

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 117 OF 2019

STATE

v

SEVARO RABOSEA

Counsel : Ms. S. Iivao for State
: Ms. L. Ratidara for Defence

Dates of Trial : 3, 4, 5 August 2020
Date of Summing Up : 5 August 2020

SUMMING-UP

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing-up of the case very carefully and attentively. This will enable you to form your individual opinions as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.

4. In other words you are the judges of facts. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for the Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this courtroom. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw inferences from proved facts if you find those inferences reasonable in the circumstances.
11. As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of facts in a trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
12. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.
13. In deciding on the credibility of a witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gives evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable. But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
14. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who have given evidence in court. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.

15. When you evaluate evidence of a witness, you should take into account his or her intellectual capabilities, personal circumstances, level of education and maturity. Try to look at things from his or her perspective. Some people do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as immaturity and mental retardation.
16. You should consider whether there is a delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.
17. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the complainant was a witness who offered direct evidence as to what she saw, heard or felt.
18. Documentary evidence is evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time upon examination of the complainant.
19. I now wish to direct you on recent complaint evidence. You heard the complainant say that she relayed the incident to her uncle Sevaro Drika soon after the incident. Drika gave evidence and said that he received the complaint from the complainant. However, Drika was not present when the alleged incident happened and therefore, not in a position to give evidence as to what actually happened between the complainant and the accused. What he heard from the complainant is not evidence as to what actually happened between the complainant and the accused. Recent complaint evidence is adduced to show consistency in the conduct of the complainant and is relevant in assessing her credibility. If you find that the complainant had made a complaint soon after the alleged incident, you can use that complaint to test the consistency and credibility of the conduct of the complainant.
20. Evidence was led that the complainant looked distressed, that she was crying when she arrived at Drika's house shortly after the alleged incident. You must be satisfied beyond a reasonable doubt that the complainant's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged sexual offences. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred. The distress evidence must not be used to connect the accused to the alleged offence. Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause.
21. In evaluating evidence, you should consider whether there is a motive on the part of the witnesses to make up an allegation against the accused. If the witnesses had such a motive, then you may think that this allegation has been fabricated. If there is no such motive, you may conclude that the allegation is truthful.
22. In this case, the doctor gave evidence as an expert witness. He tendered the medical examination form prepared by Dr Elvira Ongbit. Expert evidence should not be accepted blindly. You will have to decide the issues before you by yourself and you can make use of

doctor's opinion if her reasons are convincing and acceptable to you; and, if her opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the case. You have to bear in mind that the expert evidence does not implicate the accused or link him to the alleged offences even if you decide to rely on it. The doctor was not present when the alleged offences were committed and therefore you should only use doctor's evidence to test the consistency and credibility of complainant's evidence.

23. A screen was put up in front of the accused so that the complainant, while being in the witness box, could not see the accused. The screen was put up because the complainant in this case is a vulnerable witness. You must not draw any negative inference against the accused from that.
24. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. The agreed facts are as follows:
- I. That the complainant in this matter is ATECA SAULAKI.
 - II. That Sevaro Rabosea is known to the complainant.
 - III. That Sevaro Rabosea was 77 years old at the time of the alleged incident.
 - IV. That the Complainant was residing at Waikete Village with her siblings and her Uncle namely Petero Naobi at the time of the alleged incident.
 - V. That Sevaro Rabosea resided at Waikete Village at the time of the alleged incident.
 - VI. That Sevaro Rabosea was at Waikete Village at the time of the alleged incident.
 - VII. That Sevaro Rabosea agrees to the existence of the medical report.
 - VIII. That doctor's credentials (as per attachment) are not in dispute.
25. I have given you a copy of the information which contains the charges against the accused. Please refer to it. The information reads as follows:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (b) of the Crimes Act 2009.

Particulars of Offence

SEVARO RABOSEA on the 8th day of March 2019 at Waikete Village, Nausori in the Eastern Division unlawfully and indecently assaulted **ATECA SAULAKI** by sucking both her breasts.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SEVARO RABOSEA on the 8th day of March 2019 at Waikete Village, Nausori in the Eastern Division penetrated the mouth of **ATECA SAULAKI** with his penis, without her consent.

COUNT THREE

Statement of Offence

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

Particulars of Offence

SEVARO RABOSEA on the 8th day of March 2019 at Waikete Village, Nausori in the Eastern Division had carnal knowledge with **ATECA SAULAKI**, without her consent.

26. To establish the offence of Sexual Assault, the Prosecution must prove beyond reasonable doubt that the accused unlawfully and indecently assaulted the complainant. The word "unlawfully" means without a lawful excuse. The assault becomes indecent when it is committed in circumstances of indecency. A circumstance of indecency is what right minded people would consider indecent. Assault can be defined as an application of unlawful force on another's body.
27. To prove count two, the prosecution must prove the following elements of the offence of Rape beyond reasonable doubt:
- (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis;
 - (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.
28. To prove count three, the prosecution must prove the following elements of the offence of Rape beyond reasonable doubt:
- (a) The accused;
 - (b) Penetrated the mouth of the complainant with his penis;

(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.

29. A slightest penetration is sufficient to satisfy the element of penetration.
30. On the issue of consent, it must be proved that the accused either knew that the complainant did not consent or was reckless as to whether she was consenting.
31. Consent as defined in the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. You observed what type of a witness the complainant is in this case. Evidence was adduced that she is a slow learner. You should consider all these aspects to decide if the complainant had the necessary mental capacity to give consent.
32. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.
33. The Defence takes up the position that the accused was elsewhere at the time of the alleged offences. The accused produced evidence to that effect. But, he need not prove anything in this case. Even if you reject the version of the accused, still the Prosecution must prove beyond reasonable doubt, that the accused committed these offences.
34. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of the complainant, depending on how you are going to look at her evidence.
35. I will now remind you of the Prosecution and Defence cases. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarise the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision in this case.

Case for Prosecution

PW1 Ateca Saulaki (The Complainant)

36. Ateca was staying in Waikete village with her uncle Petero since her mother passed away. She said that on 8 March 2019, she went in the afternoon to the pig pen to feed the pigs. She met Kamu Seva, whose full name is Sevaro Rabosea. Rabosea is living in the same village and she knew Kamu Seva as he is related to her. When she was feeding the pigs, Kamu came, so she asked him, "Where are you going?" He said he was going to get some *duruka*. Then he came and raped her, she said.
37. Ateca then described how she was raped; Kamu Seva pulled down the zip of his pants and put his *mimi* into her mouth. Her mouth was filled with sticky saliva. She described his *mimi* as his ball. She did not want him to put his ball in her mouth.
38. Kamu Seva also sucked her breast for a long time. He did not ask if he could suck her breast. She did not want him to suck her breast. It was painful. He sucked her breast before he put his *mimi* in her mouth. She did not say or do anything as she was scared that police will arrest her and put her in the cell.
39. After that, Kamu Seva took off her panty and put his *mimi* into her *mimi*. It was paining. She did not run away because she was scared; the kids will make fool of her. There were bloodstains on her clothes.
40. When the State Counsel showed two separate diagrams depicting the male and female anatomy, she pointed out where *mimi* is located in relation to each diagram. She highlighted the male and female genitalia in the respective diagrams.
41. Ateca said she did not want him to put his *mimi* in her *mimi*. When his *mimi* was in her *mimi*, she did not do anything because she was 'taboo'. After doing this, Kamu Seva told her to keep shut and mad. He then took the lead to the village. She was scared of her uncle. He went to her uncle Sevaro Rabosea who is a different Sevaro. She told Sevaro's daughter Mereoni what Kamu Seva had done to her. Mereoni then told her father. Mereoni's father then called her inside the house and asked what had happened. She told uncle Sevaro that his namesake had raped her. He then took her home and the matter was reported to police. She was seen by a doctor and her statement was recorded by police.
42. Ateca recognised the accused in court as the person who had raped her.
43. Under cross-examination by Defence, Ateca agreed that she is 27 years old. She knew only two people by the name of Sevaro in Waikete. She agreed that she went past Kalo and Setaita's houses. She agreed that Kalo told her to go because her uncle will be angry with her if she was late. She agreed that she only went home because Setaita insisted that her uncle might hit her if she was late. She agreed that she did not tell Kalo or Setaita that Kamu Seva had done anything to her.
44. Under re-examination, Ateca said that she went straight to her uncle's house after the incident.

PW-2 Sevaro Drika

45. Drika said that Ateca is his older brother's daughter. Both her parents passed away and that greatly affected Ateca. It is common knowledge in the village that Ateca is a slow learner.
46. On 8 March 2019, at around 5.30 pm, Ateca came home, crying. He thought somebody had hit her. He asked her what happened. Ateca told him that Kamu Seva raped her. He said there are two Sevaros in the village and he knew Ateca was referring to Sevaro Rabosca. Ateca said that Kamu Seva asked her to take off her panty and lie down on the floor. Kamu Seva then put his *mimi* into her mouth, he took it back and put it into her *mimi*. He said he saw blood stains on her clothes. He took Ateca to her uncle Petero's house. Petero asked somebody to inform the police as Petero had one of his legs amputated.
47. Under cross-examination, Drika admitted that there are others by the name of Sevaro in the same village. He agreed that Sevaro has a brother named Tomasi and this Tomasi's house is situated in the opposite direction where the pig pen is.

PW 3 Petero Naiobi

48. Petero said that Ateca was staying with him in Waikete after her parents passed away. Ateca is a slow learner. She takes time to understand what is happening in her surroundings.
49. On 8 March 2019, at around 4 pm, he sent Ateca to feed the pigs as usual. Pig pen is located in an isolated place in the bush. When Ateca returned home, she came with Sevaro Drika. She was crying and did not look okay. He came to know that Ateca was raped. He saw blood stains on her clothes.

PW 4 Dr. Nikotimo Bakani

50. Dr. Bakani tendered the Fiji Police Medical Examination Form prepared by Dr. Elvira Ongbit, who had examined Ateca on 9 March 2019. Dr. Bakani described the lacerations and other injuries noted on Ateca's vagina by the examining doctor. Upon the examination Dr. Ongbit had found the following: hymen is fibriated, elastic, admits two fingers with ease with fresh hymenal lacerations at 3 o'clock, 5 o'clock, 7 o'clock and 9 o'clock positions. The doctor concludes that the patient is positive for penetration, possibly a penile penetration.
51. That, is the case for the Prosecution. At the close of the Prosecution's case, you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
52. The accused elected to give evidence under oath. He also called two witnesses on his behalf. That is his right. By electing to give evidence, accused has not assumed any burden to prove his innocence. He has nothing to prove in this case. You must take into consideration the evidence presented by the Defence and its version when evaluating evidence.

Case for Defence

DE.1 Sevaro Rabosea (The Accused)

53. Rabosea said that on 8 March 2019, he returned home from Suva after 2.30 pm in the school bus. Upon his return, he went to his brother Tomasi's house. He knew where the Petero's pig pen was. He did not go in that direction. He denied the allegations and having gone on that evening to the pig pen where Ateca was. He said Ateca was lying because of a land dispute. He said that there are 6 Sevaros in Waikete village.
54. Under cross-examination, Rabosea admitted that he is related to Ateca and that he knew her since the day she was born. He knew that Ateca is a slow learner.

55. DE 2- Ma'ata Kalokaloniceva

Ma'ata lives in Waikete village. Ateca is her niece. On 8 March 2019, she saw Ateca standing in front of her house after 3 pm. Ateca went to the pig pen and returned. Ateca did not tell her anything. She told Ateca to go home, fast. She did not observe anything unusual in Ateca. She did not see anybody else crossing her house.

56. DW-3 Setaita Verenika

Setaita also said that she saw Ateca returning from the pig pen between 3-4 pm on 8 March 2019. She did not notice anything unusual in Ateca.

57. That, is the case for Defence

Analysis

58. Ladies and Gentleman assessor, the accused is charged with one count of Sexual Assault and two counts of Rape. You must consider evidence against each count separately.
59. The case for Defence is one of complete denial. The Defence's case is that the accused was visiting his brother and he was nowhere near the place where the alleged incident occurred.
60. Prosecution called four witnesses, and its case is substantially based on the evidence of the complainant. Defence called the accused and two other witnesses.
61. The resolution of the dispute mainly depends on whether you could accept the evidence of the complainant as being credible and believable. Prosecution says that the complainant told the truth in court. If you are satisfied that she told the truth in court, you can safely act upon her evidence in coming to your conclusion. No corroboration of her evidence is required.
62. Prosecution says that the complainant is consistent and reliable. It relies on recent complaint evidence, distress evidence and medical evidence to prove complainant's consistency. Prosecution says that the complainant relayed the alleged incident to her uncle Petero at the first available opportunity. Petero said that he had received a complaint from the complainant

and that the complainant was in a distressed condition at that time she relayed the incident to him. Both Petero and Drika had seen blood on her clothes.

63. Please apply the directions on how you should deal with recent complaint evidence and distress evidence. The Prosecution says that the subsequent conduct of the complainant is consistent with her evidence that she was sexually assaulted. Having considered the evidence led and, observed her demeanour, you decide if the conduct of the complainant is consistent with her evidence that she was raped and sexually assaulted.
64. Prosecution also relies on medical evidence to prove consistency of the complainant. They say that the findings of the doctor on 9 March 2019 are consistent with complainant's evidence that she was raped on 8 March 2019. Having taken into consideration the directions I have given, you decide what weight you should attach to the medical evidence and if it is consistent with that of the complainant.
65. It was asserted by the Prosecution that the pig pen was located in an isolated place in the jungle and that the accused, having known the fact that the complainant is a mentally impaired person, and of her routine movements, took the opportunity to rape her.
66. You observed complainant's demeanour and her disposition in court. You decide if she told the truth in court.
67. The Defence called the accused and two other witnesses. You had the opportunity to hear Defence's side of the story. The accused denies all the charges. He says that the complainant did not tell the truth in court. The Defence took up the position that the accused was never present at the pig pen on the day of the alleged incident. The accused says that the complainant made up these allegations against him because of a land dispute. You consider if you could believe the evidence of the accused.
68. If you believe that the complainant is telling you the truth, then you must be satisfied that all the elements of each offence have been proved beyond reasonable doubt.
69. The Defence adduced evidence to suggest that there are number of Sevaros in the Waikete village. There is no dispute that the accused is known to the complainant. You must be sure that it is the accused sitting in the dock and nobody else that had committed these offences.
70. If you are satisfied that the complainant told the truth and you are sure that when she used the word "mimi" she was referring to the genital organs (penis of the accused and the vagina of the complainant) and that his penis had penetrated, at least slightly, the vagina of the complainant, then you should find that the second element of count 2 has been proved. If you are satisfied that the accused had penetrated complainant's mouth with his penis, then you should find that the 2nd element of count 3 has been proved.
71. The complainant said that she did not want the accused to put his *mimi* either into her mouth or to her *mimi*. The accused did not ask and she did not want him to suck her breasts. She said she was sacred. She promptly complained and she was crying as she complained. She had not physically resisted though. There is no dispute that the complainant is a mentally impaired person and that her mental capacity is known fact to the accused. You decide if the complainant had the necessary mental capacity to give consent to any of the sexual activities and the accused was aware that she was not consenting at the time of the offence.

72. If you are satisfied that the accused had sucked complainant's breast without her consent you should find the accused guilty of Sexual Assault on the count 1. If you are satisfied that the accused penetrated the vagina of the complainant with his penis, without her consent, you should find the accused guilty on count 2. If you are sure the accused penetrated her mouth with his penis, without her consent, you should find the accused guilty on count 3.
73. If you do not believe complainant's evidence regarding the alleged offences, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty.
74. Your possible opinion is either guilty or not guilty on each count.
75. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
76. Any re-directions?



A handwritten signature in black ink, appearing to read "Aruna Aluthge".

Aruna Aluthge

Judge

At Suva

5 August 2020

**Solicitors: Office of the Director of Public Prosecution for State
Legal Aid Commission for Defence**