

IN THE HIGH COURT OF FIJI

CRIMINAL JURISDICTION

AT LAUTOKA

CRIMINAL CASE: HAC 090 OF 2013

BETWEEN : STATE

AND : HARRY MOSES LILO

Counsel : Mr. J. Niudamu for State
Ms. J. Singh for the Accused

Date of Hearing : 1st and 2nd of August 2016

Date of Closing Submissions : 3rd of August 2016

Date of Summing Up : 4th of August 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 demeanor 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 of Proof and Standard of Proof

12. I now draw your attention to the issue of burden and standard of proof. The accused 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 is guilty for the offence.
13. The burden of proof of the charge against the accused is on the prosecution. It is because the accused 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. In other words there is no burden on the accused 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’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused 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 penetrated his penis into the vagina of the victim without her consent during the period between 1st day of October 2012 and 31st of March 2013.
17. The main elements of the offence of rape as charge in the information are that;
 - i) The Accused,
 - ii) Penetrated into the vagina of the victim with his penis,

iii) The victim did not consent to the accused to penetrate into her vagina with his penis

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

19. I now kindly request you to draw your attention to the agreed fact, 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 fact by the prosecution beyond reasonable doubt.

20. The prosecution has filed this information as a representative count. It covers a length of time between 1st day of October 2012 and 31st day of March 2013. This form of charges are sometimes chosen by the prosecution in cases where the complainant is not sure of exact dates where the alleged offending has taken place. In order to find the guilt of the accused for a representative count, you must be satisfied beyond reasonable doubt that between the dates specified in the particulars of offence, there was at least one offence of rape committed on the victim by the accused.

21. The accused person has admitted in the agreed fact that he had been engaged in sexual intercourse with the victim since October 2012 with her consent. The prosecution alleges that the victim did not give her consent to the accused person to have sexual intercourse with her. Accordingly, the main dispute in this matter is whether the victim has given her consent to the accused to have sexual intercourse with her.

22. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable that the victim did not give her consent to the accused to insert his penis into her vagina.
23. 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 she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear or by threat or by exercise of authority or by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.
24. If you are satisfied, that the accused had inserted his penis into the vagina of the victim and she had not given her 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.
25. 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 prevailed at the time of the alleged incident took place.

26. 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 accept it as reliable and truthful, you are not required to look for any other evidence to support the account given by the victim.
27. 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.
28. Offences of this nature can take place in any circumstance between any kind 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.
29. It is your duty as judges of facts to assess the evidence in order to determine whether the accused penetrated into the vagina of the victim with his penis and she had not consented for this alleged sexual intercourse. 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. 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.

30. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

31. The first witness of the prosecution is Mereoni Kavu. She is the victim of this case. She was fourteen years old in 2012. Mereoni was staying with her mother, her mother's *de facto* partner, the accused and their three kids at Rewasa settlement in October 2012. She was attending Penang High School in Form three. Mereoni stated that one Saturday night in the month of October 2012, the accused came home around 2 a.m. in the early morning. He came from drinking grog. She could not recall the date. Her mother was fast asleep at the sitting room as she came from work in that night. When the accused knocked the door of the kitchen, she went and opened it for him. He then forcefully held her hand when she tried to go back to her room. He elbowed on her ribs and forcefully made her bend down beside the gas stove. He then removed her undergarment and inserted his penis into her vagina. She tried to scream, but he closed her mouth from his hand. It took about 15 minutes. He then told her to go and sleep. The accused had told her that he will kill her if she told anyone about this incident. She was frightened and was not able to sleep in that night. She was shivering and afraid. She felt blood was coming through her thighs. She was afraid because the accused threatened her and also her real mother was not beside her when she needed her.

32. Mereoni in her evidence explained the nature of her relationship with the accused and her mother. Her mother never listened to her. Both her mother and the accused were very abusive towards her. They have assaulted and punched her when they came to know that Mereoni was meeting her biological father in the town. That was the reason she did not tell her mother about this incident.

33. According to the evidence given by Mereoni, the accused continuously had sexual intercourse with her until 31st of March 2013. Mereoni explained those instances in her evidence in chief. Those subsequent incidents had taken place in the bed room, in the kitchen and sometimes in the sitting room. He had punched and assaulted her when she refused him to have sexual intercourse.
34. Mereoni in her evidence stated that she found her menstruation was not taking place. One day she felt weak and could not walk back home while she was returning from school. Her aunty found that she was weak and was sitting beside the road. She helped her to go home. Her mother did not care about her condition. When she told her mother about her menstruation problem, the accused had told her that it was because she works too much.
35. One Sunday, her two aunties came to visit them and they have noticed changes in her body. They have sent one of her cousins to call her mother. Mereoni was in the kitchen cleaning cassava. The accused had approached her and told her not to blame him for her pregnancy and tell them that it was one his relatives called James did that to her. She was then called by her aunt to her house. She told her everything, when her aunt asked about her changes in her body. The name of her aunt is Lusiana Bon and she is a teacher.
36. Mereoni in her evidence stated that she did not give her consent at any time to the accused to have sexual intercourse with her.
37. During the cross examination, she stated that her mother was sleeping in the sitting room when the accused first had sexual intercourse with her in the kitchen. She could not scream as her mouth was closed. She stated that she was

- frightened and felt embarrassed to tell anyone about this incident, even to her teachers or her friends in school. According to the evidence given by the victim, that the accused did not like her and *vice versa*. She has not told the police that the accused threatened her that he will kill her if she told anyone about this incident. She was frightened to tell that. Moreover she said that she couldn't tell everything in detail to the police as she was frightened and also her statement was recorded by a male police officer. She was not having a good relationship with her biological father during that time. She was afraid to tell the house girl about this incident.
38. One occasion, the accused had called her to the sitting room. He was laying naked on the floor of the sitting room. He then forced her to come on top of him and sit on his penis. She said that she could not run away or shout for help as she was scared of the accused at that time. If she ran away, the accused could have assaulted her. She said that she is not fabricating this allegation.
39. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted to give evidence on oaths. However, he advised the court that he does not wish to call any other witnesses for his defence.
40. The accused in his evidence stated that he was staying with his de facto partner Vasiti Naluvui, their three kids, and the victim at Rewasa in 2012. Mereoni is Vasiti's daughter from her earlier marriage. He has been in this de facto relationship with Vasiti since 2006. Mereoni was about 9 or 10 years old when he started this de facto relationship. The accused in his evidence stated that he

treated Mereoni as one of his own children and never differentiated her from his other three children. Mereoni's relationship with her mother was also normal.

41. According to the evidence given by the accused, he went to drink grog at the village on one Saturday night in October 2012. He had a conversation with Mereoni before he left and she told him wait for her mother to go to sleep. When he returned home, she came and opened the door of the kitchen. He then went and check whether her mother was sleeping. He then told her to have sexual intercourse as they have already discussed about it. He took her hand and went near the gas stove and had a sexual intercourse with her. He said that he did not pull her hand by force and elbowed on her ribs to make her bend down forcefully. He said that he did not forcefully remove her undergarment and only pushed it aside and inserted his penis into her vagina. He further said that he did not threatened her saying that he will kill her if she told anyone about this incident. Mereoni went back to her room to sleep after he had sexual intercourse with her.
42. Since this first incident, the accused had been continuously engaged in sexual relationship with Mereoni with her consent. Most of the time, she used to told him wait till her mother go to sleep or wait others in the house to go for them to have sexual intercourse. He stated that he still considered her as one of his own children after this incident in October 2012. However, she never considered him as her father.
43. During the cross examination, the accused stated that he first had sexual intercourse with Mereoni in the kitchen and not on mattress in the sitting room as stated in his caution interview given to the police.

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.
45. 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.
46. You may recall that the victim in her evidence explained that the accused forcefully had sexual intercourse with her on number of occasions during the time period stated in the information. The first such occasion took place in one Saturday night in October 2012. It took place in the kitchen beside the gas stove. She could not recall the exact date. Since then, he had been forcefully engaged in sexual intercourse with her in number of occasions. The accused also in his evidence admitted that he first engaged in a sexual intercourse with the victim in October 2012. According to the evidence given by the victim and the accused the subsequent incidents of sexual intercourse took place sometimes in the bed room, in the kitchen and in the sitting room of the house.
47. As I explained above, the prosecution is not required to prove beyond reasonable doubt that the victim did not give her consent to the accused to have sexual intercourse on each and every such occasions. It is sufficient to prove that at least one of such occasions, the victim did not give her consent and the accused knew

that she was not giving her consent for him to have sexual intercourse in order to prove the accused is guilty for this representative count of rape.

48. The learned counsel for the defence proposed to the victim during the cross examination that she should have run away or shouted when he called her to have sexual intercourse while he was lying naked in the sitting room. She further suggested that she should have shouted when the accused forcefully inserted his penis into her vagina in the kitchen in that night of October 2012. The victim in her answers stated that she was scared of the accused and was frightened to him. She further explained during the re-examination that if she ran away, he would have assaulted her.
49. The victim was 14 years old at the time of this alleged incident took place. She is now 18 years old young adolescent person. You saw her 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. Her 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 evidence given by the victim.
50. The learned counsel for the defence suggested that the delay in complaining this matter to her aunt by the victim makes it less likely that the complaint that she 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, 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 affects the credibility and reliability of evidence given by the victim. In order to do that, you need to consider what the victim said about her experience and her reaction to it.

51. The victim in her evidence explained the reasons for the delay in complaining this incident. The victim said that she was frightened as the accused threatened her that he will kill her if she told anyone about this incident. She further stated that she felt embarrassed to tell her teachers or the friends in school about this incident. According to her evidence, she had a distant relationship with her mother. She was not in good terms with her father at that time.

52. The prosecution tendered the statement made by her aunt, Lusiana Bon as an exhibit of the prosecution with the consent of the defence. You are allowed to consider the content of the said statement. However, what Lusiana stated in her statement about this 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. The content of the statement of Lusiana will 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.

53. You might recall that the learned counsel for the accused person questioned the victim during the cross examination about the inconsistent nature of her evidence and the statement she made to the police. The victim has not stated in her statement that the accused threatened her that he will kill her if she told anyone. Moreover, she has not stated in much details about the subsequent instances of sexual intercourse the accused forcefully had with her since the first such incident in October 2012. The victim in her evidence stated that she was afraid of the accused and it was the reason that she did not mention those details in her statement to the police. Furthermore, she said that the statement was recorded by a male police officer and she was afraid to give everything in detail at that time.
54. Likewise, the learned counsel for the prosecution questioned the accused during the cross examination about the inconstant nature of his evidence and the answers given in his caution interview made to the police. The accused stated in his evidence that he first had sexual intercourse with the victim in the kitchen beside the gas stove. However, in his caution interview he has stated that the first time he had sexual intercourse with her on a mattresses in the sitting room. The record of the caution interview of the accused was tendered as an agreed fact. The accused stated during the cross examination what he stated in evidence is he correct version of the event in respect of his first sexual encounter he had with the victim.
55. Accordingly, 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. In the same context, the learned counsel for the prosecution suggested you that the evidence given by the accused is not consistence with his

answers given in the caution interview. The evidence of a witness is what he or she told us in court on oaths. Any prior statement made to the police by the witness is not evidence.

56. I now explain you the purpose of considering the previously made statement of a witness with his or her 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 witness is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents.
57. 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. Moreover, as I explained above, the victims of rape react differently to the trauma and the experience they have gone through, specially in revealing those incidents to another person. Sometimes they are unable to recall every minute detail soon after the incident due to the traumatic impact or the experience they undergo *et cetera*. Sometimes, with the passage of time they would be able to resurrect their memory and recall some details of those traumatic experiences.
58. 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.

59. 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.
60. 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.
61. 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.
62. Upon consideration of all evidence, if you are satisfied that the count of rape is proved beyond reasonable doubt, you can find the accused is guilty of the charge. If you are satisfied that charge is not proved beyond reasonable doubt, then you must find the accused not guilty.
63. If you found the accused is not guilty for this offence of rape on the ground that that the victim actually gave her consent or have reasonable doubt whether she actually gave her consent to the accused to have sexual intercourse, you are then allowed to consider whether the accused is guilty of committing an lesser offence of "Defilement of young person between 13 to 16 years of age".

64. I will now explain you the offence of "Defilement of young person between 13 to 16 years of age". The main elements of the offence are that;

i) The accused,

ii) Unlawfully had a carnal knowledge or attempted to have carnal knowledge with the victim ,

iii) Age of the victim is between 13 to 16 years old,

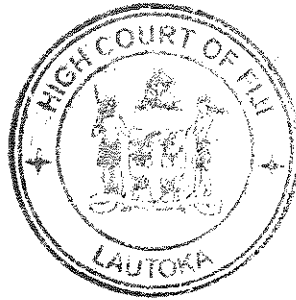
65. Carnal knowledge is the penetration of vagina with the penis. Evidence of slightest penetration of the penis of the accused is sufficient to prove the element of penetration. The consent of the victim to have the carnal knowledge is not a defence for this count.

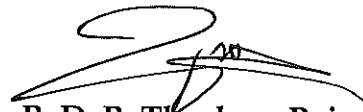
66. The accused in his evidence stated that he had sexual intercourse with the victim between 1st day of October 2012 to 31st day of March 2013. It is an agreed fact that the victim was fourteen years old at the time material to this charge.

67. If you found the accused is not guilty for the offence of rape and you are then allowed to consider whether the accused is guilty for the offence of defilement of young person between 13 to 16 of age.

68. If you are satisfied that the count of defilement of young person between 13 to 16 of age is proved beyond reasonable doubt, you can find the accused is guilty of the charge. If you are satisfied that the count of defilement of young person between 13 to 16 of age is not proved beyond reasonable doubt, then you must find the accused not guilty.

69. 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. You will be asked individually for your opinion and are not required to give reasons for your opinion. Once you have reached your opinion, you may please inform the clerks, so that the court could be reconvened.
70. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R. D. R. Thushara Rajasinghe
Judge

At Lautoka
4th of August 2016

Solicitors : Office of the Director of Public Prosecutions
Office of Legal Aid Commission