

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 88 OF 2013

BETWEEN : STATE

AND : AMINIASI MASEI

Counsel : Mr. S. Babitu for State
Miss. S. Nasedra for the Accused

Date of Hearing : 12th of July 2016

Date of Closing Submissions : 13th of July 2016

Date of Summing Up : 14th of July 2016

SUMMING UP

1. It is my duty to sum up the case to you. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. You are to determine the facts of the case, based on the evidence that has been placed before you during the course of the hearing. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give you as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard my comments on the facts unless it coincides with your own independent opinion. I say so because you are the sole judges of the facts.
4. You all have been chosen from the community and represent a pool of common sense, knowledge and experience of the conduct of human beings in our community. Accordingly, you are required to use your experience, common sense and knowledge of the community and the conduct of human in your deliberation of facts of this case.
5. You must reach your opinion on evidence. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits and agreed fact. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel of the prosecution is not evidence. The purpose of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the accused are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimonies, agreed facts and

the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.

7. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that your opinion will assist me in reaching my judgment.
8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.
9. Matters which will concern you are the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.

10. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his own evidence but also with other evidence presented in the case.
11. It is your duty as judges of facts to consider the demeanour of the witnesses, how they react to being cross examined and re-examined, where they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he testifying, his disinterestedness, his integrity, and his veracity in order to determine the credibility of the witness and his evidence.

Burden and Standard of Proof

12. I now draw your attention to the issue of burden and standard of proof. The accused person is presumed to be innocent until his is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused person is guilty for the offence.
13. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused person is presumed to be innocent until he is proven guilty. Accordingly, the burden of proof rest on the prosecution throughout the trial and it never shifts to the accused person. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.

14. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused person’s guilt. If there is a riddle in your mind as to the guilt of the accused person after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused person beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information

15. The Accused is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars of the offence are before you. Hence, I do not wish to reproduce it in my summing up.
16. The prosecution alleges that the accused pulled the victim into the sugar cane field by his collar, while he was walking back after nature’s call. He then asked to victim to remove his pants. The accused then inserted his penis into the anus of the victim without the consent of the victim.
17. The main elements of the offence of rape as charge in the information are that;
- i) The Accused,
 - ii) Penetrated into the anus of the victim with his penis,
 - iii) The victim did not consent to the accused to penetrate into his anus with his penis

iv) The Accused knew the victim was not consenting for him to insert his penis in that manner.

18. Prior to taking your attention to the main elements of the offence of Rape in detail, I kindly request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven facts by the prosecution beyond reasonable doubt.
19. The prosecution and the defence have agreed that the accused and the victim are known to each other. The accused completely denies this allegation. Hence, it is the onus of the prosecution to prove beyond reasonable doubt that it was the accused who penetrated into the anus of the victim.
20. The second element is the penetration into the anus of the victim. Evidence of slightest penetration of the penis of the accused is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.
21. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven that the victim did not give his consent to the accused to insert his penis into his anus.
22. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the victim consents only, if he had the freedom and capacity to voluntarily make a choice and express that choice freely. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.

23. If you are satisfied, that the accused had inserted his penis into the anus of the victim and he had not given his consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed that the victim was freely consenting for this alleged sexual intercourse.
24. I must advise you that belief in consent is not the same thing as a hope or expectation that the victim was consenting. You must consider whether the accused knew either that the victim was not in a condition or a position to make a choice freely and voluntarily, or the victim had made no choice to agree to sexual intercourse. If you conclude that the accused believed that the victim was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that was prevailed at the time of the alleged incident took place.
25. You must bear in mind that offences of sexual nature do not need the evidence of collaboration. It means that if you are satisfied with the evidence given by the victim and accepts it as reliable and truthful, you are not required to look for any other evidence to support the account given by the victim.
26. One or more of you may have assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape or a rapist or a victim of rape.

27. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses and the exhibits during the course the hearing.
28. It is your duty as judges of facts to assess the evidence in order to determine whether the accused penetrated into the anus of the victim with his penis and he had not consented for this alleged sexual intercourse. It will require an assessment by you of the evidence given by the victim. It is an assessment that you have to make. In doing that, you must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. It is impossible to predict how a victim of rape will react, either in the days following, or when speaking publicly about it in court. The experience of the court is that those who have been victims of rape react differently in giving evidence about it. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanor of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.
29. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.
30. The first witness of the prosecution is AB. He is the victim of this matter. The victim in his evidence stated that he was staying with his parent at Naviyago in 2013. He was fifteen years old in 2013. He is the only child of the family. He

recalls that on 6th of March 2013, he went to see one of his friends at his house. The friend's name is Angelo. He stayed at his friend's house for few minutes and then came out to nature's call. He went to nearby sugar cane field to nature's call. When he was coming back from the sugar cane field, he met the accused. The victim knows the accused as he has seen him before. The accused pulled the victim inside the sugar cane field by his collar. The accused then told him to pull down his pants. The victim stated that the voice of the accused was rough and he was really frightened. The victim pulled down his pants. The accused then inserted his penis into the anus of the victim. The victim in his evidence said that he knew that the accused inserted his penis into his anus. The victim was frightened. In few minutes time, the accused pulled out his penis and told the victim to put his pants on. He then told the victim to go home.

31. The victim in his evidence stated that he then went back his house. After few days of this incident, the victim has told his mother about it. The victim said that he had sleeping problem as this incident regularly came to his mind. That was the reason he told his mother about this incident. He told his mother about this after the morning prayer devotion at his house. The victim said that the accused told him not to tell anyone. That was the reason for not to inform his parent about this incident soon after it took place.
32. During the cross examination, the victim said that he sometimes go to visit his friends during the weekend. He could not recall whether 6th of March 2013 was a school day. He could not recall whether the 6th of March 2013 did fall on a weekend. The victim said that he could not recall whether other members of his friend's family were at home when visited his house. He further stated that he

should have either gone to the rest room of his friend's house or nearby vicinity for nature's call.

33. According to the evidence given by the victim, the sugar cane field is surrounded by two houses. Angelo's house is also close to the sugar cane field. There was a pig pan in that area. The victim stated that he did not see anyone when he went to the sugar cane field for nature's call.
34. The victim stated that the evidence he gave in court to the effect that the accused pulled him by his collar at the sugar cane field has not been mentioned in the statement he made to the police. He said that he could not recall whether the accused signaled him to stop at the sugar cane field.
35. The victim further stated that he saw the accused unzipping his trouser and taking out his penis. He cannot recall whether the accused used his both hands to do that. The victim said that if the accused used his both hands, he could have escaped from him. He further said that if he screamed for help, the families at nearby houses would have heard him. He said that he should have fought with the accused to escape.
36. The victim said that he did not lie to the police. He said that it was the accused who inserted his penis into his anus at the sugar cane field on that day. The house of his friend is not close to his house. It takes about three to four minutes to go there from his place. The victim stated that he never saw the accused after this incident. His mother was not at home as she had gone to work when he came home after the incident. His father was at home. He said that he neither told his father nor the mother about this incident when he came home on that

day. He said that he started to have problems with his sleeping after this incident. He further said that he could not sleep because this incident actually took place.

37. The victim in re-examination stated that he was not in school on the day this alleged incident took place. He further said that he did not try to escape as he was frightened. He did not inform his parent about this matter as the accused told him not to tell anyone of this incident.
38. The second witness of the prosecution is Keiyasi Kuruiqara. She is the mother of the victim. She in her evidence stated that she found her son was still staying on the settee after the early morning session of prayer devotion. She asked him why he was not going to sleep. When she asked him first time he did not give any reply. She asked him again. The victim then told his mother that something bad happened to him. He then told his mother about this incident. Mrs. Kuruiqara then waited till the morning and went to the police station to report this incident.
39. During her cross examination, she stated that the victim was a healthy child and she did not notice any problem with his sleeping until he told her about this incident. She further stated that the house of Angelo is not far and it takes about ten minutes walk to go there from her house. She knows the sugar cane field where this alleged incident took place. She said that the sugar cane field is surrounded by two houses.
40. The last witness of the prosecution is WDC Irene. She in her evidence stated that she could recall receiving of this report on the 3rd of April 2013. This report came after about four weeks of the alleged incident took place.

41. At the conclusion of the prosecution case, the accused person was explained about his rights in defence. The accused person opted to give evidence on oaths. However, he advised the court that he does not wish to call any other witnesses for his defence.
42. The accused gave evidence on oaths. He stated that he does not know why he was brought into this matter. He completely denied the allegation.
43. During the cross examination the accused stated that he was staying at Naviyago in March 2013.
44. I have summarised the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Analysis

45. The prosecution and the defence presented conflicting versions of event. The prosecution alleges that the accused came and pulled the victim into the sugar cane field, while the victim was walking back after nature's call. He then forced the victim to remove his pants and inserted his penis into the anus of the victim. In contrast, the accused claims that he does not know anything of this matter and completely denied this allegation. The prosecution and the defence agreed that the accused and the victim are known to each other.

46. Accordingly, the case of the prosecution against the accused is mainly founded on the correctness of recognition of the accused by the victim. I must warn you of the special need for caution before convicting the accused in reliance on the evidence of recognition. A witness who is convinced in his/her own mind may, as a result, be a convincing witness, but may nevertheless be mistaken of recognition of even a known person.
47. You should therefore examine carefully the circumstances in which the recognition was made by the victim. How long did the victim have the person under his observation? At what distance? In what light? Did anything interfere with the observation? Had the victim ever seen or known the accused before? If so, how often? If only occasionally, had he any special reason for remembering him?
48. Let me now draw your attention to the circumstances where the victim made his recognition of the accused.
49. As I mentioned above, the prosecution and the defence agreed that the accused and the victim are known to each other. Hence, the issue in this matter is whether the victim clearly and correctly recognised the accused as the person who inserted his penis into his anus. The victim gave evidence that he saw the accused when he pulled him into the sugar cane field by his collar. He stated that the accused told him to pull down his pants. His voice was rough. He saw the accused unzipping his trouser and taking his penis out. He then saw the accused inserted his penis into his anus when he looked back. Meanwhile, the accused denies this allegation.

50. During the cross examination, the learned counsel for the accused suggested to the victim that it was not the accused person who committed this crime. The victim answered that it was the accused who did this and it was actually happened on that day.
51. I must emphasise to you that the questions posed by the learned counsel for the defence during the cross examination are not evidence. What contents in those questions does not become evidence unless they are adopted or accepted by the witnesses in their respective answers.
52. I now draw your attention to the second element of the offence, whether the accused inserted his penis into the anus of the victim. As I mentioned above, the slightest penetration into the anus is sufficient to constitute the element of penetration. The victim in his evidence stated that the accused inserted his penis into his anus. He further stated that he saw it when he looked back at the accused. The accused denied the allegation. It is your duty as judges of fact to consider these evidence and to determine whether the prosecution has proven beyond reasonable doubt that the accused penetrated the anus of the victim with his penis.
53. The next element is the consent of the victim. The victim in his evidence stated that he did not consent the accused to penetrate his penis into his anus. According to the evidence given by the victim the accused pulled the victim into the sugar cane field by his collar. He told him to remove the pants of the victim.
54. You may recall that the learned counsel proposed to the victim during the cross examination that he should have fought and escaped from the accused. For

which the victim said he should have. The victim further stated during the re-examination that he was really frightened and that was the reasons he could not escaped. As judges of the facts, you have to consider all of these evidence in order to determine whether the victim gave his consent or not for this alleged incident.

55. The victim was 15 years old at the time of this alleged incident took place. He is now 18 years old young adolescent person. You saw him giving evidence in court. An adolescent person as of the victim may not have the same standards of logic and consistency as of an adult person. His understanding may be difference from experience of an adult person for a number of reasons, such as the age, limited experience and immaturity. Life viewed through the eyes and mind of a young adolescent person may seem very different from life viewed by an adult. You must bear those consideration in your mind when you consider the answers given by the victim.
56. The learned counsel for the defence suggested that the lateness in complaining this matter to the parents by the victim makes it less likely that the complaint that he eventually made was true. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the nearest person they see. Others, who react with shame or fear or shock or confusion, or perhaps due to cultural taboos, do not complain or go to authority for some time. It takes a while for self confidence to reassert itself. A late complaint does not necessarily constitute a false complaint, likewise an immediate complaint does not necessarily constitute

a true complaint. It is matter for you to determine whether the lateness of the complaint affect the credibility and reliability of the evidence given by the victim. In order to do that, you need to consider what the victim said about his experience and his reaction to it.

57. The victim said that he did not inform his parents soon after this alleged incident took place. The accused has told him not to tell anyone. He further stated that he could not sleep well after this incident as it regularly came into his minds. He then told his mother about this. It was after about four weeks of this incident took place.
58. The evidence given by the mother of the victim, explaining what her son told her regarding this alleged incident is not evidence as to what actually happened between the victim and the accused. She was not present and witnessed what happened between the victim and the accused at the sugar cane field on that day. The evidence of the mother only assists you in order to determine the credibility and reliability of the evidence given by the victim. It is not independent evidence of what happened between the victim and the accused.
59. You might recall that the learned counsel for the accused person questioned the victim during the cross examination about the inconsistencies in his statements made to the police with the evidence given in court. He has told the police in his statement that the accused signaled him to wait. He then waited for him at the sugar cane field. However, the victim in his evidence stated that he saw the accused while he was going back after nature's call. The accused then pulled him into the sugar cane field by his collar. The learned counsel for the accused proposed you that the statement made by the victim to the police is not

consistence with the evidence given in the court. The evidence of the victim is what he told us in court on oaths. The statement made to the police is not evidence.

60. I now explain you the purpose of considering the previously made statement of the victim with his evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such a statement when you consider whether the victim is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents.
61. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
62. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.
63. Ladies and Gentleman, it is your duty now to consider whether the evidence presented by the prosecution is reliable and truthful. If you accept them as reliable and truthful, then you can consider whether you accept them as proven

facts. Likewise, you must consider whether the evidence presented by the accused could be accepted as reliable and truthful.

64. You heard the evidence presented by the accused, where he denied this allegation. If you accepted the version of the accused as reliable and truthful, then the case of the prosecution fails. You must then acquit the accused from this charge.
65. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.
66. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.
67. Upon consideration of all evidence, if you believe that the count of rape is proved beyond reasonable doubt, you can find the accused is guilty of the charge. If you believe that that charge is not proved beyond reasonable doubt, then you must find the accused not guilty.
68. Madam and gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions on the charge against the accused person. You will be asked individually for your opinion and are not required to give reasons for your opinion. Once you have

