

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 277 of 2013

STATE

V

SUMITH CHAND

Counsel: Mr. S. Nath with Mr. R. Kumar for the State
Ms. T. Kean (L.A.C.) for the accused

Dates of hearing: 6, 12 and 13 November 2014
Date of Summing Up: 14 November 2014

SUMMING UP

1. The time has now come for me to sum up the evidence in this case and to direct you on the law. When I do so, you must accept what I say about the law and apply it to the facts.

2. You are the Judges of the facts and whatever you say about the facts is paramount and I must give your opinions the greatest amount of weight when I come to consider the final judgment of the Court. If in the summing up I express an opinion on the facts and I do, then you can reject my opinions unless you agree with me and come to your own opinions. I have no right to usurp your view of the facts. On assessing the evidence of witnesses, you may accept all of what a witness says, you may reject all or you may reject or accept part of the evidence.
3. It is for you to tell me what you believe the facts of this case are by applying the law as I direct you and then by telling me if in your opinion the accused is guilty or not guilty of the crime of rape.
4. You will judge this case solely on the evidence that has been heard or seen in this Courtroom. Evidence consists of oral evidence from the witness box, agreed facts put before you, documentary evidence such as the records of interview, and photographs if you think they assist you. All of that is evidence and you must consider it all.
5. You will not judge this case on anything that you have heard or seen outside of the Courtroom – that would not be fair to the accused person.
6. Similarly you will not let any sympathy or prejudice play a part in your deliberations. If you have strong views on young people having sex, then you will put those views to one side. Similarly, don't be swayed by the father's strict moral code and the lifestyle it appears his daughter was leading. All of that is irrelevant.

7. I make no apologies for repeating to you what I said at the beginning, because it is important. That is that you can only find the accused guilty if you have been made sure by the State prosecutor that he is guilty – that is you are certain beyond reasonable doubt. Reasonable doubt is not any little niggling doubt – your doubt must be reasonable and if it is, then it is your duty to return an opinion of not guilty. The accused does not have to prove anything. The burden is on the State to make you sure of the guilt of the accused, no matter what he might say in evidence.
8. As you are well aware the accused is charged with rape. Rape in our law is sexual intercourse without consent. To find this crime proved you must be sure that it was indeed this accused who had sexual intercourse with Fareen, and at the time of the sexual intercourse she was not consenting to the act and he knew that she was not consenting.
9. I am sure that you will have no doubt that we have the right accused. It has never been a question of doubt that the identity of the rapist is in question. Both Fareen and Sumith admit that there was an act of sex in his bedroom that night so the only question for you to decide Madame and Gentlemen is whether Fareen consented to the act of sex that night. She says no; he says yes. So it is for you to decide that vital fact and give me your opinion of guilty if you believe Fareen and not guilty if you don't believe her.
10. As I will explain later, Sumith's evidence is something for you to consider but it doesn't really matter what he says. You must be sure after hearing the State's evidence whether it proves rape or not.

11. This has been a very short case and I am sure that the evidence is still fresh in your mind but it is my duty to remind you of what I think the important evidence is. Again I remind you that it is not for me to say what is important; it is you. If I stress something is important, then you will discard it if you think otherwise; and vice versa, if I fail to mention something which you think is important then you will give it the weight that you think fit.

12. The first and obviously main witness for the prosecution was the young lady herself, Ms Fareen Farisha. She told us that on the 7th July 2013 she was 16 years old. She was a student at Suva Muslim College. At 10pm that evening she was in her bedroom doing her homework when somebody knocked on the door. She opened the door to find Sumith, the accused. He smelt of liquor so she took him outside and told him to go home but he never went. So she took him to the gate to his home. It was only about 20metres away. She wanted him out of the way because she was scared her father might see them together – he was very strict. When they got to the house she saw 4 boys inside talking and when they saw her they left. One of them took the key to the outside gate with him. Sumith then turned off the lights and took her to the bedroom. He started to take off her clothes. She struggled and pushed him. They were both standing and he pulled her down on to the bed. When he had removed her clothes, he started kissing her and he penetrated her with his finger but she pushed him away. He came on top of her and put his penis inside her. She pushed him away but he did the same thing again for about 5 minutes before leaving the room. He was watching TV and she stayed in the bedroom until 5am. She had gone to sleep and when she woke she went out to use his phone. She called a neighbor, Steven who said he would come to pick her up.

13. What occurred after that, Madam and Gentlemen, is largely irrelevant to the allegation but the lady did tell us of various taxi journeys she made, of meeting her angry father at Fatty's Shop and of her father and her brother confronting the accused and beating him.
14. She said that on her father's orders she went to Valelevu Police Station to make a report. At the Police Station her father made the report. Her mother, grandmother and a Policeman took her to CWM for a medical examination two days later. She gave two statements to the Police. Two because she was afraid and nervous. She admitted that she has known Sumith for about a year and he was a "normal friend".
15. In cross-examination she admitted that she had met Sumith at about 4pm just in passing on the road and she admitted that she cared for him. She was unable to answer why she called Steven and not the Police or her home. She admitted that she was scared of her father.
16. She admitted also in cross-examination that in her first statement to the Police she had said that when they met at 4pm he had asked her to meet at 10pm and she had agreed. She told Police that she had left home at 10pm and had met him on the road and at his request she had followed him home where his friends were.
17. She said that she had lied to the Police when she said that because she was frightened.
18. Now Madam and Gentlemen, I have to direct you in law that whatever somebody says in Court is the real evidence. It takes precedence over anything inconsistent that they have said at an earlier time out of Court. However having two different versions

of the same episode might lead you to have doubts about the truthfulness of the witness. If she lied to the Police, is she lying to us? You cannot accept what she said to the Police as the truth. You can only accept what she says in Court but it might cause you to doubt her credibility. It is all a matter for you.

19. Her father gave evidence to say that he got a message from a taxi driver that Fareen had been seen at Fatty's shop. He went there and met her. She told him that she had "been with Sumith" and he said he wanted to meet that guy. He went to get him and took him to the Police Station for them to deal with him. He said he was angry because Fareen had slept with him.
20. A doctor from CWM examined Fareen on the 9th July 2013. You might find that his report is not very helpful in proving rape. The only thing that the examination was able to prove was that Fareen was not a virgin (nothing more - nothing less). There were no signs of violence or bodily injury.
21. A Police Officer produced the record of the accused's interview under caution. You have seen the record and it was read out to you.
22. This record has been produced by consent and there is no reason why you cannot use the answers in it as you think fit. It is evidence for you to consider in the normal way.
23. You will see in the interview that Sumith says that there was sex that night but it was instigated by Fareen herself and she was fully consenting to the acts. He said there that they had sex twice that night.

24. Well Assessors, that was the end of the Prosecution case. You heard me tell Sumith what his rights are in defence and having been advised by his counsel he elected to give sworn evidence.

25. I must tell you this. Sumith didn't have to give evidence. He could have remained silent and say that the State had not proved the case against him. The fact that he chose to give evidence does not alter that burden on the State. So it doesn't really matter what you make of Sumith's evidence. If you find that the State has proved to you so that you are sure that he raped Fareen then his evidence is for you to consider but does not affect your finding. Again if you find that the State has not proved their case beyond reasonable doubt then it doesn't really matter if you believe Sumith or not.

26. Sumith told us that on the 7th July 2013 he was going home between 4 and 5 and he met Fareen on the road. She later texted him to say that she wanted to go to her friend's house because she had had an argument with her mother. He told her to come to his place and she came with a bag of her clothes. His friends were there. She texted him at 10pm. When the friends had left Fareen said she was not a virgin and asked to have sex with him. They then had sex in the bedroom, before going to sleep in the bed. In the morning she woke and said that she wanted to go to her friend's so she called a taxi and Sumith opened the gate. She left at about 1pm. In the evening she came with her father and another and they asked him to go to the Police Station. The father punched him in the taxi. Father took him to their house where he was punched again. He said that Fareen had been suspended from school for 2 weeks, she had had an argument with her mother and she didn't want to be at home – she had packed her clothes and had come to him.

27. Sumith added that she had been to his place once before and they had had sex that time too.
28. In cross-examination, he stuck to his story and added that she liked the sex that they had.
29. Well, that is the end of my review of the evidence. It is now time for you to retire and consider your opinions. It would be best if you could all be agreed but that is not strictly necessary. You will be asked individually for your own opinions when you return.
30. Tell one of my staff when you are ready and I will reconvene the Court. You may retire now, but just before you do I am going to ask Counsel if they wish me to add or change anything I have said about the law.
31. Counsel?



At Suva

14 November 2014

P.K. Madigan

Judge