
58. The doctor explained excoriation meant an abrasion to the lower part of the labia which is the outer part of the vagina. Excoriation was like a friction related injuries caused by any blunt force applied across the skin surface.
59. The doctor further stated that the outer part of the vagina mainly the labia which was the minor and major and the opening of the labia with the clitoris are all collectively known as the vulva.
60. In the professional opinion of the doctor the injuries seen were friction related excoriation approximately 24 to 48 hours after force had been applied to the labia.
61. At page 5 of the medical examination form (prosecution exhibit no. 2) the doctor explained the diagram he had drawn. He labeled the left and right side of the patient and that the diamond shaped illustration represented the vaginal cavity or the opening which was called the introitus and just outside the doctor marked the excoriation of the skin surface he had seen.
62. In cross examination the doctor agreed there was no penetration beyond the hymen and it was possible if the complainant had rubbed herself hard against the labia it could cause injuries and that the labia was part of the vulva.

63. The doctor agreed the vulva cannot be penetrated a simple touch hard rubbing could cause the excoriation.
64. In re-examination the doctor clarified a simple touch would not cause excoriation it would need hard rubbing. The injuries were seen at the labia.

Ladies and Gentleman Assessors

65. You have heard the evidence of Dr. Narayan who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in his evidence as a whole is to assist you.
66. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
67. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
68. The fourth prosecution witness Police Constable Nemani Lutumailagi recalled on 28th June, 2017 he caution interviewed the accused in the iTaukei language. The witness had also translated the caution interview into the English language.

69. The original caution interview of the accused in the iTaukei language dated 28th June was marked and tendered as prosecution exhibit no. 3 and the English translation was marked as prosecution exhibit no. 4.
70. The witnessing officer was WPC Makelesi the accused had signed all the pages of the caution interview with the witnessing officer and the witness. Before the interview commenced the accused was fine and he did not make any complaints he was also cooperative. There was no force or any threat made to the accused before during and after the interview and reconstruction. At the end of the interview the accused was calm.
71. The witness also stated that none of his colleagues threatened or assaulted or verbally abused the accused. The witness identified the accused in court.
72. In cross examination the witness stated that the accused was interviewed in the charge room at the Vatukoula Police Station. During the interview there were other police officers present in the charge room namely the station orderly who was in uniform and the witnessing officer WPC Makelesi who wore civilian clothes.
73. Corporal Sabino was not present during the interview. The witness disagreed that Cpl. Sabino had thrown a lemon on the head of the accused during the interview.
74. The fifth prosecution witness was W/Cpl. Makelesi Ranadi the witnessing officer during the caution interview of the accused. The role of this officer was to make sure that there was no assault or any ill treatment on the accused whilst the interview was conducted.
75. The witness observed that the accused was fine and cooperative. She confirmed signing the caution interview with the accused. The accused was

not assaulted or verbally abused or threatened and she did not receive any complaints from the accused at the end of the interview.

76. The final prosecution witness Sabino Duaibe informed the court that he was at the Vatukoula Police Station on 28th June, 2017 from Nadarivatu Community Post for his weekly meeting and cleaning up of the police station. In the morning he attended a lecture and then went for the cleaning up of the station after changing his uniform.
77. In cross examination the witness denied he saw the accused at the Vatukoula Police Station or had met police officer Nemani. He also denied assaulting the accused by throwing a lemon on his head.
78. This was the prosecution case.

Ladies and Gentleman Assessors

79. The caution interview of the accused is before you, the answers in the caution interview are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview.
80. During the cross examination of the Police Officers the counsel for the accused had asked questions of these officers suggesting assault by them on the accused. This means counsel was putting to these witnesses that the admissions made by the accused contained in the caution interview was not voluntarily given by him and therefore you should disregard those admissions.
81. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his caution interview then you should

disregard them. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.

Ladies and Gentleman Assessors

82. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent and not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent and not call any witness.

DEFENCE CASE

83. According to the line of cross examination, the accused takes up the position that he did not penetrate the vulva of the complainant with his fingers as alleged. The complainant who was 7 years of age at the time had caused the injuries by rubbing herself hard against the labia.
84. This was the defence case.

ANALYSIS

85. The prosecution alleges on 24th June, 2017 the accused had penetrated the vulva of the complainant with his fingers after touching her thighs and then putting his right hand right up to her private part. As a result of what the accused had done the complainant suffered pain.
86. The complainant was wearing her shorts the accused put his hands inside her pants in the front. After the accused left the complainant told her

mother everything the accused had done to her. She waited for the accused to leave because she was scared of him.

87. The mother of the complainant recalled on 25th June, 2017 the complainant came and told her that when she visited the washroom it was painful. At 3pm the accused left her house when he left the complainant came and told her mother the accused did something to her by putting his fingers inside her panty.
88. Dr. Nikish Narayan on 26th June, 2017 had examined the complainant at the Tavua Hospital. The doctor explained that he had seen some injuries applied to the labia of the complainant which was inflicted about 24 to 48 hours ago.
89. The prosecution further states when the accused was caution interviewed by the police he admitted touching the thighs of the complainant and penetrating the vulva of the complainant with his finger.

Ladies and Gentleman Assessors

90. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
91. 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.
92. 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.

93. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
94. 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.
95. 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.
96. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
97. In this case, the accused is charged with one count of sexual assault and one count of rape, as mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.

98. Your possible opinions are:-

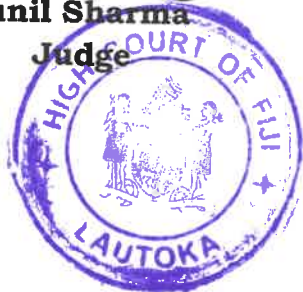
Count One: **SEXUAL ASSAULT: GUILTY OR NOT GUILTY.**

Count Two: **RAPE: GUILTY OR NOT GUILTY.**

Ladies and Gentleman Assessors

99. 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.

100. 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
23 April, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.