

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC. 306 OF 2014

STATE

V

EPELI WAQANITABUA KELEI

Counsel : Ms. S. Puamau for State
Ms. T. Kean for the Accused

Dates of Hearing : 08th & 09th June 2016

Date of Summing Up : 09th June 2016

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies for this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty.
2. Evidence is what the witnesses said from the witness box in this court room and the admitted facts. Your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard such information.
3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion.

You heard the opening address and you heard the closing addresses. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.

4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
5. Please remember that I will not be reproducing the entire evidence of the case in this summing up. I would only refer to the evidence which I consider important to explain the case and the applicable legal principles. If I do not refer to certain evidence which you consider as important, you should still consider that evidence and give it such weight you may think fit.
6. During this summing up, if I express my opinion on the evidence or if I appear to do so, you are not bound accept such opinion. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
7. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court; how they conducted themselves in the witness box; how they answered the questions during examination-in-chief, cross-examination and re-examination. Applying your day to day life experience and your common sense as representatives of the society, you should decide whether you can believe what each witness said in court. You may decide that the entire evidence of a particular witness can be believed; or you may decide to believe only a part of the evidence and reject the other part; or you may reject the entire evidence of a witness if you decide that the entire evidence of that particular witness is not capable of being believed.
8. Based on the evidence of witnesses you may decide that certain facts are proved. In addition to those facts you would consider as directly proved, you may also draw reasonable inferences from those proved facts.

9. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment.
10. In assessing the credibility of a witness, it may be relevant to consider whether there are inconsistencies in his/her evidence or whether he/she had previously made a statement which conflicts with the evidence given in this court. You have to bear in mind that previous statements made out of court are not evidence except for those parts that are put to a witness as inconsistent versions. As I have already told you, evidence is only what came out from the witness box. When a counsel attempts to highlight an inconsistency, only the alleged inconsistent part in the statement is put to the witness and that part is all you need to consider when it comes to a previous statement made out of court.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what he/she said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
12. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. A victim's reluctance to complain could also be due to shame coupled with the cultural taboos existing in the society in talking about matters of sexual nature with others. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint.
13. You are not required to decide every point which has been raised by the lawyers in this case. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the elements of those offences have been proved.

14. When I say 'proved', as a matter of law you should remember that the burden of proof always lies on the prosecution. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. Under our criminal justice system, an accused person is presumed to be innocent until proven guilty.
15. The next question is; what is the standard of proof or to what extent the prosecution should prove the guilt of an accused? The standard of proof in criminal trials is one of proof beyond reasonable doubt. You must be sure of the accused person's guilt.
16. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. If you have a reasonable doubt in respect of any element of an offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. However, if you find that the prosecution has proved all the elements of a particular offence beyond reasonable doubt, you should find the accused guilty of that offence. I will explain you the elements of the offences in a short while.
17. In this case, the accused is charged with three offences. Therefore you should bear in mind to consider each count separately. You must not assume that the accused is guilty of the other counts just because you find him guilty of one count.
18. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion where all three of you agree on whether the accused is guilty or not guilty; but it is not necessary. May I also inform you that, according to our law, I am not bound to conform to your opinion and the final decision on the facts rests with me. But, you being the representatives of the society in this trial, your opinion will assist me immensely to arrive at my final decision.
19. Let us now look at the Information. DPP has charged the accused for the following offences;

FIRST COUNT
Statement of offence

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

Particulars of offence

EPELI WAQANITABUA KELEI on the 13th day of November 2014 at Samabula in the Central Division had carnal knowledge of **MAY MAFTUNA**, without her consent.

SECOND COUNT

Statement of offence

Rape: Contrary to Section 207 (1) and (2)(b) of the Crimes Decree No. 44 of 2009.

Particulars of offence (b)

EPELI WAQANITABUA KELEI on the 13th day of November 2014 at Samabula in the Central Division penetrated the vagina of **MAY MAFTUNA**, with his finger, without her consent.

THIRD COUNT

Statement of offence

Indecent Assault: Contrary to Section 212 (1) of the Crimes Decree No. 44 of 2009.

Particulars of offence (b)

EPELI WAQANITABUA KELEI on the 13th day of November 2014 at Samabula in the Central Division unlawfully and indecently assaulted **MAY MAFTUNA**, by kissing her on her lips.

20. In this case, there are certain facts which are admitted by both the prosecution and the defence. Those facts are before you. You should consider those facts as proven beyond reasonable doubt. Among other facts, it is admitted that the accused was present at the complainant's 21st birthday party on 12/11/14; and that on 13/11/14 early morning, the accused penetrated his penis inside the complainant's vagina.
21. To prove the offence of rape, the prosecution must prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) penetrated the vagina of the complainant with his finger or penis;
 - c) without the consent of the complainant;
 - d) accused knew or believed that she was not consenting or was reckless as to whether or not she was consenting.

22. The first element of the offence of rape is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
23. The second element of the offence of rape involves penetration. In the first count, it is alleged that the accused penetrated the complainant's vagina with his penis. In the second count, it is alleged that the accused penetrated the complainant's vagina with his fingers. The law states that this element is complete on penetration to any extent. It is not necessary to have evidence of full penetration or ejaculation. A slightest penetration either by a finger or penis is sufficient to satisfy this element.
24. The next two elements involve consent. The prosecution should prove that the accused penetrated the complainant's vagina without her consent. The prosecution should also prove that the accused knew that the complainant did not consent to the act or that the accused was reckless as to whether or not she was consenting.
25. What is meant by 'reckless as to whether or not she was consenting'? If the accused was aware of the risk that the complainant may not be consenting for him to insert his finger or penis inside her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate her vagina with his finger or penis, you may find that the accused was reckless as to whether or not she was consenting. Simply put, you have to see whether the accused did not care whether she was consenting or not.
26. Third count involves the offence of indecent assault. The elements of the offence of indecent assault are;
 - a) the accused
 - b) unlawfully and indecently
 - c) assaulted the complainant
27. Again, the first element involves the identity of the accused.
28. The word "unlawfully" simply means without lawful excuse.
29. An act is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent.

30. Assault is the use of unlawful force. Accordingly, a physical contact constitutes an assault if it is done without a lawful excuse.

Case for the prosecution

31. Complainant said that she had her 21st birthday party on 12/11/2014 at her house. She had about 10 nips of Vodka before she left with her friends to go to a night club around 9.30pm. She did not drink much alcohol at the night club. She came back home around 3.00am on the following morning. She slept in her bedroom with her 1 year old daughter. She woke up around 4.00am to go the bathroom. To reach the bathroom, she had to go pass the living room where her brother William and the accused were sleeping. She walked around the two to reach the bathroom. When she came out of the bathroom, the accused was standing outside the bathroom and then he kissed her. She did not expect this, as he was her cousin and she regarded him as a brother. She pushed him away and asked what's wrong with him. Then she went to her bedroom and went to sleep. She did not raise an alarm because she was shocked and scared.
32. She woke up again when she felt a pain in her vagina. She said the accused's two fingers caused that pain. However, at that point she did not realise that it was the accused. She thought she was dreaming because she did not see anyone inside the room and the mosquito net was still down. She went back to sleep. She woke up again when she felt a heavy weight on her body. When she woke up she saw accused's face and realised that he was having sex with her. His penis was inside her vagina. She kicked him. She said the accused did not ask her at any point prior to that whether he could have sex with her. After she kicked him, it took the accused few seconds to pull out. He got up, stood next to the bedroom door and pulled his zip up. At that time her dress was pulled up to her stomach and she was not wearing her underwear. She said she did not remove her underwear. Then the accused crawled under her bedroom curtain and went to the mattress he was sleeping. She said, there was a solar light hanging in their living room which brightens the living room, her bedroom and her parent's bedroom, throughout. She reported the matter to the police on 14/11/14. It took her about 24 hours to report because she was ashamed, scared and shocked.
33. During cross examination, it was suggested to her that the reason that she did not complain to anyone about the accused kissing her and inserting his fingers inside her vagina was because the accused never did those things to her. She denied. She also

denied that she woke the accused up by kicking his legs on her way back from the bathroom, and that she told the accused to come to her room with her. She agreed that it is stated in her statement made to police that she woke up around 4.00am when she felt someone having sex with her, where she said in court that she woke up around 4.00am to go to the bathroom. She said the accused pulled out, when she pushed and kicked him and at that time he also heard her parent's bed squeak. It was suggested to her that the reason she did not complain to anyone in the house after the accused left her room that morning is because she had consensual sex with the accused. She denied this. She said she told her mother about the incident on 14/11/14.

34. In re-examination she confirmed that it was 4.00am when she went to the bathroom.

Case for the Defence

35. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give sworn evidence.
36. Accused said that he was at the complainant's birthday party on 12/11/2014 and he was drinking kava with his relatives before the complainant and her friends left that night and he was still drinking when they returned early morning on 13/11/14.
37. He said while he was sleeping, the complainant kicked him and then she told him to go to her room. He sat for a while and then followed her to her room. He said when he entered the room the complainant was looking at him. Then he got onto the bed and had sexual intercourse with her. According to him, he knew that the complainant was "ok" for him to have sex with her because she did not say anything and because she was moaning. He said the complainant did not tell him to stop or expressed that she did not like what he was doing.
38. During cross examination he denied meeting the complainant after she came back from the bathroom that morning. But he admitted that he told the police that he met the complainant when he went to the toilet. He denied kissing her in the living room. He denied inserting his finger into the complainant's vagina. He said the complainant consented for him to have sexual intercourse with her.

39. In re-examination he said what he said in court was the correct version and not what he told the police.

Analysis

40. With regard to the first count, you have to decide whether the complainant consented for the accused to insert his penis into her vagina and whether the accused knew that she was not consenting or whether the accused did not care whether she consented or not.
41. The prosecution says that the accused inserted his penis inside the complainant's vagina when she was asleep and that the accused never obtain the complainant's consent.
42. The defence says that the complainant told the accused to come to her room that morning and then the complainant and the accused had consensual sexual intercourse. According to the defence, that is the reason why the complainant did not inform anyone about the incident soon after though she had the opportunity.
43. With regard to the second count, the complainant said that the accused's two fingers caused the pain she felt that morning inside her vagina while she was sleeping. She also said that she did not see the accused inserting his fingers. As she did not see anyone when she looked around after she felt the pain, she went back to sleep.
44. The accused denies this allegation.
45. The prosecution says that they are relying on circumstantial evidence to prove the second count. Therefore you should consider the circumstances presented by the prosecution in relation to the second count. You should first consider whether the evidence relating to the circumstances is credible and reliable and if so, you should then consider, when taken together whether those circumstances will lead to the only conclusion that it was the accused who committed the crime. The circumstances were;
- a) Complainant felt a pain inside her vagina while she was sleeping inside her bedroom with her daughter;
 - b) She felt that that pain is caused by two fingers;

- c) When she looked around after she felt the pain, she did not see anyone inside her bedroom;
 - d) At that time complainant's parents were sleeping in their bedroom;
 - e) At that time the complainant's brother and the accused were sleeping in the living room; and
 - f) The next time she woke up, she realised that the accused was having sex with her.
46. You have to ask yourselves, whether the above circumstances and any other circumstance which you may decide to consider, are sufficient to prove beyond reasonable doubt that someone inserted two fingers inside the complainant's vagina that morning while she was asleep; and it was the accused and no one else who did that. If you are sure that the accused did penetrate his fingers inside the complainant's vagina then you should also consider whether the complainant consented for the accused to do that, and whether the accused knew that she was not consenting or whether the accused did not care whether she consented or not.
47. With regard to the third count, the prosecution says that the accused kissed the complainant on her way back from the bathroom that morning. Accused denies this allegation.
48. It is for you to consider whether the accused unlawfully and indecently assaulted the complainant on the day in question by kissing her as alleged by the prosecution.
49. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case.
50. The defence says that there are inconsistencies in the complainant's evidence and the prosecution says that there are inconsistencies in the accused's evidence. In dealing with inconsistencies, first you have to be satisfied that in fact there is an inconsistency. If you are satisfied that there is an inconsistency, then you should consider whether that inconsistency is material and relevant to the case and whether there is any explanation given with regard to the inconsistency. It is for you to decide what weight you would give to the evidence of a witness in view of any inconsistency you find in that evidence.

51. I should also direct you with regard to the relevance of intoxication to the offence of rape. In this case there was evidence that both the complainant and the accused had been drinking. Drunkenness can affect a complainant of a rape case in two ways. Firstly, a person who is drunk, depending on the degree of intoxication, may do things which he/she would not do or less likely to do if he/she is not drunk. Secondly, a complainant may get drunk to the extent that his/her capacity to exercise a choice is totally removed.
52. It is for you to decide the extent of the complainant's drunkenness based on the evidence and whether her drunkenness had any bearing on what took place on the morning in question.
53. When it comes to a rape charge, according to our law, drunkenness or intoxication which is self-induced is not a defence. You need to look at all the circumstances as they would have appeared to the accused had he been sober. It is not a defence for an accused in a rape case to take up the position that he would not have behaved in the way he did, had he not been drunk. Therefore, considering the circumstances of this case you should bear in mind that intoxication cannot be considered as a defence.
54. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
55. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each offence;
 - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty of an offence charged. The situation would then be the same as if he had not given any evidence at all. You should

still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

56. Any re-directions?
57. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
58. Your possible opinion should be as follows;
- 1st count – guilty or not guilty
(Rape)
 - 2nd count – guilty or not guilty
(Rape)
 - 3rd count – guilty or not guilty
(Indecent Assault)



Vinsent S. Perera
JUDGE

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