

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 32 OF 2013

STATE

-v-

PENAIA RATU

Counsels : Mr. Alvin Singh for the State

Ms. M. Tarai for the accused

Date of Trial : 21 November 2013 to 25 November 2013

Date of Summing Up : 25 November 2013

(Name of the victim is suppressed. She is referred to as SL)

SUMMING UP

Madam Assessors 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 on law and evidence. 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 opinion 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 fact. 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 Prosecution and the defence counsel made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the defence 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, and 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 decisions 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 to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
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 the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

12. In accessing 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. In deciding on the credibility of any 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 gave evidence. Was he/she evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.
13. I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinions. That is – as you could hear from evidence – this case involved an alleged incident of rape of a child. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law, to which every one of us is subject to. I will deal with the law as it is applicable to the offence with which the accused-person is charged, in a short while.
14. The charge against accused is as follows:

Statement of Offence

RAPE: Contrary to Section 207 (1) (2) (b) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

PENAIA RATU on the 13th of February, 2013 at Tavua in the Western Division inserted his finger into the vagina of **SL**, aged 4 years and 6 months.

15. I will now deal with the elements of the offences. The offence of rape is defined under Section 207 of the Crimes Decree. Section 207(1) of the Decree makes the offence of rape an offence triable before this court. Section 207 (2) states as follows:

A person rapes another person if:

- (a) The person has carnal knowledge with or of the other person without other person's consent; or

- (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
 - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
16. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man of the vagina of a woman to any extent. So, that is rape under Section 207 (2) (a) of the Crimes Decree.
17. If a person penetrates the vagina to any extent with a part of another's body, which is not the penis of that person, without the consent of the woman, that is rape under Section 207 (2) (b).
18. So, the elements of the offence of Rape in this case are that the accused **penetrated the vagina of victim to some extent with any other thing** which means that the insertion of any other thing fully into vagina is not necessary.
19. Other parts of the offence are irrelevant to the facts of this case.
20. Consent as defined by Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a woman with a necessary mental capacity to give such consent. A woman under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The girl in this case was only 5 years of age and, therefore, she did not have the capacity under the law to consent. So, the prosecution does not have to prove the absence of consent on the part of the girl because law says that she, in any event, cannot consent.
21. Apart from the elements of the offence, the identity of the person who alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person and connect him to the offence that he alleged to have been committed.
22. 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 victim who saw, heard and felt the offence being committed. In this case, for example, the victim was the witness who offered direct evidence, if you believe her as to what she saw, heard and felt.

23. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, Medical Report is an example if you believe that such a record was made. Then you can act on such evidence. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time on the document upon examination of the victim.
24. Expert evidence is also important to borne in mind. Usually, witnesses are not allowed to give opinion. They are allowed to give evidence on what they say, heard or felt by their physical senses only, as described earlier. 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 their opinions express on a particular fact to aid court and you to decide the issues/s before court on the basis of their learning, skill and experience.
25. The doctor in this case, for example, came before court as an expert witness. The doctor, unlike any other witness, gives evidence and tells us her conclusion or opinion based on examination of the victim. That evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if such opinion is 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 in the case.
26. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

Test of means of opportunity: That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically crated just out of a case against the other party.

Probability and Improbability: That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case. Or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

Belatedness: That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was 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 to such delay.

Spontaneity: This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

Consistency: That is whether a witness telling a story on the same lines without variations and contradictions. You must see whether a witness is shown to have given a different version elsewhere. If so, what the witness has told court contradicts with his/her earlier version.

You must consider whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another for example by a police officer in recording the statement where the witness is alleged to have given that version.

You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.

You must also consider the issue of omission to mention something that was adverted to in evidence on a previous occasion on the same lines. You must consider whether such omission is material to affect credibility and weight of the evidence. If the omission is so grave, you may even consider that to be a contradiction so as to affect the credibility or weight of the evidence or both.

In dealing with consistency you must see whether there is consistency *per se* and *inter se* that is whether the story is consistent within a witness himself or herself and whether the story is consistent between or among witnesses. In deciding that, you must bear in mind that the evidence comes from human beings. They cannot have photographic or videographic memory. All inherent weaknesses that you and I suffer, insofar as our memory is concerned, the memory of a witness also can be subject to same inherent weaknesses.

Please remember that there is no rule in law that credibility is indivisible. Therefore, you are free to accept one part of a witness's evidence, if you are convinced beyond doubt and reject the rest as being unacceptable.

27. You need to consider all those matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.
28. I will now deal with the summary of evidence in this case.
29. Prosecution called the Victim SL as the first witness. She is 5 years old. She said that she was sleeping in her house in Tavua. She said the accused climbed through the window and took her to her brother Kali's room. There he had taken off her pants and the panty and licked and bit her vagina. She had started crying. Then person had gone away through the window. She had gone and told her mother about this. Mother had gone out to look. She was taken to a medical examination by her mother and father.
30. Under cross examination she stated that she did not see the face of the person and she can't be sure it was really the accused she saw that night.
31. You watched her giving evidence in court. What was her demeanour like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of SL beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charge.
32. The next witness for the prosecution was victim's mother. She is a mother of five children. On 12.2.2013 she was sleeping with her children in the sitting room. The victim was sleeping close to the Kali's room. Victim came and woke her up. Victim had told her somebody carried her to Kali's room, took her pant and panty off. At that time she had touched her daughter's vagina. She felt blood on her hand. When victim came to her she was not wearing anything. She had told her that somebody licked and bite her vagina. She had gone to Kali's room and had seen that the window was open. Victim's panty and pants were on the bed.

33. After that she had woke her husband up and told him about this. He had gone out to look but couldn't see anyone. Then she had gone to the funeral and had talked to Arieta Vuda there. While she was talking she had seen the accused from the side of the village. It was ½ hour after the incident. After breakfast she had taken the daughter to the hospital. The matter was reported to police same day. She identified the accused in Court.
34. Under cross examination, she said that she touched the vagina and felt blood. She denied bit of her hand going inside the vagina of the victim. She admitted that the accused came to her house after breakfast next day with Sisa.
35. You saw her giving evidence in Court. She had given prompt answers to questions put to her by the accused. It is up to you to decide whether you could accept her evidence beyond reasonable doubt. If you accept her evidence it corroborates the evidence of the victim regarding recent complaint.
36. Doctor Losalini was called as the next witness for the prosecution. She is a doctor with 3 years experience. She had examined the victim at Tavua hospital on 13.2.2013. The history was given by the mother. There were bruising on vagina labia minora and majora. Hymen was not intact. She had observed blood stains were also there. These injuries could have been caused by forced penetration according to her professional opinion. The findings are compatible with the history given. She submitted medical report marked PE3.
37. Under cross examination she stated that this is the first examination she did in a case of rape. She had not seen bite marks. The injuries could not have been caused by rubbing or scratching the vagina. She further said the hymen not been intact could not have happened earlier.
38. The doctor is an independent witness. If you believe her evidence there is evidence of bruising of vagina and hymen being not intact of SL which could have been a result of recent licking of vagina, putting a finger to vagina. There is evidence of recent vaginal penetration.
39. The next witness for the prosecution was DC Simone Ratu. He is a police officer with 26 years experience. On 13.2.2013 he had received instructions from crime officer to caution interview the accused. PC Jese was assisting as witnessing officer. It was done at the crime office Tavua police station. It commenced at 4.45 p.m. and concluded at 7.55 p.m. The accused was calm and normal. He had an old small injury on lip. The interview was conducted in i-Taukei language in question and answer format. He had prepared an English translation which was tendered marked PE 2. The interview notes were marked PE1. The

accused was not assaulted, threatened or forced. The accused did not make a complaint after the interview. He identified the accused in Court.

40. Under cross examination he admitted that complainant's father is working with him. He also admitted that witnessing officer took part in the arrest. He denied there was bleeding from accused's lips. He denied accused being assaulted at the time of the interview. He admitted that he failed to write down about the break and refreshments given to the accused at the time of the reconstruction. He admitted that the complainant's father was present during the reconstruction.
41. In re-examination he stated that accused or his family members had not made any formal complaint against any police officer up to now. Further no complaint was made to the Magistrate about an injury.
42. It is up to you to decide whether the accused made a statement under caution voluntarily to this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of the charge are proved by this statement.
43. After the prosecution case was closed you heard me explaining the accused his rights in defence.
44. The Accused elected to give evidence. His position was that on 12.2.2013 he was at a death ceremony helping with the cooking. Then he drank Grog with the boys from the village from 6.00 p.m. to till 4.00 a.m. Then he had gone to the place where lovo is made and gone home after that about 5.00 a.m. He said the victim's house was far from where he was. (from witness box to the road leading to Court). Then he said there were only two houses to the victim's house. When he was at home Sisa came, woke him up saying Akariva had send him. He had gone with Sisa to Akariva's house. He was asked whether he had come to that place in the night and he denied. Then he was told that they will come to get him in the afternoon.
45. He had no problem with Akariva earlier. In the afternoon when he was at the bus stand with his aunt to go to Suva, police officers came and arrested him. On the way he was assaulted by the police officers in the vehicle. He was punched and slapped and told to

admit the offence. He had a cut in the lips at the time he went to the police station. He was interviewed by Simone Ratu and was forced to admit the offence by police officers Kini, Iveri and Jese who were present there. He was punched on the ribs and smacked on the head. When he was taken to the reconstruction, Akariva and his wife swore at him.

46. He did not make a complaint to anyone as all of them are police officers. He was afraid to ask them to take him for a medical examination. He used his T-shirt to wipe the blood. It was given to parents when they came with change same day. He identified and marked the T-shirt as D1. There were two small marks on that. He described the distances from funeral to the place they drank Grog, the place where lovo was prepared and the complainant's house.
47. Under cross examination, he denied that he was going to Suva to run away from the police. According to him, he had received just a cut on the lips due to all police assault. His parents who visited him twice to the police station had seen this and inquired about it. But they never made a formal complaint about it. He had not made a formal complaint or request for medical examination. When he was produced before Magistrate or High court judge he had not made such complaint. But he said then it was in his written submissions of his bail applications. He admitted that even there he had not stated that he received injuries due to police assault.
48. He denied disappearing for little while, when he went to get water to mix the Grog. He further denied all the suggestions regarding the offence, saying that he never went there. He admitted that he was drunk that morning. But he said he exactly remember things that happened at that time.
49. You watched the accused giving evidence in court. What was his demeanour like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? The position taken up by the accused in giving evidence in the court is different from his caution interview statement. In other words his version is inconsistent. It is up to you to decide whether you could accept his version and his version is sufficient to establish a reasonable doubt in the prosecution case. If you accept his version accused should be discharged. Even if you reject his version still the prosecution should prove it's case beyond reasonable doubt.
50. Defence called Sisa Bevu as a witness. He was also at the funeral. His job was to prepare lovo. He said the accused was with him throughout the night and did not go anywhere. He went out only to get water or relieve himself. Even then he could see him as he was

keeping an eye on him. He said that he went with the accused to the complainant's house in the morning. The victim's parents blamed the accused.

51. Under cross examination he said even at the time accused went to relieve himself, he saw the accused. When the accused went to get some water he was looking at him. When he was asked whether he knew that accused was going to Suva next day he said 'no' first. Then he said accused told him about that. He had made a statement to police only last week.

52. I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

You will generally find that an accused gives an innocent explanation and one of the three situations then arises:

(i) You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offence.

(ii) Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.

(iii) The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offence. The situation then would be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be Guilty.

53. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should be reminded yourselves of all that evidence and form your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.

54. Please remember, there is no rule for you to look for corroboration of the victim's story to bring home an opinion of guilty in a rape case. The case can stand or fall on the testimony of the victim depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the victim's evidence if you think that it is safe to look for such supporting evidence. Corroboration is, therefore, to have some independent evidence to support the victim's story of rape.

55. The accused's defence is one of alibi. He says that he was not at the victim's house when offence was committed. As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a defence.

56. Present Criminal Procedure Decree in Section 125 provides that:

'On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.

A notice under this section shall be given-

- (a) Within 21 days of an order being made for transfer of the matter to the High Court (if such order is made); or
- (b) In writing to the prosecution, complainant and the court at least 21 days before the date set for trial of the matter, in any other case.

57. A notice was given of alibi in this case only on 5.11.2013 and that is outside the time period prescribed by law.

58. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt.

59. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of the charge you must find him guilty for the charge. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

60. Your possible opinions are as follows:

(i)	Charge Rape	Accused Guilty or Not Guilty
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61. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

62. Any re-directions?

Sudharshana De Silva
JUDGE

AT LAUTOKA
On 25 November 2013

Solicitors for the State:
Solicitors for the Accused:

Office of the Director of Public Prosecution
Office of the Legal Aid Commission