

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 162 OF 2016

BETWEEN : STATE

AND : APISALOME NAWA

Counsel : Ms. R. Uce for State
Ms. Bilivalu with Ms. Reddy for the Accused

Date of Hearing : 29th and 30th of May, 2019

Date of Closing Submissions : 30th of May, 2019

Date of Summing Up : 31st 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 defence 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. Your opinion need not be unanimous. I must advise you that I am not bound by 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 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 of Rape as charged are that;

i) The Accused,

ii) Penetrated into the vagina of the complainant with his fingers,

iii) The complainant did not consent to the accused to penetrate into her vagina with his fingers,

iv) The Accused knew or believed or reckless that the complainant was not consenting for him to insert his fingers in that manner.

Admitted Facts,

12. I now take your attention to the admitted 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.

13. According to the admitted facts, the accused had admitted that he had consumed alcohol with the complainant and few others at the house of the complainant on the 12th of August 2016. He had further admitted that he had inserted his fingers into the vagina of the complainant. Hence, the elements of the identity of the accused and the penetration of the fingers of the accused into the vagina of the complainant are not disputed. However, the accused has not admitted the manner that he had inserted his fingers into the vagina of the complainant. Accordingly, you are allowed to take those

facts into consideration as the facts proved beyond reasonable doubt. In view of the admitted fact, the main issue in this matter is whether the complainant had given her consent or was in a position to make a choice freely and voluntarily to give her consent to the accused to insert his fingers into her vagina.

Consent

14. Let me take your attention to the issue of consent. 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.
15. The complainant must have the freedom to make the choice. It means that she must not be being 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.
16. If you are satisfied, that the accused had inserted his fingers 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 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 act. 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 prevailed at the time of the alleged incident took place.

Corroboration

17. You must bear in your 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.
18. 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.
19. 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.

20. 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. Demeanours 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

21. Let me now remind you briefly the summary of the evidence presented by the prosecution. I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
22. The complainant had a drinking session with her husband, Vatemmo who is the boyfriend of her niece, brother of Vatemmo and the accused on the 12th of August 2016 at her home. They had consumed alcohol until 3 a.m. in the following morning. Then her husband said that he would go to sleep. The complainant stayed at the drinking party for another 30 more minutes and then went to sleep. In the morning she went to the room where her children were sleeping and slept beside them. While she was sleeping, she felt that someone was touching her private parts. She was sleeping facing her face down. She first thought that it was her husband. But it was painful when that person touched her vagina, so she turned up and saw that it was the accused who touched her vagina. The accused was kneeling down in front of her. She then shouted and the accused stood up and ran out. Because of her shout, Vatemmo came and asked what happened. Vatemmo and her husband chased the accused down and managed to catch him. They then took him to the police station. When she got up and found that her

daughter was not sleeping in the room. She then went out and found her daughter was crying beside the door of the bedroom. She went and hugged her.

23. You have heard the complainant said that she was wearing a mini short and a t-shirt in that night. The accused had put his hand through the bottom side of the short to touch her vagina. However, you further heard that the complainant had given a statement to the police on the same day of this incident took place, saying that the accused came and pulled her pants down and then inserted his fingers into her vagina as she felt the pain. The complainant then said that actually it was not a pants, but a mini short and the accused tried to pull it down halfway when she turns up. She has not turned up when the accused put her finger into her vagina. It happened within few seconds and she turned up when she felt the pain. The complainant then said that the accused had pulled her mini short down halfway and then put his hand through the bottom of the short.
24. Moreover, she has told to the police in her statement that she went to sleep with her husband. However, in the evidence she said that she actually went to sleep 30 minutes after her husband went to sleep. The complainant said that she was not in her right mind and shocked when she gave her statement to the police on the 13th of August 2016.
25. The complainant denied that she laughed, talked, joked, danced and intimately engaged with the accused during the drinking session. You have further heard that the complainant said that while she was sleeping the front side of the upper and lower body was touching and pressing to the floor that she was sleeping.
26. The second witness of the prosecution is Vatembo. According to his evidence the com-

plainant and the accused seated at the drinking party facing to each other. They spoke, laughed, joked with each other. Not only that, they have danced together. While they were dancing they hugged each other and touched the parts of each other's' body. Vatemmo had seen them going to the toilet together and found them were standing close to each other and talking and laughing at the passage goes towards the toilet. The complainant still stayed with them even after her husband went to sleep. After a while she went into the room where her children were sleeping. The complainant did not go into the room where her husband was sleeping.

27. Following morning Vatemmo heard a sound, like someone kicked the door. He was in the kitchen at that time. He then went and opened the door of the room where the complainant and her children slept. The door was not locked. When he opened the door, Vatemmo found the complainant and the accused. The accused just walked passed him when he entered into the room. The complainant was dressed in a long pants, which covers up to the bottom of her legs. When Vatemmo entered into the room, her pants were down and the complainant was trying to pull it up. The complainant did not tell him anything and she looked surprised and shocked. More like she was shocked of seeing Vatemmo. It was Vatemmo who asked her what happened, and she then told him that the accused touched her. She did not specify the place or the location that the accused touched.

Right to Remain Silent

28. 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.

29. I have summarized the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and recall yourselves on all of them. What I did only was to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

Analysis and Directions

30. According to the evidence adduced during the course of the hearing, the prosecution alleged that the accused had inserted his fingers into the vagina of the complainant without her consent while she was sleeping in the room of her children at her house. The accused has admitted that he inserted his fingers into the vagina of the complainant, but he claims that it was done with her consent. Accordingly the main dispute that you have to determine is whether the complainant gave her consent to the accused to insert his fingers into her vagina and also whether the accused knew or believed or reckless that the complainant was not consenting for him to insert his fingers in that manner.
31. As I already explained you that the accused has admitted that he had inserted his fingers into the vagina of the complainant. However, you heard the learned counsel for the defence extensively cross examined the complainant regarding the manner and the position that the accused inserted his fingers into her vagina. You have to be mindful that the accused has only admitted that he inserted his fingers into her vagina, but not to the manner in which he inserted his fingers into the vagina of the complainant as claimed by the prosecution. Therefore, it is your duty to determine whether the accused

inserted his fingers into the vagina of the complainant in the manner that the complainant claims.

Evaluation of Evidence

32. In order to do that you have to evaluate the evidence presented by the prosecution and determine the reliability and credibility of evidence given by the witnesses.

Reliability of Evidence

33. You must be satisfied that you can rely on the evidence as true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

Credibility of Evidence

34. The assessment of credibility of evidence is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his/her motivations, his/her relationship to and the reaction to the particular situation.
35. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to determine whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.

36. 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 talking in the evidence. You should then 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.
37. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence. In doing that you have to keep in your mind that some witnesses are not used to giving evidence in court and may find the different environment in the court house distracting.
38. Moreover, you must bear in your mind that 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.

Inconsistent Nature of the Evidence of the witnesses

39. You may recall that the learned counsel for the defence proposed to you to consider the inconsistent nature of the evidence given by the complainant. As I said before, you can consider the consistency of the evidence given by a witness with his or her own evidence and also with other evidence adduced in the hearing. In doing that you must bear in mind that some witnesses are not used to giving evidence and may find the different environment distracting.

40. The complainant said during the evidence in chief that the accused put his hands through the bottom of the mini short that she was wearing on that morning. She then said the accused tried to pull it down halfway and put his hand through the bottom of the mini short. Moreover, you may recall that the complainant said during the cross examination that she knew that it was not her husband when she was being touched. During the re-examination the complainant said that she initially thought it was her husband but then she felt the pain and thought it cannot be her husband.
41. You have heard the evidence of Vatemu. According to his evidence the complainant and the accused had been talking, laughing, joking, touching and hugging each other during the drinking session. The complainant in her evidence said that she did not do such acts with the accused during the drinking session. Moreover, the complainant said that she went into the room where her husband was sleeping to sleep. According to the evidence of Vatemu, the complainant never went into the room of her husband, but went into the room where her children were sleeping when she went to sleep. According to the evidence of the complainant she was wearing a mini short on that day. However, Vatemu said in his evidence that she was wearing a long pants which goes up to the bottom of her legs.
42. You are allowed to take these facts into consideration when you determine whether the evidence given by the complainant is inconsistent with her own evidence and also consistent with the evidence given by Vatemu or not. It would assist you to finally determine the credibility, reliability and the truthfulness of the evidence given by the witnesses.

Inconsistencies and omissions with the previously made statement

43. Madam and Gentleman, you have heard that the learned counsel for the accused cross examined the complainant about the omissions and inconsistencies in the statement that she made to the police and the evidence given in the court.
44. The complainant admitted in her evidence that certain incidents that she stated in her evidence have not been stated in the statement that she made to the Police. The complainant in her evidence said that she was not in a proper state of mind at the time she made her statement to the police.
45. I now explain to you the purpose of considering the previously made statement of the complainant with her evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such statements when you consider whether the complainant is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents.
46. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
47. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to 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 of the reliability of such witness.

Evidence of Recent Complaint

48. You have heard that the complainant had told Vatemmo that the accused touched her. She had not specified the place or the part of her body that the accused had touched.
49. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between the complainant and the accused. Vatemmo was not present and witnessed what happened between the complainant and the accused.
50. You are entitled to consider the evidence of recent complaint in order to decide whether or not the complainant has told the truth. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the accused and the complainant. It therefore cannot of itself prove that the complaint made by the complainant is true.

Final Direction

51. 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 has committed the offence of rape as charged, you can find the accused guilty to the said offence.
52. 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

53. 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.
54. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



R. D. R. Thushara Rajasinghe

Judge

At Lautoka

31st May, 2019

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