

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 218 OF 2016

BETWEEN : STATE

AND : INOKE VOCEVOCE

Counsel : Mr. J. Niudamu for State
Ms. K. Vulimainadave for the Accused

Date of Hearing : 27th of May, 2019

Date of Closing Submissions : 27th of May, 2019

Date of Summing Up : 28th of May, 2019

SUMMING UP

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
4. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the accused are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public

opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

7. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty to the offence.
8. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
9. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused.

Information and elements of the offences

10. The accused is being charged with one count of Rape, contrary to Section 207 (1) and

(2) (a) of the Crimes Act. The particulars of the offence are before you, therefore, I do not wish to reproduce it in the summing up.

11. The main elements of the offence as charged are that;

- i) The Accused,
- ii) Penetrated into the vagina of the complainant with his penis,
- iii) The complainant did not consent to the accused to penetrate into her vagina with his penis,
- iv) The Accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner.

Agreed Facts:

12. I now take your attention to the agreed facts, which are before you. They are the facts that the prosecution and the defence have agreed without any dispute. Hence, you are allowed to take them into consideration as proven facts beyond reasonable doubt.

Accused

13. It is the onus of the prosecution to prove beyond reasonable doubt that it was the accused who committed this offence to the complainant. According to the Agreed Facts, the accused and the complainant are cousins and lived in the same village. Hence, the identity of the accused is not disputed by the parties.

Penetration

14. Evidence of slightest penetration of the penis of the accused into the vagina of the

complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Consent

15. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent to the accused to insert his penis into her vagina.
16. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.
17. The complainant must have the freedom to make the choice. It means that she must not be pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
18. If you are satisfied, that the accused had inserted his penis into the vagina of the complainant and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or

reckless that the complainant was freely consenting for this alleged sexual intercourse. I must advise you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual intercourse. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that were prevailed at the time of the alleged incident.

Corroboration

19. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable, credible and truthful; you are not required to look for any other evidence to corroborate the account given by the complainant.
20. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.
21. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and

make your judgment strictly on the evidence that you have heard from the witnesses during the course of the hearing.

22. You must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanors of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

Evidence of the Prosecution

23. Let me now remind you briefly the summary of the evidence presented by the prosecution during the course of the hearing. I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
24. The complainant was living at the Balekinaga village with her parents and the brother in the year 2016. On the 16th of September 2016, her parents had gone to the farm while she was staying alone at home. She saw the accused, who is a cousin of her, was coming towards their home while she was sitting at the front of her home. The time was around 7 o'clock in the evening. The accused came and pulled her hands and took her into the bedroom. He then closed her mouth and undressed her, while undressing himself. The accused then inserted his penis into her vagina. The complainant had tried to shout, but the accused had closed her mouth. After he finished the sexual intercourse, the accused had asked the complainant to dress up and go away.

25. The complainant had told about this incident to her teacher at the school on the 14th of October 2016. During the cross examination, the learned counsel for the defence suggested that this alleged incident never happened, for which the complainant said that it happened as she explained. The complainant further said that she told the teacher about this incident when she was questioned by the teacher for some other incident. The class teacher is Ms. Raveena Gounder. The teacher had noticed that the complainant was not doing her revision works in the class at the school on the 14th of October 2016. When the teacher inquired about it, the complainant had told the teacher that she was beaten up by her father with a stick. While explaining that, the complainant had further told the teacher that a boy had tried to touch her private parts and also tried to have sexual intercourse with her. The said boy had punched her as well. The teacher had problems in communicating with the complainant, therefore she had requested the assistance of another teacher. They have then taken the complainant to the head teacher of the school.
26. The head teacher said that once he heard this incident, he had gone and visited the complainant's parents in the village. The 14th of October 2016 was a Friday. He had gone to visit her parents on the Sunday. After a week, the head teacher had inquired from the parents of the complainant and found that they have not reported the matter to the police. The head teacher then reported the matter to the police.
27. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted not to give evidence on oath and exercised his right to remain silent. The accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

Analysis and Directions

28. The prosecution alleges that the accused had forcefully inserted his penis into the vagina of the complainant without her consent on the 16th of September 2016. The defence suggested to the complainant during the cross examination that such an incident never took place. The complainant in her answers refused the said suggestion. Accordingly, you have to determine whether this alleged incident actually took place as claimed by the prosecution.

Evaluation of Evidence

29. In order to determine whether the prosecution has proven beyond reasonable doubt that the accused committed this crime as charged, you have to consider 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 accurate in another thing.
30. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is testifying in the evidence. You then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that, you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.

31. It is your duty to consider the demeanours of the witnesses, how they react to being cross examined and re-examined, were they evasive, in order to decide the credibility of the witness and the evidence.

Delay

32. It has been said on behalf of the accused that the fact the complainant did not report what had happened to her as soon as possible makes it less likely that the complainant she eventually made was true. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint, likewise an immediate complaint does not necessarily demonstrate a true complaint.
33. You have heard that this alleged incident had taken place on the 16th of September 2016. According to the evidence of the complainant, the accused had not threatened or forced her not to tell anyone about the incident. The complainant had eventually related this matter to her teacher on the 14th of October 2016. The head teacher had then told her parent to report this matter to the police, which he later found not being done. The head teacher then reported the matter to the police.
34. In her closing address the learned counsel for the defence has submitted to you that the delay in reporting this matter suggests that the victim was not telling the truth.

This is an argument which you have to consider with care. When you do, you should not assume that there is any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the courts is that people who are being subjected to non-consensual sexual activity may respond in a variety of different ways.

35. You heard that the complainant had told her class teacher about this incident on the 14/10/2016, when the teacher inquired about the injuries on her hand. According to the teacher the complainant had told the teacher that a boy had tried to touch her private parts and tried to have sexual intercourse with her.
36. The evidence of the teacher is not an evidence as to what actually happened between the complainant and the accused. The teacher was not present and did not witness what happened between the complainant and the accused.
37. You can take the evidence of the teacher into consideration in order to decide whether or not the complainant has told the truth. This evidence would assist you to determine the consistency of the complainant's evidence and also to determine the reliability and credibility of the evidence of the complainant.

Final Direction

38. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused had committed the offence of rape as charged, you can find the accused guilty to the said offence.
39. If you are not satisfied or have doubt whether the prosecution has proven beyond

reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused not guilty to the said count.


Conclusion

40. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
41. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



At Lautoka

28th May, 2019


R. D. R. Thushara Rajasinghe
Judge

Solicitors : Office of Director of Public Prosecution
Office of the Legal Aid Commission