

IN THE HIGH COURT OF FIJI AT LABASA

CASE NO: HAC 57 of 2018
[CRIMINAL JURISDICTION]

STATE

V

WAISAKE RATAVO

Counsel : Mr. I. Rakaria for the State
Mr. A. Kohli for the Accused

Hearing on : 26 - 27 June 2019

Summing up on : 27 June 2019

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are the judges of facts.
2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room and the admitted facts. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
6. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.

7. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, you may perhaps think it 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.
8. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
9. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
10. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

11. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
12. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
13. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
14. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.
15. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
16. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

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

Particulars of Offence

WAISAKE RATAVO on 4 June 2018, at Savusavu in the Northern Division, penetrated the vagina of **SUSAN CATHERINE**, with his penis, without her consent.

17. In order to prove that the accused is guilty of the above offence, the prosecution should prove all the elements of the offence beyond reasonable doubt.
18. To prove the offence of rape in this case, the prosecution should prove the following elements beyond reasonable doubt.
 - I. the accused;
 - II. penetrated the vagina of the complainant with his penis;
 - III. without the consent of the complainant; and
 - IV. the accused either;
 - (i) knew or believed that the complainant was not consenting; or
 - (ii) was reckless as to whether or not she was consenting.
19. In this case, the accused admits that he had sexual intercourse with the complainant on 04/06/18. Therefore, first and the second elements above are not disputed. You should consider that the first two elements have been proven beyond reasonable doubt.
20. Therefore, in this case the prosecution is required to prove the two elements involving consent, the third and the fourth elements, beyond reasonable doubt. If you have a reasonable doubt in respect of any of those two elements, as to whether the prosecution has proved that element, then you must find the accused not guilty of the offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason.
21. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent.

22. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
- a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
23. Apart from proving that the complainant did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
24. It is not difficult to understand what is meant by "the accused knew or believed that the complainant was not consenting". But you may wonder as to how you could determine whether the accused was reckless as to whether or not the complainant was consenting. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
25. You should also remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind.

Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.

26. The prosecution led the evidence of two witnesses and closed the case. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence on oath.
27. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
28. Firstly, let us look at the admitted facts. The following facts are admitted in this case and you should consider that these facts have been proven beyond reasonable doubt;
 - On 4 June 2018, at about 8am, Susan Catherine met Waisake Ratavo near a bus stop.
 - On the above date the accused and the complainant went to Waisake Ratavo's farm.
 - At Waisake Ratavo's farm, the accused and the complainant had sexual intercourse.
 - On the above date, Waiake Ratavo gave Susan Catherine \$10.
 - On 13 June 2018, the matter was reported to Savusavu Police.
 - On 13 June 2018, almost 2 weeks later, the complainant was medically examined at Savusavu Hospital. There were no injuries noted.

- On 22 June 2018, the accused was interviewed under caution at the Savusavu Police Station. The accused admitted sexual intercourse with the complainant on the alleged date.
29. The complainant (PW1) said in her evidence that she is 19 years old. In 2018 she lived with her grandfather. On 04/06/18 when she met the accused, the accused wanted to have sexual intercourse with her. She told him that she does not want to have sexual intercourse with him because she is having menses. Then the accused told her “just come, I will give you \$10”. She then told him that her aunt is waiting for her at the bus stop. Then the accused got hold of both her hands and took her down to his farm. She was afraid when he held her hands and she did not agree to go with the accused. The accused then removed her skirt and laid her down. He came on top of her and had sexual intercourse with her. She said she did not agree for the accused to remove her skirt and did not agree to have sexual intercourse with the accused. Thereafter the accused got up and got dressed. She also got dressed. The accused gave her \$10. After that she went to the road and she met her aunt. She told the matron at St. Bedes about the incident on 13/06/18. But she did not tell her in detail. She knew the said matron because she was staying with her. The matron reported the matter to the police.
30. When the complainant gave evidence it was noted that the complainant took some time to respond to questions. The second prosecution witness said that the complainant’s mind is slow.
31. During cross-examination the complainant agreed that the accused’s farm is located on the same side of the road where the ‘concrete bus stop’ is. It was also evident from her evidence during cross examination that there was another bus stop on the other side of the road near the place where food parcels were sold. This was on the left side of the road when facing Buca Bay and the ‘concrete bus stop’ and the accused’s farm where the sexual intercourse took place were

on the right. The complainant initially said she was walking on the side of the road opposite to the accused's farm when the accused came to her and pulled her hands. But later she said that she crossed the road herself and was walking on the same side where the accused's farm is situated when the accused pulled her hands. She said she cannot clearly remember what happened to her when she was asked the reason for her to change her initial version. She was also questioned as to the reason she crossed the road to the side where the accused's farm is situated. Initially she said that she crossed the road to go to the bus stop at the other side. Then when it was pointed out that the bus stop she said she was going to was on the same side she was initially walking, she said she crossed the road because the accused was walking behind her. When it was suggested to her that the accused was walking on the other side of the road and not the side she was walking on, she took time and then did not answer. She also did not answer when it was suggested to her that she should not have crossed the road (to the side where the accused's farm was situated) if she was going towards the bus stop which was near the place where the parcels were sold as she claimed.

32. She agreed that the 'concrete bus stop' is right in front of the track that comes down from the village across the road. She also agreed that the place the accused held her hands was about 15 meters past the 'concrete bus stop'. When she was asked the reason for her to walk past that bus stop, she said it was because her aunt told her to wait at the other bus stop which was on the side of the road she was walking. Her evidence was that she was going to the town that morning and it was revealed that the buses to the town stop at the 'concrete bus stop'. Given these answers during cross-examination, it may be relevant for you to see whether there was an acceptable explanation as to why the complainant crossed to the other side of the road where the accused's farm was situated if she was going to the bus stop near the place where the parcels were sold as she claimed.

33. She agreed that, in order to reach the place where they had sexual intercourse they had to go on a slope from the edge of the road and had to be careful so that they do not slip. When she was asked whether the accused was holding her hands with both his hands, she said 'yes'. Then when she was asked how they were going down the slope, she said the accused was leading facing downwards and she was following him facing his back. When she was asked the reason she did not shout when the accused was pulling her, she said that she was afraid because the accused was holding on to a knife. She did not mention about the accused having a knife in her evidence in chief. She did not explain how the accused was holding a knife and then also was holding her hands from both his hands. The defence invites you to consider whether it is probable for the accused to go down the slope holding the complainant's hands with both his hands as the complainant explained, especially given the complainant's evidence that one must be careful when going down that slope.
34. She agreed that the relevant road is a highway and the said road is busy around 8.00am. People from the village would also come to the bus stop.
35. She agreed that when she met the accused that morning, they greeted each other and then the accused went home to get money. But she said she never told him to bring money. This was something she did not reveal during her evidence in chief. It was not clarified by the complainant whether the accused asked her about having sexual intercourse before he went home to get the money or after he came back. If that conversation took place before the accused went home, then the complainant had the opportunity to leave the place.
36. When it was suggested to the complainant that because she did not want her clothes to get dirty, the accused made her stand against a stone and 'had sex with her from the back', she took some time and said that it did not happen that way. She maintained that the accused had sexual intercourse with her while she was

lying down. She said her singlet was not taken off completely and her back and the singlet were rubbing against the ground. She also said that after having sexual intercourse with the accused, she met her aunt at the bus stop and the aunt did not say anything about her clothes. She went with the aunt in the bus to the town and then she went to school. It would be relevant for you to consider the time the complainant took to respond when the suggestion was made that the accused penetrated her from behind, her demeanour when she gave the answer, the fact that the aunt the complainant met soon after the incident did not note anything in the complainant's clothes and the fact that the complainant went to school directly from the farm, to decide whether the version the complainant gave regarding the manner the accused had sexual intercourse with her was reliable and probable.

37. The complainant also said during cross-examination that she did not tell the matron the same day because she was afraid. When she was asked what she was afraid of she said "*I'm afraid that Waisake's family might come for me*".
38. You may have noted that there were certain inconsistencies in the evidence given by the complainant. I have explained you how to deal with inconsistencies. You should follow the said directions when you deal with any inconsistency you may come across.

Delay in making the complaint

39. Though the complainant said during cross-examination that she informed two of her friends about the incident the same day, those friends did not give evidence to confirm that. According to the prosecution case, the second prosecution witness is the first person the complainant made a complaint about the incident who then took the complainant to the police station. This complaint was made about 09 days after the incident.

40. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, when there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. So, when there is a delay in making a complaint, you should look whether there is a reasonable explanation for that delay. Always remember that your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.
41. The second prosecution witness was Sesilia Joana (PW2). She said that she was the matron at St. Bedes College and she came to know the complainant when the complainant came to stay at her hostel. On 13/06/18, she found the complainant crying. When she asked, the complainant told her that "*one old man raped me when I went up to grandfather*". She then stopped the complainant from giving further details and took the complainant to the police station.
42. During cross-examination she said the complainant came to her hostel in February 2018. She said she used to check the complainant's school work and the complainant was doing well though her mind is slow. But after 04/06/18, when she tell the complainant to study, the complainant would sit with the book and stare at it without studying. She did not ask the complainant the reason for this. It was suggested to her that she was the one who made a complaint for rape when the sexual intercourse was consensual. She said she went to the police station with the complainant but the police questioned the complainant.
43. The prosecution is relying on PW2 as a recent complaint witness. In this regard, if you believe the evidence of PW2, you should consider whether the complaint

made to her by the complainant was a prompt complaint regarding the incident and whether the complainant sufficiently complained of the offence the accused is charged with. In this case the first complaint was made around 09 days after the incident.

44. You should bear in mind that a recent complaint need not specifically disclose all the ingredients of the offence and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. However, please remember that this evidence of recent complaint is not evidence as to what actually happened between the complainant and the accused. PW2 cannot confirm whether what the complainant told her is true because she was not there at the place of offence at the material time to witness what actually happened. PW2's evidence in relation to the alleged incident is based on what she understood from the story relayed to her by the complainant and what she could remember about that conversation. Therefore remember that, recent complaint evidence may only assist you to decide whether the complainant is consistent and whether or not the complainant has told you the truth. In the end you are deciding whether the complainant has given a truthful account of her encounter with the accused.
45. However, the defence says that it was PW2 that made this an allegation of rape when it was a case of consensual sexual intercourse.
46. The accused (DW1) said in his evidence that on 04/06/18 he saw the complainant standing beside the breadfruit tree opposite his farm. They greeted each other. When he asked, she told him that she is going to the town. Since the complainant was just standing there, he asked her if she wanted something and whether she wanted her fare. The complainant nodded. He then went home and brought \$10 with him. It took him about 20 to 25 minutes to go home and come back. When he was coming back the complainant had moved a bit further

from where she was initially standing. While he was walking through his farm the complainant crossed the road and then came down the slope and they met at the bottom. He said that the complainant was glad to see him. They hugged and then kissed each other on the mouth. He said he sensed that the complainant wanted to have sex with him. He said that the surrounding was wet due to the rain the previous night and the complainant told him that she doesn't want her clothes to get dirty. Then they went further inside and they had sex while they were standing. The complainant was facing a rock. He said the complainant pulled her clothes a little bit down and did not remove the clothes. After having sexual intercourse he gave her the money and they parted ways.

47. He said that the road was a highway and between 8.00am to 9.00am the road is usually busy. He said that the slope was quite steep where you need to brace yourself or grab something when you are going down. He said he did not pull her and did not force her to have sexual intercourse with him.
48. The defence says that the complainant was not a credible witness. The defence says that the complainant's version is not probable.
49. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
50. You should also bear in mind that the accused is tried for the offence of rape under the law. Therefore, what you should decide in this case is whether or not the disputed elements have been proven beyond reasonable doubt and not whether the accused is right or wrong according to moral standards. Accordingly, you should decide whether the evidence presented in this case establishes beyond reasonable doubt that the complainant did not consent for the accused to penetrate her vagina and if you find that she did not consent,

then, whether the accused knew or believed that she was not consenting or whether the accused was reckless as to whether or not she was consenting.

51. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
52. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
 - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.


If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

53. Any re-directions?
54. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge

against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

55. Your opinion should be whether the accused is guilty or not guilty.




Vinsent S. Perera
JUDGE

Solicitors;

Office of the Director of Public Prosecutions for the State
Kohli & Singh, Barristers and Solicitors, Labasa for the Accused