

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 200 of 2016

STATE

V

EPI KORAINAMOCE TUITECI

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

Dates of Hearing : 12, 13 August, 2019
Closing Speeches : 14 August, 2019
Date of Summing Up : 14 August, 2019

SUMMING UP

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

Madam and Gentlemen 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. 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

8. 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

9. 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.
10. 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.
11. 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.
12. 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

13. The accused is charged with one representative count of rape. (A copy of the information is with you)

COUNT ONE

REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

EPI KORAINAMOCE TUITECI, between the 1st day of August, 2016 to the 31st day of August, 2016 at Sigatoka in the Western Division, inserted his penis into the vagina of “EL” without her consent.

REPRESENTATIVE COUNT

Madam and Gentlemen Assessors

14. You will note that the above count is a representative count, which covers a period between the 1st day of August, 2016 and the 31st of August, 2016. By a representative count the prosecution alleges that more than one offence as described in the information was committed during the period specified in the count. The law says that it shall be sufficient for the prosecution to prove that between the specified date in the count at least one offence was committed.
15. To prove the above count, the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Inserted his penis into the vagina of the complainant “EL”;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.
16. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had inserted his penis into the vagina of the complainant without her consent.
17. The slightest of penetration of the complainant’s vagina by the accused penis is sufficient to satisfy the act of penetration.

18. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
19. The second element is the act of penetration of the complainant's vagina by the penis.
20. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
21. If you are satisfied that the accused had inserted his penis into the vagina of the complainant and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
22. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
23. You must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for you to find the accused guilty of the offence of rape. 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.
24. 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.

ADMITTED FACTS

25. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final amended admitted facts.
26. 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.
27. 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

28. The prosecution called one witness to prove the charge against the accused. The complainant informed the court that in 2016 she was 16 years of age and a class 8 student. In August, 2016 on one afternoon she was doing some cleaning at home when the accused who was her neighbour came and asked her about the whereabouts of her brother and her parents.

29. When complainant told the accused that they were not at home the accused walked into her house and asked her if she had a boyfriend the complainant did not reply. At this time the accused came close to her and told her to remove her clothes she refused and told the accused that she will inform her father. The accused told her not to be scared and then he forcefully removed the complainant's clothes and pushed her on the floor he made her lie down and told her not to be afraid. The complainant did not like what the accused was doing to her, at this time the accused removed her shorts and panty.
30. The accused also had his pants down he put on a condom on his penis then went on top of the complainant and inserted his penis into her vagina she told the accused that it was painful but the accused said keep still and he will do it slowly.
31. The complainant did not like what the accused was doing to her she wanted to cry for help but since her house was far from the village she did not shout for help. The complainant further stated the accused had sexual intercourse with her for about 5 minutes during this time she felt pain, was feeling weak and had a headache.
32. After having sex with the complainant the accused stood up took his clothes and left. The complainant felt so weak she could not stand up she did not tell anyone because she was afraid if her father came to know about what the accused had done to her he would have harmed the accused.
33. Also in the same month on one afternoon the complainant was sleeping with her brother Avete when the accused came into her house and asked for some tobacco. After the complainant found some she gave it to the accused. The accused smoked the tobacco on the house verandah after a while he came inside the house and asked the complainant "*can we do something bad or no*" the complainant replied "*if my father finds out we will be both in*

trouble". The accused did not care what she had said, he moved close to her pushed her on the floor and then forcefully removed her shorts and panty.

34. As the complainant was about to scream the accused threatened her that if she screams he will do something to her, this made the complainant scared and embarrassed the accused forcefully inserted his penis into her vagina and had sexual intercourse with her for about 5 minutes. On this occasion the accused did not wear a condom after the accused had finished he took his clothes and left. She did not tell anyone since she was afraid her father would harm the accused if he came to know about what the accused had done to her.
35. Thereafter in late August the complainant did not have her menses she felt she was pregnant so she told her aunt about her problems who then informed her mother. When her father came to know about her pregnancy he was furious the complainant identified the accused in court.
36. In cross examination the complainant disagreed that the only place she had consensual sex with the accused was at the palm trees near the piggery and that it was incorrect that the complainant and the accused had sex in September, 2016. She denied that she had consensual sex with the accused and that she had asked the accused to insert his penis into her vagina slowly.
37. The complainant agreed that she did not scratch or kick the accused but when suggested that she did not say anything to the accused to stop having sexual intercourse with her the complainant maintained that she did not have sexual intercourse at the palm trees. The complainant disagreed that this was the only time she had sex with the accused she also disagreed with the suggestion that during the two incidents in 2016 as described by her she was angry with the accused because he had left without saying

anything to her. She also denied that she was an admirer of the accused or liked the accused so much that she used to give him tobacco.

38. The complainant disagreed that nothing had happened between her and the accused in August, 2016 she also denied having consensual sex with the accused in early September, 2016. The complainant denied that the only reason she made a false complaint against the accused was to cover up for her pregnancy.
39. This was the prosecution case.

Madam and Gentlemen Assessors

40. Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for the complainant not make any complaints to anyone until she realized that she was pregnant.
41. 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 complainant's reluctance to complain in full or not at all as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
42. 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 16 years of age at the time did not inform anyone about what the accused had done to her immediately after those incidents but only when she realized she was pregnant.

DEFENCE CASE

43. 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.
44. The accused denies committing the offence as alleged. According to the line of cross examination defence takes the position that the accused and the complainant had sexual intercourse at the palm trees near the piggery in September, 2016 and not in August, 2016. The defence further says the complainant did not complain or tell anyone about what the accused had done to her since she had consented to have sexual intercourse with the accused and she made a false complaint against the accused after she got pregnant. The defence is asking you not to believe the complainant.
45. This was the defence case.

ANALYSIS

46. The prosecution alleges that the accused between the 1st August, 2016 and the 31st August, 2016 on two occasions penetrated the vagina of the complainant without her consent.
47. In August, 2016 the complainant was doing some cleaning at home the accused came into her house, pushed her on the floor when she was lying down the accused forcefully removed her shorts and panty.
48. After putting his pants down the accused put on a condom and went on top of the complainant and forcefully inserted his penis into the vagina of the

complainant. The complainant did not consent to have sexual intercourse with the accused.

49. Also in the same month the complainant was sleeping at home with her brother Avete when the accused came and asked for some tobacco. After the complainant found some in her house she gave it to the accused. After a while the accused forcefully pushed the complainant on the floor and then forcefully removed her shorts and panty.
50. As the complainant was about to scream the accused threatened her that if she screams he will do something to her, this made the complainant scared the accused forcefully inserted his penis into her vagina and had sexual intercourse with her. On this occasion the accused did not wear a condom after the accused had finished he took his clothes and left. She did not tell anyone since she was afraid her father would harm the accused if he came to know about what the accused had done to her. The complainant also on this occasion did not consent to have sexual intercourse with the accused.
51. On the other hand the accused denies committing the offence as alleged. According to the line of cross examination defence takes the position that the accused had sexual intercourse with the complainant with her consent at the palm trees near the piggery in September, 2016 and not in August, 2016. The defence further says the complainant did not complain or tell anyone about what the accused had done to her since she had consented and she made a false complaint against the accused after she got pregnant.

Madam and Gentleman Assessors

52. You have seen the complainant give evidence keep in mind that some witness react differently when giving evidence.

53. 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 whether the complainant is reliable or not. You observed the witness give evidence in court. You decide whether she was forthright and truthful or not. You may use your common sense when deciding on the facts. Assess the evidence of the witness and her demeanour in arriving at your opinions.
54. In deciding the credibility of the witness and the reliability of her evidence it is for you to decide whether you accept the whole of what the witness said, 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 the witness is telling the truth and is correctly recalling the facts about which she has testified. You can accept part of a witness 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.
55. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge 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 her own 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.
56. 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.
57. 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.

58. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

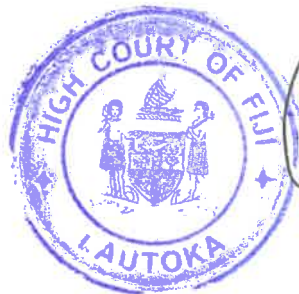
59. Your possible opinions are:-

Count One: **RAPE**: GUILTY OR NOT GUILTY

Madam and Gentlemen Assessors

60. 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 the staff so that the court can be reconvened.

61. 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

14 August, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.