

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 59 of 2019

STATE

V

TIMOCI TUIYOYO

Counsel : Ms. S. Naibe for the State.
: Ms. V. Diroiroi for the Accused.

Dates of Hearing : 27, 28, 31 August, 2020
Closing Speeches : 01 September, 2020
Date of Summing Up : 01 September, 2020

SUMMING UP

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

Ladies and Gentleman 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

[REDACTED]

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 accept what they said. Page

by exercise of authority then that consent is no consent at all

an act of another shall not alone constitute consent.

19. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis 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.
20. 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.
21. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis

25. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offence.
26. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
27. The final element of assault is the unlawful use of force on the complainant by touching her vagina.

You should ask yourself:

- (a) whether you consider the force which was used in touching her vagina was sexual in nature; and
 - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
28. In this trial, the accused has denied committing the offence of sexual assault.
 29. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by touching her vagina.
 30. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then you must find the accused guilty. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused not guilty.

31. 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.
32. You must be satisfied that the prosecution has proved all the elements of both the offences beyond reasonable doubt in order for you to find the accused guilty of either or both the offences. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or both the offences, then you must find the accused not guilty.
33. In this case, the accused is charged with two offences, you should bear in mind that you are to consider the evidence in respect of each count separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.

ADMITTED FACTS

34. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
35. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
36. 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

37. The prosecution called one witness to prove the charges against the accused.
38. The complainant informed the court in 2019 she was 17 years of age and a Form 6 student. During early morning of 10th March 2019, the complainant was awoken by her father so that she could accompany them to the church. The complainant told her father that she wanted to sleep so she will not be going with them.
39. At about 5.20am the complainant's parents left the house, she was alone at home, her bedroom door was closed. As the complainant was lying down with her back towards the door, she heard the bedroom door opening. The complainant did not really care because her brother usually comes into her bedroom to take her phone.
40. When this person came and lay beside her at this time she smelt liquor the complainant thought it was her brother. This person was so close to her that she could hear his breathing just as the complainant turned around to face this person the complainant's face was covered with the blanket she was using. The complainant was turned over facing the floor whereby her mouth and her nose got blocked. When the complainant was lying face down, with her hands she was moving from side to side trying to defend herself and also gasping for breath since this person had covered her nose and her mouth with his hand.
41. The complainant struggled for about 15 minutes trying to defend herself both were pushing each other until she felt weak. At this time, her strapless bra was pushed down but her shorts and panty were removed, he started to touch her body and also her vagina. The complainant explained that with one hand this person had covered her mouth and nose from over the blanket.

42. The complainant was again turned around to face up and then he penetrated his erected penis into her vagina and had sexual intercourse with her for about 15 minutes without her consent. When this person was having sexual intercourse, the complainant's hands were free but she was tired and helpless since she had been lying facing the floor for about 15 minutes.
43. By this time, the accused hand slipped off her face the complainant removed the blanket that was covering her head and then she saw the accused, her maternal uncle. After recognizing the accused the complainant said "*aren't you ashamed we are in the same family and you doing this to me.*" The accused responded by saying, "*I have been admiring you for a long time.*" This conversation took place when the accused was over her and having sexual intercourse.
44. After this, the complainant heard her mother's voice the accused stood up and jumped out of the window. The complainant was on her bed crying when her mother entered her bedroom. It was on the same day the matter was reported to police.
45. According to the complainant when she recognized the accused, she was shocked she did not agree to have sexual intercourse with the accused or for him to touch her vagina, the complainant identified the accused in court.
46. In cross examination the complainant stated that the windows in the bedroom had glasses which have to be pushed out to open. When it was suggested that when the accused had walked into the bedroom she was completely covered with the blanket, the complainant disagreed and stated that only half her body was covered with the blanket.

47. The complainant denied when the accused had walked into her bedroom he had kicked her twice and asked her where her brother Epeli was, and at that time her mother had walked into the house.
48. The complainant also denied that when the accused had seen the complainant's mother, he had walked past her mother and went out of the house. She maintained that the accused had jumped out of the window.
49. After the accused had left, the complainant denied sitting on her mattress fully clothed. The complainant was not aware of any incident where the accused had taken one of her uncle's horses and did not return it. In respect of the incident whereby her brother Epeli had killed and sold a pig belonging to the accused, the complainant said it was the accused who had killed a pig belonging to his sister.
50. The complainant agreed when she was sleeping the blanket was covering half her body when she was turned around her face was covered with the blanket. The complainant explained the accused covered her head with the blanket and then from underneath the blanket, he had covered her nose and mouth while she was facing down. The complainant did not become unconscious because she was struggling by going from side to side hence she was able to breathe while the accused was on top of her.
51. The complainant said that she did scream even though the accused was blocking her nose and mouth. She also denied the suggestion that she had not screamed because nothing had happened.
52. The complainant maintained the accused had sexual intercourse with her and also he had touched her vagina. She denied making up the allegation against the accused because her family and the accused family did not share a good relationship.
53. This was the prosecution case.

DEFENCE CASE

Ladies and Gentlemen Assessors

54. 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 guilt beyond reasonable doubt remains on the prosecution at all times.
55. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination and he also called one witness.
56. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath and called one witness which you must take into account when considering the issues of fact that you are determining.
57. The accused informed the court that the complainant's grandfather is elder than his father. He attended primary school up to class 8 only. Despite the family relationship between the complainant and the accused he did not visit the complainant's house.
58. In the morning of 10th March, 2019 the accused was drinking at the river bank of Nawaka Village. It was nearly day break when he was told that the complainant's brother Epeli had killed his pig. The accused went to the complainant's house to see Epeli, since the door of the house was open he went inside and called out from the sitting room.
59. There was no response so he went into Epeli's bedroom to check. In the bedroom he saw someone lying down fully covered in blanket so he kicked the person twice because he knew it was Epeli since it was Epeli's room. After the person he had kicked screamed he then realized it was not Epeli.

60. The accused was shocked to see the complainant, the accused sought forgiveness and asked about Epeli, the complainant replied Epeli was not at home. The conversation was for about 2 minutes only, after a while the complainant's mother came into the bedroom and asked him what he was doing there.
61. The accused did not respond but stood up and walked away through the main door. The accused denied committing the offences as mentioned by the complainant he maintained that he did not do anything as alleged. The complainant made a false report against him because he had asked the complainant's uncle to ride his horse to the Nausori Highlands, on the way the horse died, when he told the complainant's uncle he started getting angry.
62. The accused relationship with the complainant's family was not good in 2019 because he had a fight with the complainant's uncle.
63. In cross examination the accused agreed that the complainant calls him uncle but he hardly goes past the complainant's house or visit her or enter her house but he knew the bedroom he had entered was the bedroom of Epeli.
64. When asked to explain how he knew it was Epeli's bedroom the accused said as soon as he entered the house he saw the first bedroom with someone sleeping. The accused also stated that he went to the complainant's house looking for Epeli since he had received information that Epeli had killed his pig.
65. The accused was referred to his caution interview dated 11th March, 2019 to question and answer 43 which was read as:

Q. 43 What was the reason of your going to Vilisi's house?

A. "I just wanted to sleep".

66. In explaining the above, the accused said he told the truth to the police he maintained that the sole reason he went to the complainant's house was to confront Epeli about his pig and he told this to the police. The accused agreed that what he told the police during his caution interview was different to what he told the court. When he had entered the bedroom he kicked the person sleeping who turned out to be the complainant and he told this to the police which was the truth.
67. The accused was again referred to question and answer 47:
Q. 47 Then what happened when you saw her?
A. I went and lie down beside her in a mattress which was spread on the floor”.
68. The accused agreed he told the truth to the police and what he told the court are two different things.

Ladies and Gentleman Assessors

69. The learned state counsel in this regard was cross examining the accused about some inconsistencies in his interview he gave to the police when facts were fresh in his mind with his evidence in court. I will now explain to you the purpose of considering the previously made statement of the accused with his evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the accused is believable and credible. However, the interview itself is not evidence of the truth of its contents.
70. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.

71. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the accused.
72. Upon further cross examination the accused denied that he had sexually assaulted and raped the complainant as alleged, he maintained that he did not do what was alleged against him.
73. In re-examination the accused stated that his interview was not correct what he told the court he had also told the police and that he told the truth in court.
74. The second defence witness Dr. Vasitia Cati informed the court that she graduated with an MBBS degree in 2003 and in 2013 she completed her Masters in Medicine (Obstetrics and Gynaecology), both the degrees was obtained from the Fiji School of Medicine. From 2016 the witness has been a Consultant at the Lautoka Hospital. Currently she is the Head of Obstetrics and Gynaecology Department.
75. The witness knows the examining doctor in this case Dr. Pene who was one of her interns working under her supervision.
76. The witness was unable to recognize the hand writing or the signature of Dr. Pene but she knows that the examining doctor always completes the medical report and as such she knew the medical report was completed by Dr. Pene. The photocopy of Fiji Police Medical Examination Form of the complainant dated 10th March 2019 was marked and tendered as defence exhibit no. 1.

77. According to the witness, Dr. Pene had made the following specific medical findings as noted in the medical report as follows:

Vaginal Examination

- a) External - No laceration, bleeding noted;
- Hymen not visualized;
- b) Speculum showed normal cervix, normal vagina;
- c) No sign of trauma was seen.

78. According to the witness no laceration meant there was no forceful interference. Hymen not visualized meant hymen was not intact also virginity did not equate to hymen being intact because the hymen can be broken for other reasons such as horse and bike riding , sexual intercourse etc.

79. In the professional opinion of Dr. Pene the vagina examination did not show any signs of trauma, however, this did not rule out that the patient was raped or sexually assaulted.

80. In cross examination the witness stated that in March, 2019 she did not supervise Dr. Pene because by this time Dr. Pene was a Medical Officer.

81. According to the witness from her experience victims of sexual offences came in crying, had marks on the body but generally not all the victims of sexual violence were the same.

Ladies and Gentlemen Assessors

82. Complainants of sexual offences may react in different ways to what they may have gone through. It is for you to decide what weight you would give to the fact that Dr. Pene had noted in the medical report that the complainant was comfortable and not distressed when she came for the medical examination.

83. The witness agreed that Dr. Pene had stated that sexual assault and rape could not be ruled out and that a doctor had to be objective in his or her findings.

Ladies and Gentleman Assessors

84. You have heard the evidence of Dr. Cati who was called as an expert witness on behalf of the defence. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called. The police medical examination form of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.
85. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. At this point, I would like to caution you about the evidence of Dr. Cati.
86. Dr. Cati was not the author of the medical examination form tendered and she was not the examining doctor. She had come in for Dr. Pene who was the examining doctor accordingly Dr. Cati had only read the notes made by Dr. Pene at the time she had examined the patient. Dr. Cati was in court to explain what the examining doctor had recorded in the medical report.
87. It is not for Dr. Cati to express her opinion on what she would have concluded had she carried out the medical examination of the complainant. I direct you to confine your deliberations to the medical report as per the findings of Dr. Pene.
88. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it.

Indeed, you do not have to accept even the unchallenged evidence of the doctor.

89. You should remember that the evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your opinions, you must reach your opinion having considered the whole of the evidence.
90. This was the defence case.

ANALYSIS

91. The prosecution alleges that during the early morning of 10th March, 2019 the complainant was alone at her home when the accused entered the bedroom of the complainant whilst she was sleeping with a blanket half way over her. When she turned around to face the accused she was covered with her blanket on her head turned over to face the floor and her mouth and nose was blocked from over the blanket.
92. There was a struggle between the accused and the complainant for about 15 minutes by this time the complainant was exhausted. At this time, the complainant's strapless bra was pushed down but her shorts and panty were removed, the accused started touching her body and also her vagina.
93. The accused then turned the complainant over facing him, at this time the accused hand slipped from over her nose and mouth. The complainant removed the blanket that was covering her head and then she recognized and saw the accused was having forceful sexual intercourse with her. The complainant did not consent for the accused to have sexual intercourse with her or touch her vagina.
94. On the other hand the defence says the accused had entered the bedroom of the complainant that morning but he did not do anything as alleged. The

accused had gone to ask the complainant about the whereabouts of her brother Epeli and it was at that time the complainant's mother came into the house and he left.

95. The allegations had been made up against the accused since the family of the complainant and the family of the accused are not in good terms with each other. The defence also says the complainant had undergone a medical examination on the same day of the alleged incident within hours, however, there were no lacerations or trauma seen upon the vaginal examination by the examining doctor. If what the complainant had described to court was the truth and had it happened for about 15 minutes then by all means there should have been some form of injuries seen on and around the vagina of the complainant or her body.
96. Furthermore, the defence also says when the complainant was medically examined on the day of the alleged incidents the doctor did not see any signs of trauma upon vaginal examination or on her body which suggests that nothing had happened. The defence is asking you not to believe the complainant because what she told the court was not possible.

Ladies and Gentleman Assessors

97. You have seen all the witnesses give evidence keep in mind that some witness react differently when giving evidence.
98. 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 which witness is reliable and which one is not. You observed the witnesses give evidence in court. You decide which witness was forthright and truthful and who was not. Which witness was straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

99. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, 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 a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of 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.
100. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges 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 his or her own evidence or with his or her previous statement or with the other witnesses. 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.
101. 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.
102. 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.
103. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

104. As I have mentioned earlier, in this case the accused is charged with two offences you should bear in mind that you are to consider the evidence in respect of each offence separately from the other. You must not assume that because the accused is guilty of one offence that he must be guilty of the other as well.

105. Your possible opinions are:-

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

Count Two: **SEXUAL ASSAULT**: GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

106. 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.

107. 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

01 September, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.