

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 274 of 2014

STATE

v

ESEKAIA DAULAKO

Counsel: Ms S. Navia with Ms S. Tivao for the State
Mr. M. Yunus (L.A.C.) for the accused.

Date of trial: 20, 21 July 2015,
Date of Summing Up: 22 July 2015

SUMMING UP

1. Ladies and Gentleman assessors. It is now my duty to sum up to you. In doing so, I will direct you on matters of law which you must accept and act on. You must apply the law as I direct you in this case.
2. As far as the facts of this case are concerned, what evidence to accept, what weight to put on certain evidence, which witnesses are reliable, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts, or if I appear to do so it is entirely a matter for you whether you accept what I say or form your own opinions. In other words you are masters and the judges of facts.

3. Counsel for the prosecution and the defence had made submissions to you about how you should find the facts of this case, They have the right to make these comments because it is part of their duties as counsel. However you are not bound by what counsel for either side has told you about the facts of the case. If you think that their comments appeal to your common sense and judgment, you may use them as you think fit. You are the representatives of the community of this trial and it is for you to decide which version of the evidence to accept or reject.
4. You will not be asked to give reasons for your opinions, but merely your opinions themselves, and you need not be unanimous although it would be desirable if you could agree on them. Your opinions are not binding on me and I can assure you that I will give them great weight when I come to deliver my judgment.
5. On the issue of proof, I must direct you as a matter of law that the onus or burden of proof lies on the prosecution to prove the case against the accused. The burden remains on the prosecution throughout the trial and never shifts. There is no obligation upon the accused to prove his innocence. Under our system of criminal justice an accused person is presumed to be innocent until is proved guilty.
6. The standard of proof is one of proof beyond reasonable doubt. This means that before you can find the accused guilty of the offence charged, you must be satisfied so that you are sure of his guilt. If you have a reasonable doubt about the guilt of the accused, then it is your duty to express an opinion that the accused is not guilty. It is only if you are satisfied so that you feel sure of the guilt of the accused that you can express an opinion that he is guilty.

7. Your opinions must be based only on the evidence you have heard in the courtroom and upon nothing else.
8. The accused faces two charges of rape. In our law and for the purposes of this trial, rape is committed when a person penetrates the vagina of another and where the person doing that does not have the consent of the victim or is reckless to whether she was consenting or not. The penetration can be by penis, finger, tongue or any object.
9. The accused is charged with two counts and you must look at each count separately. Just because you think he might be guilty of one count does not necessarily mean he is guilty of both and similarly with a finding of not guilty.
10. The first count is what is called a representative count. What that means is that the State is saying that in the period charged (that is February and March 2014) there was more than one act of rape, but they only charge one as a representation of the entire offending. What you are asked to do in this situation is to find that there has been at least one act of penile rape in those two months. If you find that there has been at least one, then you may find the accused guilty of the representative count. You will find him not guilty if you find that there has not been at least one act of rape.
11. The second count is another charge of rape but this charge relates solely to the allegation that the accused penetrated her vagina with his finger. It is not a representative count, so what the State is asking you to find is that in the period of February and March 2014 the accused penetrated Francis with his finger and that he did that without her consent.

12. Consent is a matter of evidence from the victim. You may believe her or not believe her on this issue, but I must also add that our law says that consent is not freely given if it is obtained by the exercise of authority over her. What this means is that if she succumbed to his advances because of his being her elder and her guardian at the time, then that represents lack of consent.
13. This has been a very brief case and I am sure that the evidence is still fresh in your minds. However it is my duty to remind you of the main points of it.
14. Francis told us that in February/March 2014 she was 13 years old, about to turn 14. The accused was a relative of her Father and he lived in the same house with them. She said that the accused would come into the bedroom where she slept with her brother and sister. He would come in at night when she was sleeping, perhaps about 10pm or so. He would penetrate her with his finger without saying anything, then he would go out and later come back and penetrate her with his penis. He did this about 4 to 5 times in the two month period. Francis would cry and kick him away. She was scared of him and what he might do to her if she told anybody. So eventually she told her Mum because she wanted to get him out of her life and to be far away. She identified the accused as the man who she claims was doing this to her. She confirmed that she never consented to any of this happening. After she told her Mum, the Police were informed and she was taken for a medical examination.
15. Francis' mother was the next witness who told us that she found out about the sexual abuse from her two daughters on a date in July 2014 when she overheard them talking seriously. Francis told her the same story that she told is in her evidence in Chief. Mrs. Dickson was angry

and upset because he had been living with them since Francis was a baby and the children called him Uncle. She referred the matter to the Police.

16. I must tell you Ladies and Gentleman that there is no requirement in our law for the victim of rape to tell anybody else, or to tell anybody else as soon as possible. That used to be the law but it is no longer. You may find the accused guilty or not guilty on the strength of the evidence of the victim alone and on nothing else.
17. The third and final witness for the Prosecution was the Doctor who examined Francis in July 2014. He said that there were no injuries on her genitals, however the hymen was not intact and he could not rule out the possibility that there had been penetration of the vagina. He said that a hernia doesn't affect erection or ejaculation.
18. Well, that was the end of the prosecution case.
19. You heard me explain to the accused what his rights in defence are and he elected to give sworn evidence. Now I must direct you that in giving evidence the accused does not have to prove anything. The fact that he gives evidence does not relieve the State from proving their case to you so that you are sure.
20. Even if you don't believe a word he says, it does not make him guilty if the State has not proved the case beyond reasonable doubt. However if you think that what he says is true or may be true, then you will find him not guilty of the two counts of rape.
21. What the accused told us in evidence is this:

He was living with the Dickson family in February and March 2014. For the last five years (since 2009) he has been suffering from a hernia which prevents him from having sexual intercourse because he cannot sustain an erection. He denies any allegation that he invaded Francis neither with his finger nor with his penis. He used to discipline her about the housework and she didn't like it. He never approached her sexually, but he treated her like a sister's daughter.

The accused called a doctor who gave evidence of having examined him in Korovou prison. He was (in October 2014) suffering from a linguinal hernia which need surgery. The accused is still waiting for the surgery at CWM. The Doctor opined that in his condition it would most likely affect his ability to have sexual intercourse. But he later admitted that an erection was still possible but it would be uncomfortable.

22. Well ladies and gentleman that is all I wish to say to you about the evidence. It is now time for you to retire and consider your opinions. It would be better if you could all be agreed that is not strictly necessary. You will be asked individually for your opinion and you will not give a reason for it. Let a Member of my staff know when you are ready and I will reconvene the Court.
23. Redirections Counsel?

24. You may now retire.



At Suva
22 July, 2015

A handwritten signature in black ink, appearing to read "P.K. Madigan". The signature is written in a cursive style with a large, looping initial "P".

P.K. Madigan
Judge