

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 141 of 2015

BETWEEN : STATE

AND : IMRAN ALI

Counsel : Mr Seravatu and Ms Uce for the State
Mr Tunidau and Mr Duanasali for the Accused

Dates of Hearing : 24 and 25 July 2019

Closing Speeches : 26 July 2019

Date of Summing up: 26 July 2019

(The complainant's name is suppressed and will be referred to as SN)

SUMMING UP

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinions. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You are to decide the facts of the case based on the evidence that has been led before this court. You will then apply

those directions to the facts and give me your opinions as to whether the Accused person is guilty or not guilty.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going through evidence. If you do not agree with that opinion you will ignore it and form your own opinion with that evidence.
3. You must base your opinion only and only on the evidence given by the witnesses. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence. A suggestion put to a witness by a counsel is also not evidence.
4. You may act only upon the evidence given by the witnesses in this case and nothing else. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so is entirely a matter for you.
5. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinion. You will also not let any sympathy or prejudice sway your opinions. Emotions have no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of the elements of the offence of rape.
6. I will give you only a summary of evidence. I will not go through every word uttered by the witnesses in this case, and if I leave out something that seems to

be important, nothing stops you from taking that into account. Because you decide the facts.

7. After this summing up, you may give your individual opinions as the representatives of the community. Your opinions need not be unanimous. And you need not give reasons for your opinions.
8. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Ladies and gentleman assessors,

9. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated them.
10. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail. Due to lapse of time many witnesses tend to forget details. You have to use your common sense in assessing the reliability and credibility of a witness. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.
11. Complainants of sexual offences react differently when they got to narrate the traumatic experiences they have gone through. Some may display obvious signs of distress, anxiety and restlessness, but some may not. Every witness has his or her own way of expressions when they give evidence about an

experience, specially a traumatic one. Conversely, it does not follow that signs of distress by a witness confirms the truth and accuracy of the evidence given.

12. Subsequent conduct of complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may react instantly and report because of their maturity, education level, social status and for other similar reasons. Some may not complain at once due to immaturity, lack of education, social status and etc. A complainant's reluctance to report an incident could be due to many reasons. Some may not even complain at all due to the fear that it may damage family ties. A complainant may not be comfortable to report a matter to close family members due to the respect, fear, or due to the reluctance to openly discuss matters relating to sex with elders.
13. A late complaint does not necessarily signify a false complaint. Similarly, an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to decide what weight should be attached to the promptness or the lateness of a complaint.
14. It must be noted that according to the law sexual offences do not require other evidence to corroborate the evidence of the complainant. Which means you can solely rely on the evidence of the complainant without any other evidence to support it.
15. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the prosecution must prove every element of the offence beyond reasonable doubt.
16. The Accused need not prove his innocence. The burden is on the prosecution to prove the guilt of the Accused. That means you must be satisfied that the

state has proved every element of the offence beyond reasonable doubt. That doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of the offence, you must find him guilty.

17. You would have observed that in the Information a phrase is noted within brackets as "representative count". A representative count is a count by which the prosecution alleges that several offences as described in the statement of offence were committed during the time period specified in the count. To prove a representative count, the law only requires the prosecution to prove that at least one such offence was committed between the dates specified in the count. It simply means that if you are sure that at least once the Accused has entered his penis into the vagina of the complainant during the period stated in the count you must find the Accused guilty to that representative count of rape.

18. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make express their opinions on a particular fact to assist the court to decide the issues before the court based on their expertise, skill and experience.

19. The prosecution called a doctor in this case to give evidence as an expert witness. An expert's evidence is not to be accepted blindly. You will have to decide the issue of rape by yourselves and you can make use of doctor's opinion if the reasons are convincing and acceptable to you; and, if that opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to consider the rest of the evidence led in the trial as well. You have to bear in mind that the expert

evidence does not implicate the accused or link him to the alleged offence even if you decide to rely on it. You can only use doctor's opinion to test the consistency of victim's story that she was raped.

20. You may consider whether there is a reason or motive on the part of the complainant to make up an allegation against the accused. If the complainant had such a motive, then you may think that this allegation has been fabricated.

Ladies and gentleman assessors,

21. We will now look at the offence that the Accused is indicted for. After the closure of the prosecution case this court made a finding of not guilty in respect of the first count. Therefore, now you have to consider only the second count in the Information. You may see that the second count is a representative count of rape;

Second Count

Representative count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

Imran Ali between the 1st day of June 2014 and 30th day of April 2015 at Nadi in the Western Division penetrated the vagina of SN a child under the age of 13 years, with his penis.

22. The prosecution and the defence agreed to certain facts. Those facts are with you in a document titled as admitted facts. Those facts need not be proved again by the prosecution and you can use those facts to make your opinions without any further proof. Accordingly, the parties agreed that;

- I. The Accused in this matter is Imran Ali, 39 years old of Tabuka Lautoka at the time of the alleged offence.
- II. The complainant in this matter is SN, 9 years old of Mulomulo at the time of the alleged incident.
- III. The mother of the complainant is Shainaz Khan, 32 years old of Mulomulo, Nadi.
- IV. That Shainaz Khan was legally married to the Accused.
- V. The complainant was medically examined by Dr Sainimili Wainiqolo on the 1 May 2015.

23. Now I will explain what matters you must take into consideration to determine whether the offence of rape is proved by the prosecution. The prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vagina of the complainant with his penis;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not she was consenting.

24. The first element is concerned with the identity of the person who committed the offence. The identity of the Accused is an agreed fact and it is not in dispute in this case as mentioned before.

25. The second element involves the penetration of the complainant's vagina with his penis. The law states that even the slightest penetration of the vagina is sufficient to constitute the offence of rape. Therefore, it is not necessary to have evidence of full penetration or ejaculation. The prosecution must prove beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his penis to any extent.

26. The third and the fourth elements are based on the issue of consent. However, the law says that a child under the age of 13 years is incapable of giving consent. You will see in the Admitted Facts that the parties have admitted that the complainant was 9 years old at the time of the alleged offence. Therefore, the Prosecution does not have to prove whether the complainant consented or not, because consent is not relevant to the charge of rape in this case. So, you don't have to consider the issue of consent in the third and fourth elements that I just mentioned to you.

27. If you believe that the prosecution proved the relevant elements of rape you may find the Accused guilty for the offence of rape. Likewise, if you believe that the prosecution failed to prove the relevant elements of rape you must find the Accused not guilty.

Ladies and gentleman assessors,

28. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence given by witnesses when forming your opinions.

29. The complainant gave evidence that in 2014 she was residing at Nadi, Nasau with her mother, father, brother and grandmother. She referred to her stepfather as Abu and said his name is Imran Ali. She testified that during the time she was residing at Nasau her stepfather inserted his penis into her vagina. According to the complainant the incident had taken place in the morning. She said that when it happened her grandmother was sleeping; her mother was cooking, and her brother was having a shower. She said when she was going to have a shower the Accused had called her to his room. She said that her stepfather asked her to write on his back. The complainant also said that the Accused removed his trousers and pulled down her trousers as well. She further gave evidence that she was seated on the bed and the Accused was also sitting on the bed facing each other when he inserted his penis into her vagina.

The complainant said that when her brother finished the shower her mother called her and then the Accused told her to go.

30. The complainant gave evidence that after that she had a shower and started studying till she went to school. The complainant said that she could not understand whether she should tell someone about the incident or not. She further said that the Accused did similar things more than two times when she was residing in Nasau, Nadi.
31. According to the complainant's evidence she had complained about the incidents only when they left the Accused's house and moved into her uncle's house in Mulomulo, Nadi. She had complained to her maternal grandmother about the incidents. She also said that later either her mother or her grandmother reported the matter to the Police.
32. Under cross examination the complainant said that the Accused is her stepfather. During the cross examination she denied that her mother assaulted the grandmother and said that she had not seen her mother assaulting the grandmother. The complainant once again said that she could not understand whether she should tell her mother about it or not when she was asked during cross examination as to why she did not run to her mother. The complainant also said that although she was close to her mother she was not able to share everything with her. She further said that she thought that her mother would scold or hit her.
33. When she was asked whether it was several weeks after the alleged incidents that she complain to her grandmother, the complainant said that she informed about it to her grandmother the very next day when they moved into her uncle's house.
34. She admitted that she told her grandmother that the Accused inserted his penis into her vagina and she cried as it was painful. However, she said that she cried only once, and she cried softly.

35. Under cross examination it was suggested that the Accused did not insert his penis into her vagina and her mother made up a story to accuse him. The complainant denied the suggestions.
36. The complainant's mother, Shainaaz Khan gave evidence that the complainant was born in September, 2006. She said during her marriage with the Accused they used to reside in Nasau, Nadi. The witness gave evidence about the disputes she had with the Accused in her marriage.
37. However, it must be noted that the complainant did not say at any time that she reported the incident to her mother. Although Shainaaz Khan gave evidence about certain incidents that the Accused had allegedly done, that part of evidence amounts to hearsay and you must disregard the evidence she gave about what she was told by the complainant. According to the law a witness cannot give evidence on a fact which was uttered by another person as such evidence is considered as hearsay evidence and hearsay evidence is not generally admissible.
38. The prosecution called Dr. Sainimili Bulatale to give evidence. She said that she has been a medical doctor for 6 years and when she did the medical examination of the complainant it would have been her 2nd year as a medical officer. She confirmed that she conducted the medical examination of the complainant on 01 May 2015 at Nadi hospital. She said that the complainant's date of birth was given as 22 September 2006 and she would have been 7 or 8 years at that time.
39. The witness said that she did not observe any bruises, lacerations or tenderness. She further said that the hymen was intact. She also said that she has noted in the medical report that there were no signs of recent sexual intercourse.
40. When she was asked whether it is possible for a hymen to be intact after vaginal penetration she said that it differs in different women. She said that if it is an 8 years old child and the penetration is by an adult male most probably it would break the hymen. She said that there was no penetration into her vagina when

she examined her. It was the opinion of that witness that for penetration of vagina it has to go pass the hymen and touching of the vaginal opening is not penetration.

41. Under cross examination the doctor was asked about the history related by the complainant. She said that she has only recorded that he attempted to insert the penis and if the complainant informed her that it actually went in she would have written that in the history. She said she was not related about that. Under cross examination she further said that the hymen was still intact and a penis could not have entered the vagina.

42. That was the case for the prosecution.

43. After the closure of the prosecution case the Accused was explained his rights to address the court, to give evidence or to call witnesses. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused and he need not prove his innocence. The counsel for the Accused addressed the court and the Accused decided to give evidence.

44. The Accused gave evidence about the disputes he had with the complainant's mother. However, he said that his relationship with the complainant was normal and she used to call him dad. He said that the complainant was telling lies. He denied the allegations against him.

45. The Accused was cross examined at length by the prosecution. During the cross examination the Accused said that the disputes with the complainant's mother and her brothers were the reason for false allegations. The Accused said that the complainant was telling lies when he was questioned about the allegations.

Ladies and gentleman assessors,

46. It should be noted that in our law no corroboration is needed to prove sexual offences. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, in sexual offences the prosecution can solely rely on the evidence of the complainant, without any supporting evidence whatsoever. It is for you to decide how credible and consistent is the evidence of the complainant. Further it should also be noted again that the issue of consent for sexual intercourse is not relevant for children under the age of 13.

47. The prosecution case was that the Accused penetrated the vagina of the complainant with his penis at least in more than one occasion.

48. The Accused denied the allegations.

49. As it was said before, it is the duty of the prosecution to prove the elements of rape. The Accused need not prove his innocence.

50. I have now given you the directions of law and summarized the evidence adduced in this case. Before I conclude my summing up let me remind you some points again.

51. If you believe that the prosecution has proved beyond reasonable doubt the elements of rape, you may find the Accused guilty to the second count in the Information which is a representative count of rape.

52. If not, you must find the Accused not guilty.

53. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

54. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



A handwritten signature in blue ink, consisting of several overlapping loops and lines.

Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the State: Office of the Director of Public Prosecutions

Solicitors for the Accused: Keuveli Tunidau Lawyers