

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: 124 OF 2012

STATE

-v-

MOHAMMED ALFAAZ

Counsels : Mr. Semi Babitu for the State
Mr. Roneel Kumar for the accused

Date of Trial : 27 January 2014 to 29 January 2014

Date of Summing Up : 30 January 2014

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

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 state counsel and the counsel for the defence 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 sexual assault and rape. 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 information against accused is as follows:

Count 1

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) and (2) of the Crimes Decree No. 44, 2009.

Particulars of Offence

MOHAMMED ALFAAZ, on the 17th day of September 2012 at Nadi in the Western Division, unlawfully and indecently assaulted **AN** by licking the vagina of the said **AN** with his tongue.

Count 2

Statement of Offence

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

Particulars of Offence

MOHAMMED ALFAAZ, on the 17th day of September 2012 at Nadi in the Western Division, had carnal knowledge of **AN**, without her consent.

Count 3

Statement of Offence

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

Particulars of Offence

MOHAMMED ALFAAZ, on the 17th day of September 2012 at Nadi in the Western Division, had carnal knowledge of **AN**, by inserting his penis into the anus of the said **AN** without her consent.

Count 4

Statement of Offence

RAPE: Contrary to Section (1) and (2) (c) of the Crimes Decree, 2009.

Particulars of Offence

MOHAMMED ALFAAZ, on the 17th day of September 2012 at Nadi in the Western Division, penetrated the mouth of **AN**, with his penis without her consent.

15. I will now deal with the elements of the offences.

16. The offence of Sexual Assault is defined in Section 210 (1) (a) and (2) of the Crimes Decree, 2009.

17. Accordingly the elements of the offence are:

- (i) The accused,
- (ii) Licked the vagina of the victim,
- (iii) Without the consent of the victim.

18. 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.

19. 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.
20. So, the elements of the offence of Rape in the 2nd Charge are that the accused penetrated the vagina of victim to some extent with penis which means that the insertion of penis fully into vagina is not necessary.
21. According to Section 206 (5) of the Crimes Decree, carnal knowledge includes sodomy.
22. So, the elements of the offence of Rape in 3rd Charge are the accused penetrated the anus of the victim to some extent with penis which means that the insertion of penis fully into anus is not necessary.
23. According to Section 207 (2) (c) above if the accused penetrated the mouth of the victim with penis to any extent that is rape.
24. Thus the elements of the 4th charge are the accused penetrated mouth of victim to some extent with penis which means that the insertion of penis fully into mouth is not necessary.
25. 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 7 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. This position will apply to all the charges.
26. 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.
27. 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 witness who offered direct evidence, if you believe her as to what she saw, heard and felt.

28. 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.
29. Expert evidence is also important to borne in mind. 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, 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.
30. 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.
31. 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.

32. 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.
33. I will now deal with the summary of evidence in this case.
34. Prosecution called DC Arvind Singh as the first witness. He is an officer with 25 years experience. He had received instructions from station officer to conduct the caution interview of the accused on 20.9.2012. The accused did not make a complaint before the interview. He was given his legal rights. Interview took place in the bure of the Sabeto police station.
35. The interview was conducted in Hindi language. During the interview accused did not make a complaint. A reconstruction was done during the interview. Accused did not make a complaint before or during the reconstruction.
36. At the end of the interview the accused did not make a complaint and signed the interview notes. He counter signed the same. He identified and tendered the original of the caution interview marked P1A. He also tendered an English translation prepared by him marked P1B. He read out the translation in Court. He identified the accused in Court.
37. Under cross examination he admitted that he is also known by the nick name Chaina. He denied banging the head of the accused on a table before the interview. He said that when asked, the accused wanted to conduct the interview in Hindi. He denied threatening and swearing at the accused to sign the interview. He denied punching the accused on stomach. He denied PC Saiban hitting the accused in his presence.
38. 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 charges are proved by this statement.
39. The next witness was DC Satendra Kumar. He is an officer with 25 years experience. He had received instructions to charge the accused on 21.9.2012. It was done in Hindi

language. The accused had not made a complaint before or during the charge. Accused made a voluntary statement. He and the accused signed the charge statement.

40. He identified and tendered the original charge statement marked P2A. He had made a translation. It was identified and tendered marked P2B. He read out the charge statement in Court. He identified the accused in Court.
41. Under cross examination he denied making up a statement. He denied threatening the accused with assault if he did not sign the charge statement. He denied not taking any statement.
42. It is up to you to decide whether the accused made a charge statement voluntarily to this witness. If you are sure that the charge 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 charge statement are truthful. If you are sure that the facts in the charge statement are truthful then you can use those to consider whether the elements of the charges are proved by this statement.
43. The third witness for the prosecution was PC Abdul Saiban. He is an officer with 14 years experience. He is the investigating officer of this case. He had recorded statements of the witnesses, compiled the docket and taken the victim for medical examination. The accused had not made a complaint to him. He identified the accused in Court.
44. Under cross examination he denied taking part in arresting the accused. He denied assaulting the accused on stomach. He further denied wrapping a plastic bag around the head of the accused. He had said he was present in bure when the caution interview statement was taken.
45. It is up to you to decide whether you could accept this evidence beyond reasonable doubt. If you accept this evidence then it corroborates the evidence of other Police witnesses.
46. The next witness for the prosecution was John Davis. He is 18 years of age now. On 17.9.2012 he had seen the accused making his brother's daughter suck his penis inside the kitchen of Munaf's house. He had seen this from a distance of about 25 feet. He was standing on a hill. The window of the kitchen was open. This had happened after school time.
47. After they came out he went and told his mother. He identified the accused in Court. He knew the accused for about 4 years.

48. Under cross examination, firstly it was suggested that accused was at work on that day. The witness said that accused was around at that time. Then it was suggested that accused chased him away from his house as he went to steal coconut. He denied that.
49. This is an independent witness. You watched him 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? 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 this witness beyond reasonable doubt then you have to consider whether this evidence is sufficient to establish all elements of the 4th charge.
50. Prosecution called victim AN as next witness. She is nine years old now. She stated that bad things happened to her. She was reluctant to come out with the details. This happened in an afternoon in the kitchen. Alfaaz is the person who did these bad things to her. Alfaaz is related to her. Alfaaz was not wearing cloths when he did bad things to her. Alfaaz removed her pants. (Sutana) Alfaaz used his tongue on her vagina. Further Alfaaz used his penis on her vagina and back side. After the acts Alfaaz told her not to tell anyone. She identified the accused in Court as Alfaaz.
51. Under cross examination she stated that police told her, Alfaaz did bad things to her. She admitted that the accused was providing for her family and her schooling. She further stated that she had injuries from bad things done by the accused. When it was suggested that Alfaaz never put his penis into her vagina, she said that he did it. It was also suggested that Alfaaz never put his tongue in her vagina. She stated that he did lick my vagina. When it was suggested that Alfaaz never put his penis into her back side, she said that he did that. She admitted that Police lady told her to say that Alfaaz did bad things to her. But when it was put to her that it was not alfaaz who raped her, she said he did that.
52. 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? You must bear in mind the age of this witness at the time of the incident. Whether she has any reason to falsely implicate the accused? 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 AN beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish elements of all the charges.

53. Doctor was called as the next witness for the prosecution. She is a doctor with 20 years experience. She is not the person who examined the victim. She marked and tendered the medical report P3. According to the report hymen extended and wide open and was not intact. The professional opinion confirms sexual assault either through penile penetration or fingering.
54. Under cross examination, she admitted if there was penile penetration there would be swelling. But she said that it will depend on time of examination after the incident as it could have been healed. She further said that medical findings are consistent with the history.
55. The doctor is an independent witness. If you believe her evidence, there is corroboration on sexual intercourse. However, there are no injuries or swelling in the vaginal area. You have to decide whether that is possible due to time lapse. Further the doctor is not the person who examined the victim. She was giving evidence on a report prepared by another doctor. Before attaching any weight to this evidence you have to keep these factors in mind.
56. After the prosecution case was closed you heard me explaining the accused his rights in defence.
57. The Accused elected to give evidence. His position was that on 17.9.2012 he was at work and came home around 6.30 p.m. He was told by his mother that these boys came to pick coconuts. When the boys came passing his house he told them not to come again. This had happened earlier as well. Although he reported to Police no action was taken.
58. He was arrested on 20.9.2012 on his way to work. He was assaulted by Police officers on the sides of his chest and clamped on his ears. He was locked up in the cell and no food was given to him. Around 7.00 p.m. in the evening he was taken to bure at the Police station by officer Chaina. He was questioned and he answered. He admitted the offences as they were beating him. He was forced to put his signature to two sets of papers.
59. When he was taken to the Magistrate he did not make a complaint as he did not know that he could do so. At the time of the incident he was providing for the family of the victim. He denied all the allegations. He said there was no problem with the victim prior to this day.

60. Under cross examination he said that he had reported 2-3 times to Police about witness John Davis. He had only made telephone calls to Police. He had instructed his counsel about this. He said that he did not make a report about Police assault but told that to Prison officer Rotawa. Although he admitted that the victim had made certain allegations against him in court he denied those allegations.

61. The accused in his defence takes an alibi. He says that he was not at the scene of crime but was working elsewhere. 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.

62. 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.

63. No notice was given of alibi in this case.

64. 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? His position taken up in Court is different from his caution interview statement and the charge statement. In other words his evidence is inconsistent. The accused said that it was suggested to John Davis that he goes and steal things. However according to Court record such suggestion was not put to that witness.

65. 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.

66. 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.

67. 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 offences.
- (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 offences. 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 offences then the proper opinion would be Guilty.

68. 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 remind yourselves of all that evidence and from 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.

69. 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.

70. 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.

71. 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 each charge you must find him guilty for that 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 for that charge. You have to consider evidence against each charge separately. The fact that the accused is Guilty or Not Guilty of one charge does not necessarily mean that he is Guilty or Not Guilty of the other charges as well.

72. Your possible opinions are as follows:

(i)	First charge of Sexual Assault	Accused Guilty or Not Guilty
(ii)	Second charge of Rape	Accused Guilty or Not Guilty
(iii)	Third charge of Rape	Accused Guilty or Not Guilty
(iv)	Fourth charge of Rape	Accused Guilty or Not Guilty

73. 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.

74. Any re-directions?

Sudharshana De Silva
JUDGE

At Lautoka
30th January 2014

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