

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 030/2013

BETWEEN: THE STATE

AND: SEKOVE WAIDRANU

COUNSEL: Mr. S. Vodokisolomane for the State
Mr. S. Waqainabete for the Accused

Dates of Trial: 28 - 30/04/2014

Date of Summing Up: 30/04/2014

[Name of the victim is suppressed. She will be referred to as U.S.]

SUMMING UP

Madam and Gentlemen of Assessors,

1. It is now my duty to sum up this case to you. I will direct on matters of law which you must accept and act upon. On matters of facts however, which witnesses to accept as reliable, which version of the evidence to accept, these

are matters for you to decide for yourselves. So if I express my opinion to you about facts of the case or if I appear to do so it is a matter for you whether you accept what I say, or form your own opinion. In other words you are the judges of facts. All matters of facts 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.

2. You have to decide what facts are proved and what inferences drawn from those facts. You then apply law as I explain it to you and form your individual opinion as to whether the accused is guilty or not guilty.
3. Prosecution and defence made their submissions to you about the facts of this case. That is their duty. But it is a matter for you to decide which version of the facts to accept or reject.
4. You will not be asked to give reasons for your opinions but merely your opinions of yourself and your opinion need not be unanimous but it would be desirable if you agree on them. Your opinions are not binding on me but I can tell you that they carry great weight with me when I deliver my judgement.
5. On the question of proof, I must direct you as a matter of law that the onus of burden of proof lies on the prosecution throughout the trial and never shifts. There is no obligation on the accused person to prove his innocence. Under our criminal justice system accused person is presumed to be innocent until he is proved guilty. This is the golden rule.
6. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt then you must express an opinion that he is not guilty.
7. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence that who saw the incident or felt the offence being committed. The other kind of evidence is circumstantial evidence that you put one or more circumstances together and draw certain

irresistible inferences. Evidence presented in the form of a document is called Documentary evidence.

8. In certain circumstances the court would allow witnesses to give their opinions on a matter. These witnesses should be experts on that particular subject. For example, you get experts on medical field.
9. The caution interview statement of the accused person is in evidence. What an accused says in his caution interview is evidence against him. I will direct you shortly on how you should consider that evidence.
10. 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 have heard about this case outside of this court room.
11. Your duty is to find the facts based on the evidence apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotions.
12. Now let's look at the charge.

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207(1) and 207(2) (a) of the Crimes Decree No: 44 of 2009.

Particular of Offence

SEKOVE WAIDRANU between the 1st day of November 2012 and 31st day of November at Batiri Village, Seaqaqa, in the Northern Division, had carnal knowledge with U.S. without her consent.

13. In Fiji law, the offence of Rape is committed when the vagina is penetrated either by the penis or by the finger of the accused. Hence in this case the prosecution has to prove:
 - i) The accused had carnal knowledge of the complainant,

- ii) Without her consent,
 - iii) He knew or believed that she was not consenting or did not care if she was not consenting.
14. Carnal knowledge is the penetration of vagina or anus by the penis. It is not necessary for the prosecution to prove that there was ejaculation, or even that there was full penetration.
15. As far as the element of consent is concern, in our law, a child is under the age of 13 years is incapable of giving consent. In this case victim was 26 years of age at the time of the offence and, therefore, she had the capacity under the law to consent. Therefore, the offence of rape is made out only if there was no consent from the alleged victim.
16. I now remind you of the prosecution and defence cases. In doing this, it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by the counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.
17. Now let's look at the evidence led by the prosecution in this case.
18. The victim is the daughter-in-law of the accused. She lived in Batiri with her husband in the accused's house but now resides at Taveuni with her parents. She has three children. In the month of November, 2012, when her husband (accused's son) had gone out, the accused forced the victim to undress and lay on a mattress. He then removed his clothes and had sexual intercourse against her will. He put his penis into the vagina of the victim. She did not shout as the accused's house is situated about 50 meters away from the village.
19. In the same month the accused once again forcefully removed her clothes and had vaginal intercourse against her will. Before the act the accused locked two of her children inside the bath room. When he forced her she was

breast feeding her third child. On both occasions she never consented for sex with the accused. On both occasions victim's husband was not at home. As soon as he returned home, she had informed him the incidents. But he had told her to keep quiet and not to report to police. But she lodged her complaint after leaving accused house. The victim was living in the accused's house for about 5 years. She identified the accused in open court.

20. In the cross examination, victim said that she the accused's house is situated 50 meters away from the village. Cries would not be heard as one of the houses has a generator. At the first occasion the accused was wearing only a sulu. She could not run away from the house as she was breast feeding her child. According to the victim the 1st incident happened in the night. At that time her mother-in-law had gone for a funeral. She denied that accused requested her to massage his stomach. Victim reiterated that she never consented for sex with the accused. Victim admitted that the second incident happened during the day time. Finally she said that she never asked a mobile phone from the accused and the accused never promised that he would buy a mobile phone for her.
21. In the re-examination victim said that she did not complaint to village headman due to fear of her husband.
22. Ilisoni Josua is the husband of the victim and son of the accused. He lived with the accused's father until he left for Taveuni. Accused house is situated about 50 meters away from the village. One day in the month of November 2012, he had gone for a funeral and came back home at about 11.00pm. On the following day the victim had told him that the accused had forcefully had sexual intercourse with her. He advised her to solve that problem with herself otherwise his father would do something to him. He did not take any action due to fear of the accused.
23. In the same month the victim had reported another incident happened in day time. This time witness had gone to the farm. The victim had told him that the accused forcefully had sexual intercourse with her in his absence. Though victim wanted to report the matter to police, due to fear of the accused he did not report but vacated the house and went to victim's uncle's house.

24. In the cross examination witness admitted that his accused's father decided to give the house to his younger brother. Due to this a disagreement happened between him and his accused's father. He agreed due to this unhappiness a false allegation levelled against the accused.
25. In the re-examination witness said that the unhappiness is that he not liked what his father did to his wife.
26. Dr. Mesulame Namedre a MBBS doctor with about 05 years experience examined the victim on 12/04/2012. He performed the examination at Seaqaqa Health Centre at about 10.15am. He examined the victim in presence of staff Losalini. According to the history, the victim was sexually assaulted on two separate occasions in November last year when she was alone with her children. According to his specific findings, no tenderness or laceration was noted in her vagina. In his conclusion the doctor said that due to age of the assault and through physical examination, the findings do not shut out nor confirm forced sexual intercourse.
27. In the cross examination witness said that injuries and marks could exist with the extent of injuries sustained during forced sexual intercourse.
28. In the re-examination witness said that he would not expect injuries from a mother of three who was examined after 06 months of forced sexual intercourse.
29. DC Nacenieli Dralivi was the investigating officer in this case. He has 14 years experience in Fiji Police Force. Presently he is attached to Seaqaqa Police Station CID Branch. On 12/04/2012 he has recorded the complaint and took the victim for a medical examination at Seaqaqa Heath Centre. On the same day he had gone to Batiri Village, arrested the accused, visited the crime scene and prepared a sketch. After coming to Seaqaqa Police Station he recorded the caution interview statement of the accused in Fijian Language. The interview was started on 12/04/2012 at 16.30 hours and concluded at 12.30 hours on 13/04/2012. Between this period 04 breaks were given to the accused. Accused was given all of his rights. Although the accused requested Legal Aid assistance the witness was unable to provide the same. Also he could not arrange accused to meet Pastor Rupeni in Seaqaqa. The accused was normal and no complain received during or after

recording his caution interview statement. The original caution interview statement was marked as P(a) and typed English Language translation was marked as P(c). He identified the accused in open court.

30. In the cross examination witness admitted that the accused is an illiterate person. As per the request of the accused he could not provide a service of a Legal Aid Counsel and a meeting with Pastor Rupeni before recording the caution interview statement. Witness admitted that he failed to ask from the accused whether he was scared or confused before or after recording his interview. Finally he admitted that his rights were not given properly.
31. In the re-examination witness said that the accused fully understood Fijian Language at the time of recording his interview.
32. PC 4559 Jonacani was the charging officer and he charged the accused at Seaqaqa Police Station. The accused said nothing during the charging. The charge statement was marked as P3.
33. In the re-examination witness said that the right to have a Legal Aid counsel was not given. He admitted that proper procedure was not followed in this case.
34. That is the end of prosecution case. Defence was called and explained the rights of the accused. After understanding his rights he elected to give evidence from witness box.
35. According to the accused he was residing at Batiri since his birth. He has his own house. He has not gone to school. He is an illiterate person. He does farming for his living. His house is situated across the road. The other side of the road is the village. There are about 50 houses in the village. The distance between his house and closes houses is about 40 meters. One day in the month of November 2012, at about 11.00 am in the morning he got stomach pain. As nobody was at home except the victim and her children, he requested the victim to massage his stomach. While massaging the victim touched his penis and he got erection. Then he requested sex from the victim and she agreed. As per her direction he locked the two children in the bathroom and went to the bedroom. Victim then removed her clothes and he

too removed his clothes. Thereafter he had sex with the victim with her consent.

36. In the same month once again he had sex with consent of the victim. This time they had sex in the front room which is facing the road. The time was 10.00am and victim's children were sleeping. After sex, victim asked for a mobile phone and he sought time to buy the same. After three weeks the victim went to see her sick father who lived in the other side of the village. Before victim went to see her father a discussion taken place as to who is going to inherit the house of the accused. As he told that he was going to give the house to Rupeni, the victim and her husband were not happy about his decision. The victim asked the mobile phone after she returned from her father's house. The accused sought further time to buy the same.
37. One day he saw a police jeep from Seaqaqa Police had come to his house and looked for him. He was then taken to police station on the allegation that he raped his daughter-in-law. He got a shock after hearing the allegation. He got tired travelling in the police vehicle as he was suffering from Peptic Ulcer Disease since 2002. A letter which was issued by a Medical Officer from Seaqaqa Health Centre, was marked as D1 by the defence. At the police station his statement was recorded. At that time he was not in a proper mind to give a statement. As he was shocked and not in proper mind, he agreed the allegation put against him. Finally he said that the house which has a generator is about 100 meters away from his house.
38. In the cross examination accused admitted that he had sex with his son's wife (daughter-in-law) with consent. He said that he never forced her for sex in the month of November, 2012. He denied that he locked victim's children in the bathroom. He said that he admitted the charge due to fear and fatigue due to his illness.
39. In the re-examination accused said that he had sex during the day time as in the night his house is fully occupied.
40. That is end of defence case.

Analysis of the Evidence

41. Madam and Gentlemen of Assessors, in this case the victim gave evidence first. According to her the accused had forcibly had sex twice in the month of November 2012 in the absence of her husband. On the both occasion though she brought this to her husband's notice immediately, her husband did not take any action due to fear of his father. She reported the matter as soon as she left the accused's house with her family. Though accused admits that he had sex with the victim with consent, the victim denied that suggestion vehemently. As assessors and judges of facts you have to consider her evidence very carefully.
42. Madam and Gentlemen of Assessors, you heard the evidence of Ilisoni Josua the victim's husband and son of the accused. He admitted that his wife brought to his notice the incidents immediately but he did not take any action due to fear of his father. In the cross examination he said that this is a false allegation against the accused as the accused decided to give his house to his younger brother. Consider his evidence with great caution.
43. Madam and Gentlemen of Assessors, the doctor gave evidence explained what he had noted after examination of victim's vagina. He had examined the victim after six months of the incident. He neither ruled out nor confirmed forced sexual intercourse. He gave evidence as an expert.
44. Accused admitted that he had sexual intercourse with his daughter-in-law with consent. This was vehemently denied by the victim. As Assessors and Judges of facts you have to consider this evidence very carefully.
45. As I told you earlier what an accused say in his caution interview statement is evidence against him. You have to satisfy that the accused made his caution interview statement to police voluntarily without any intimidation or oppression. In this case the accused is an illiterate person. He suffers from a disease called Peptic Ulcer. He says that due to his illness he was not in good mental status when his caution interview was recorded. The officer who recorded the caution interview of the accused admitted in this court that he could not give all the rights of the accused. Though accused requested a Legal Aid Counsel his request was not fulfilled. Further he wanted a pastor

be present during his interview recording, this request too was not fulfilled. As he has a sickness he was not taken to a doctor before or after recording of his caution interview statement. As Assessors and Judges of facts you have to decide what weight you are going to give to the caution interview statement of the accused. This is entirely a matter for you to decide.

46. Madam and Gentlemen of Assessors, in this case accused opted to give evidence from witness box. That is his right. But he has nothing to prove to you.
47. In this case the accused is charged for rape contrary to section 207(1) and 207(2) (a) of the Crimes Decree No: 44 of 2009. I have already explained to you about the charges and its ingredients.
48. Madam and Gentlemen of Assessors as per section 129 of the Criminal Procedure Decree 2009 no corroboration shall be required in sexual offence cases.
49. You have heard all the prosecution witnesses. You have observed them giving evidence in the court. You have observed their demeanour in the court. Considering my direction on the law, your life experiences and common sense, you should be able to decide which witness's evidence, or part of their evidence you consider reliable, and therefore to accept, and which witness's evidence, you consider unreliable and therefore to reject.
50. You must also carefully consider the accused's position as stated above. Please remember, even if you reject the version of the accused that does not mean that the prosecution had established the case against the accused. You must be satisfied that the prosecution has established the case beyond reasonable doubt against the accused.
51. Madam and Gentlemen of Assessors, remember, it is for the prosecution to prove the accused's guilt beyond reasonable doubt. It is not for the accused to prove his innocence. The burden of proof lies on the prosecution to prove the accused's guilt beyond reasonable doubt, and that burden stays with them throughout the trial.

52. Once again, I remind, that your duty is to find the facts based on the evidence, apply the law to those facts and come to a correct finding. Do not get carried away by emotions.
53. This is all I have to say to you. You may now retire to deliberate. The clerks will advise me when you have reached your individual decisions, and we will reconvene the court.
54. Any re-directions

I thank you for your patient hearing to my summing-up.



P Kumararatnam
JUDGE



At Labasa
30/04/2014