

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 102 OF 2013S

STATE

VS

TUVITA RAQILI

Counsels : **Ms. A. Vavadakua for the State**
Ms. N. Nawasaitoga for Accused
Hearings : **10 and 12 February, 2014**
Summing Up : **13 February, 2014**

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my 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 fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that 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.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:

"... [read from the information]...."

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, on 16 February 2013, at Caubati, in the Central Division, rape the complainant?

E. THE OFFENCE AND ITS ELEMENTS

9. For the accused to be found guilty of “rape”, the prosecution must prove beyond reasonable doubt the following elements:

- (i) the accused had sexual intercourse with the complainant, that is, his penis penetrated the complainant’s vagina;
- (ii) without the complainant’s consent; and
- (iii) the accused knew the complainant was not consenting to sex, at the time.

10. The slightest penetration of the complainant’s vagina by the accused’s penis, is sufficient to satisfy element 9(i) above. Whether or not the accused ejaculated, is totally irrelevant to element 9(i) above.

11. “Consent” is to “agree freely and voluntarily and out of her own free will”. If consent was obtained by force, threat, intimidation or fear of bodily harm to herself, that “consent” is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all.

12. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to sex, at the time. You will have to look at the parties’ conduct, at the time, and the surrounding circumstances, to decide this issue.

F. THE PROSECUTION’S CASE

13. The prosecution’s case were as follows. On 16 February, 2013, the female complainant (PW1) was aged 26 years old. She was in defacto relationship with her boyfriend (PW2), aged 27 years old, at the time. The two resided in a two bedroom flat in Caubati. They shared the flat with the accused (DW1), aged 39 years old, at the time. The accused was PW2’s uncle.

14. Early morning on 16 February 2013, a Saturday, the complainant and her boyfriend were at a nightclub, partying. At about 3 am, they returned home, and slept in a bedroom. Her boyfriend slept an arms' length from her. Approximately after 6 am, she awoke to find the accused ontop of her and having sex with her. She said, the accused held her thigh up with his left arm, and was thrusting his penis in and out of her vagina. With the other hand, he covered her mouth.
15. The complainant said, she was shocked, cried and tried to resist by sitting up. The accused nevertheless continued to have sex with her. After a while, the accused stood up, and left the room. She woke her boyfriend, and told him what the accused did. They later went to Valelevu Police Station and reported the matter. An investigation was carried out. Their statements were taken at Valelevu and later at Totogo Police Station. She was later medically examined at CWM Hospital.
16. On 26 February, 2013, the accused was caution interviewed by police. On 28 February, 2013, he appeared in the Nasinu Magistrate Court, charged with raping the complainant. According to the prosecution, the accused had sexual intercourse with the complainant on 16 February 2013, without her consent, and he knew she was not consenting to sex, at the time. Consequently, they are asking you to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

17. On 10 February 2014, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the rape allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was put to his defence, he choose to give sworn evidence, in his defence. He choose not to call any supporting witness. That was his right.
18. In his sworn evidence, he admitted he was at the crime scene, at the material time. He admitted, he returned from the nightclub, at about 4am, on 16 February 2013. He said, he had been drinking at the nightclub. He said, when he came into the bedroom, he saw the complainant (PW1), her boyfriend (PW2) and two others fast asleep. He said, the complainant was sleeping naked. He said, he was aroused and wanted to have sex with the complainant. He walked towards her, knelt

beside her, fondled her breast and vagina, pulled his pants down and touched his penis. He said, he sought no permission to touch her breast.

19. According to the accused, he wanted to have sex with the complainant, but couldn't get an erection. As a result, he couldn't insert his penis into the complainant's vagina. He later stood up and went away. According to the accused, he never had sexual intercourse with the complainant, because he was unable to get an erection. Consequently, he argued he is not guilty of rape, and asks you to find him not guilty as charged, and acquit him accordingly. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

20. The state's case against the accused stands or falls, on whether or not, you as assessors and judges of fact, accept the complainant's evidence. Her story was very simple. As a 26 years old, she and her boyfriend (PW2) went partying in a nightclub until 3 am on 16 February 2013. They returned to their flat at Caubati, and felt asleep in their bedroom. They were obviously exhausted. According to her, after 6 am on 16 February 2013, she awoke to find the accused ontop of her, having sex with her. According to her, he was thrusting his penis into her vagina continuously. With one hand, the accused held her thigh up, and with the other, he closed her mouth with the same. She said, she was absolutely shocked, and tried to resist by sitting up, but to no avail. She said, she cried. After a while, she said, the accused stood up, and left. She knew the accused as her boyfriend's uncle.
21. She later woke her boyfriend up, as he was sleeping beside her, at an arm's length. She said, she told him what the accused did. Her boyfriend confronted his uncle later. They reported the matter to police. The accused was investigated and later charged for raping the complainant.
22. The accused gave sworn evidence, in his defence. He did not deny that he was at the crime scene at the material time. He admitted he was drinking liquor in a nightclub until 4 am on 16 February 2013, when he returned home. He said, he entered the bedroom the complainant, her boyfriend and two others were sleeping. He said, he saw the complainant fast asleep and naked. It appeared that he felt aroused, and wanted to have sexual intercourse with the complainant. He

went towards her while she was asleep. He pulled his pants down, knelt beside the complainant, and fondled her breast. In his police caution interview statement [Prosecution Exhibit No. 2 (A) and 2 (B)], he admitted “playing” with the complainant’s breast and vagina [Questions and Answers 74, 75 and 76]. Note that you can only use his police caution interview statements if you accept that he gave the same voluntarily to the police and you accept it as the truth.

23. However, the accused said, despite his attempt to have an erection, he couldn’t get an erection. Consequently, according to him, he could not penetrate the complainant’s vagina with his penis, because he couldn’t get an erection.
24. The complainant was medically examined by Doctor Pio (PW3) at CWM Hospital on the same day ie. 16 February 2013 at 2.49 pm. Her medical report was tendered as Prosecution Exhibit No. 1. In D(10) of the report, the doctor recorded the complainant’s complaint as follows, “...**According to the victim, she alleges that she woke up this morning after a party and found the accused ontop of her already with penetration and forcing her thigh up, she struggled and he covered her mouth...**”
25. In D (12) of the report, the doctor recorded her medical finding as follows, “...**no obvious bruising on face (and) neck...vaginal examination – bleeding (menstruation) from vault, no other obvious signs of forced entry...**” In D (16) of her report, the doctor concluded as follows, “...**There is no physical signs of forced penetration. Patient is bleeding due to menstruation. This cannot however rule out sexual assault...**” Remember, the complainant was sexually active. She was in a defacto relationship with PW2. According to the accused, she was fast asleep naked. According to the complainant, she awoke to find the accused already ontop of her, thrusting his penis in and out of her vagina. One could argue, there was no need to apply physical force on the complainant at the start of the sexual encounter, because she was fast asleep, hence, the absence of any physical signs of forced penetration. In any event, how you interpret the doctor’s medical report, is a matter entirely for you.
26. The accused was caution interviewed by police on 26 and 27 February 2013, at Valelevu Police Station. The police asked him a total of 83 questions and he gave 83 answers. In the parties’

Agreed Facts dated 16 September 2013, they agreed to tender the accused's caution interview statement, as evidence. As such, it was submitted by prosecution as Prosecution Exhibit 2A (i-taukei version) and 2 B (English version). The significance of the above concession by the defence, was that, it appeared they did not challenge the voluntariness of the above statements. In other words, it appeared they agree that the accused gave the above statements to the police voluntarily and out of his own free will. As such, as a matter of law, you are entitled to use the accused's above police statements, either for or against him, if you are sure he gave the same to the police voluntarily and out of his own free will, and they contained the truth.

27. The accused gave mixed answers in his caution interview statements. In some of his answers, he admitted the offence. See, for example, Questions and Answers 15, 46, 47, 48, 50, 61, 62, 63, 65, 72, 73, 74 and 76. In some of his answers, he denied the offence. See, for example, Questions and Answers 66, 67, 68, 69, 70, 71, 75, 77, 79, 80 and 81. Your acceptance or otherwise of his above admissions and denials will depend largely on his credibility as a witness. If you find him to be a credible witness, you may accept and/or reject some of his statements. Likewise, if you find him not to be a credible witness, you are entitled to reject his denials. It is a matter entirely for you.
28. On the whole, your decision on the case will depend largely on who you think is the more credible witness. Was the complainant credible as a witness? Was the accused credible as a witness? You have observed them give evidence during the trial. Who was the more forthright of the two? Who was the evasive witness of the two? Who, do you think, from your point of view, was telling the truth? If you decide that the complainant was the more credible witness of the two, then you must find the accused guilty as charged. If you decide that the accused was the more credible witness of the two, then you must find him not guilty as charged. It is a matter entirely for you.

I. SUMMARY

29. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it 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. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt,

you must find him guilty as charged. 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.

30. Your possible opinions are as follows:

(i) Rape : Guilty or Not Guilty

31. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions.

Salesi Temo
JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva
Solicitor for the Accused : Legal Aid Commission, Suva