

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No: HAC 205 of 2013

STATE

VS

SOHEB NASIR ALI

Dates of Trial : 4th and 5th February 2019
Summing Up : 6th February 2019

Ms. P Lata with Mr. Alvin Singh for the State
Mr. Anil Singh with Miss Koroitamudu for the Accused

SUMMING UP

1.] Madam and Gentlemen Assessors,

The time has now come for me to sum up the evidence in this case and to direct you on the law. When I do so, you must accept what I say about the law and apply it to the facts. You are the Judges of the facts and whatever you say about the facts is paramount and I must give your opinions the greatest amount of weight when I come to consider the final judgment of the Court. If in the summing up I express an opinion on the facts and I do, then you can reject my opinions unless you agree with me and come to your own opinions. I have no right to

usurp your view of the facts. On assessing the evidence of witnesses, you may accept all of what a witness says, you may reject all or you may reject or accept part of the evidence.

- 2.] Counsel have just made their closing speeches to you this morning. They have urged you to take a certain view of the evidence. That is their right as Counsel for the parties they act for; but you don't have to accept what they say unless you agree with them.
- 3.] It is for you to tell me what you believe the facts of this case are by applying the law as I direct you and then by telling me if in your opinion the accused is guilty or not guilty of rape. You must accept what I tell you about the law.
- 4.] You will judge this case solely on the evidence that has been heard or seen in this Courtroom. Evidence consists of oral evidence from the witness box and whatever documents have been placed before you. All of that is evidence and you must consider it all. You will not rely on Mr Anil Singh's speculative deductions made in his closing speech. You will not speculate and nor should he.
- 5.] You will not judge this case on anything that you have heard or seen outside of the Courtroom – that would not be fair to the accused.
- 6.] Similarly you will not let any sympathy or prejudice play a part in your deliberations. You must look at the evidence dispassionately and with the wisdom of your experience of the community and the Fijian lifestyle.
- 7.] I make no apologies for repeating to you what I said at the beginning, because it is important. That is that you can only find the accused guilty if you have been made sure by the State prosecutors that he is guilty – that is you are certain beyond reasonable doubt. Reasonable doubt is not any little niggling doubt – your doubt must be reasonable and if it is, then it is your duty to return an opinion of not guilty. The accused does not have to prove anything. The burden is on the State to make you sure of the guilt of the accused, no matter what he says in evidence.

- 8.] As you are aware, the accused faces a charge of rape. I am sure you all know what rape is, but for the avoidance of doubt, rape is commonly committed when a man penetrates the vagina of a woman with his penis without her consent. There are in our law other forms of rape but it is not necessary to discuss those more uncommon rapes here.
- 9.] So to prove rape in general it must be proved that:
- 1) it was indeed the accused who has been charged who,
 - 2) penetrated the vagina of a female with his penis
 - 3) without her consent or knowing that she was not consenting.
- 10.] **HOWEVER**, when the female person is under the age of 13 years the consent element does not apply. This is because the framers of our criminal laws must have thought that a girl under 13 is not mature enough to appreciate the physical and psychological consequences of surrendering herself to sexual intercourse. Whatever the reasons and whether you agree with the principle or not it is the law in Fiji and you and I must apply it.
- 11.] The result is that in this case, where we have seen the birth certificate proof of Crystal's age at the time, all that the State has to prove to you is
- 1) was it this accused Soheb, who
 - 2) had sexual intercourse with Crystal on a date in the month of October 2013.
- 12.] Nothing more, nothing less. It is irrelevant if Soheb thought she was older than 13, it is irrelevant if he thought she was inviting him to have sex with her. Nothing else is relevant except whether Soheb had sex with her in October 2013.
- 13.] Now I know that this has been a short case and the evidence will be fresh in your mind but it is my judicial duty to remind you of the evidence on which you must make your findings.

- 14.] The first prosecution witness was the alleged victim, Crystal. She is now 18 and married with a child but in October 2013 she was 12 years and 11 months old. Her birthday she told us is on the ~~12th~~^{17th} November 2000. She described events of the 8th October 2013 when she had been out with her mother and had come back home and was there alone. Soheb whom she identified as the accused came to the door and said he wanted to use her laptop. She knew Soheb from the Youth Club she attended once a week with her younger brother. Crystal let him in and went to her room to get the laptop. He followed her into her room, pushed her on the bed and tried to remove her clothes. He took his pants down, held her hands and covered her mouth. He penetrated her with his penis. It was mid morning on a week day. He threatened her not to tell anybody and warned of shame to her family. He left. She washed and felt weak and waited for her Mum to come home which she did bringing other relatives with her. Crystal didn't say anything. She was scared, weak and shocked.
- 15.] Soheb came back on the 23rd October 2013. He took her hand and asked her if she had told anybody. She ran into her mother's room and locked the door. She called Mum telling her to come home quickly and then she let Soheb into the room. They both sat on the bed, he playing with the laptop and she lying beside him under a blanket.
- 16.] Mum did come home and found them on the bed together. She started to beat him telling him "I told you not to come here". Her father arrived and the matter was reported to the Police at Namaka. Crystal was sent for a medical examination where it was revealed that she was no longer a virgin.
- 17.] In cross-examination of this witness, Counsel for the defence spent a long time dealing with the inconsistencies he says exist between her evidence and the statement she made to the Police.
- 18.] I must now give you a legal direction concerning this point.
- 19.] When it is revealed that there are inconsistencies between what a witness says in his/her evidence in Court and a statement he/she has

Fr.

made out of Court, then the oral evidence in Court is the definitive evidence.

- 20.] The statement itself is not evidence of the truth of its contents, except for those parts of it where she has told you are true. In examining suggested inconsistencies, you will wish to decide, first, whether there is in fact an inconsistency and if you decide that there is one, you will wish to decide whether it is material and relevant or on the other hand insignificant or irrelevant. If there is in fact an inconsistency, it might lead you to conclude that the witness is generally not to be relied on; alternatively, that a part only of her evidence is inaccurate or you may accept the reason she has provided for the inconsistency and consider her to be reliable as a witness.
- 21.] Bearing in mind that the only issues in this trial are whether there was a sexual act in October 2013, you might think that issues such as tea and biscuits, the 1st or 8th October, meeting on the roadside or not are irrelevant but it is a matter for you.
- 22.] Then Counsel for the defence raised the issue of a letter written by this witness to the DPP. The Court has never seen this letter nor have you – it is not in evidence and we do not know what it says. I would ask you to put it from your mind and place no weight at all on it in your deliberations.
- 23.] The second prosecution witness was Crystal's mother, Ms Devika Rai. She told us that she came home early on the 23rd October 2013 to find her daughter (PW1) and the accused, whom she knew as "Bash" on PW1's bed. She was furious, pulled the girl away and starting beating Bash and perhaps Crystal with a belt, a coat hanger and fists. She was swearing at them. Bash ran away. She called her husband and the Police. She took her daughter to the Namaka Police Station. From there Crystal was taken to the hospital for a medical examination and back to the station for her statement to be taken. The mother was not allowed to be present at the statement taking but saw it the next day when she was asked to come in and sign it. After the medical, PW2 came to know that her daughter was not a virgin. Crystal told her

when they got home that she had been raped. . She told her that on the 8th October Bash had come, had pushed her on to the bed, held her hands tightly and raped her. She was weak and felt dirty.

- 24.] Mother told us that both she and her daughter were upset about the way the police officer had written Crystal's statement. It wasn't in accordance with the version that Crystal was telling at the time. So they went to DPP to make another statement. We have not seen this either Madam and Gentlemen, so it is not something we can take into consideration. You will put that out of your minds as well as the letter to the DPP I have referred to earlier and you will judge this case solely on the oral evidence of the two women given in this trial, along with the evidence of the accused.
- 25.] It was once the case that in all cases of sexual assault (including rape) that there had to be corroboration for the testimony of the victim. That means that there had to be independent evidence before the Court supporting the allegation of the victim. That is no longer a requirement in law. Subject to what I direct you later in this summing up, it is open to you to find the State has proved their case on the testimony of Crystal alone.
- 26.] Mr Anil Singh spent a lot of his cross examination of this witness arguing with her whether the assault on her daughter occurred on the 1st or the 8th October 2013. He made much of the fact that the statement says the 1st. It is for you to decide whether this discrepancy is relevant or not, the charge referring to the month of October and both witnesses being adamant that it happened on the 8th October 2013.
- 27.] The third and final witness for the prosecution was a Police Officer who was in charge of the investigation at the time. It was he who obtained the original birth certificate of Crystal proving that she had been born on the 11th November 2000 and was therefore under 13 in October 2013. He said he was not present when Crystal made her statement, nor was he present when the mother made hers. He confirmed that the accused had never been in trouble with the law before.

- 28.] He talked about having interviewed the accused about the allegations and when asked by me what transpired in the interview he told me that the accused had admitted to the offence of rape.
- 29.] I will deal with this interview and how you should approach it later in my summing up.
- 30.] Well, that was the end of the Prosecution Case. You heard me tell the accused that there was sufficient evidence against him to put him to his defence. I told him his rights in defence which are that he could remain silent and submit that the State had not proved the case against him to the requisite standard. Alternatively, he could give evidence under oath and submit himself to cross-examination. In either case he could call witness if he wished.
- 31.] As you know that after consultation with his counsel he decided to give evidence having sworn an oath on the Koran.
- 32.] Soheb told us that he is now 25 years old and works as a carpenter.
- 33.] He first met Crystal at the Youth Club in 2013 in about August. They would meet once a week and sometimes he would walk her home. He had no idea how old she was. Most people in the group were around 15 to 16. He went to her house for the first time in September 2013 when he was invited to drink grog. The next time he went he and Crystal met at the road side and she asked him to her house. It was in the middle of the day. She let him in and made tea and biscuits for him. They played games for about an hour in the sitting room and then he went home.
- 34.] He went there again on the 23rd October in the early afternoon She had messaged him so he went but nobody answered the door. He sat on the doorstep waiting for her to open the door. Again there was tea and biscuits and she asked him to go to her room where they sat on the bed She lay on her side and he lay beside her with the laptop on top of him. They were both dressed. Then her mother came home and started belting him. She sent him out while she talked to Crystal. She then told him to get out and not come back. Later her father and uncle picked

him to get out and not come back. Later her father and uncle picked him up from home and took him to the Police Station. He was charged with trespass and locked up. He was taken to hospital after the interview. They asked him if he had raped or not and he told them that he didn't rape her.

- 35.] On the 1st October he had not held her hand nor did he cover her mouth. He had no idea how old she was.
He knew her mother, having seen her for the first time at Wailoaloa Beach in rather unfortunate circumstances. After that he used to see her when she brought Crystal and her brother to the Youth Club.
- 36.] He told us that he had never raped Crystal nor had he sex with her. When he went to the hospital he had injuries on his knees and his wrist. The injuries on his knees were caused by Crystal's mother throwing a chair at him in front of the Police Officers. He was interviewed by Police but assaulted and forced to sign it.
- 37.] Now I want to direct you on how you must approach the matter of the interview. Normally when a suspect is interviewed by the Police the record of that interview is used in the subsequent trial. It is evidence that may or may not assist the Prosecution. In this case, for reasons best known to themselves, both the Prosecution and the Defence agreed that it would not be placed before the Court in evidence. However when that interview becomes an issue in the evidence as it did in this trial when Counsel for the Defence asked the accused about it when he was giving evidence, then it can be "opened up" to a limited degree to show that the accused is not telling the truth. In this case the accused told the Court that he told the Police that he didn't rape or have sex with Crystal. The interview says otherwise so I allowed the Prosecution to show the interview to the accused, and in particular one answer he gave to the Police where he said ; "we had sex on the bed" . This showed that the accused was not telling the truth in his evidence in chief.
- 38.] I direct you that the only use you can make of this answer is to discredit the evidence of the accused; that is to say that you may not

think his evidence is reliable if he is shown to have lied once. You may not use that evidence to find the accused guilty because the whole of the interview and the manner in which it was made has not been satisfactorily dealt with according to strict rules of evidence relating to interview evidence. If you are to find the accused guilty you must do so solely on the evidence of Crystal and her mother and on nothing else. Apart from using the interview to show that the accused was not telling us the truth in his evidence, you are then to put it out of your minds in your deliberations.

- 39.] That then brings me on to another legal direction raised by that. The fact that an accused tells a lie is not in itself evidence of guilt. An accused may lie for many reasons and it may possibly be an innocent one in the sense that it does not mean that he is guilty; for example to conceal some other disgraceful conduct short of the charge he is facing or out of panic or confusion. So you are free to use the lie when assessing his credibility but not necessarily as evidence of guilt. If you are not sure about the Prosecution case, you must not use the lie to bolster it.
- 40.] The accused has told us that he has never been in trouble with the law before; he has a clear record. The prosecution does not deny that. You must therefore take that into account when assessing his evidence. Decide whether a 19 year old with a clear record is more likely or less likely to commit this offence.
- 41.] Well Members of the Panel I have given you a lot to think about. Your first task is to look at the prosecution case and decide whether they have proved to you so that you are sure that the accused penetrated Crystal in October 2013. Does anything that the accused say make you doubt the prosecution case?
- 42.] If you are sure you will find him guilty; if you are not sure you will find him not guilty.

43.] Please try to be all in agreement but if that is not possible I will take a majority verdict from you. Let my staff know when you are ready and I will reconvene the Court.

44.] Just before you leave us, I will ask Counsel if there is anything they would wish me to add or alter in my legal directions. The facts of course are for you alone.

45.] Counsel?



.....
Paul K. Madigan
Judge.
High Court Lautoka

6th February 2018