

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 164 of 2015

[CRIMINAL JURISDICTION]

STATE

V

MITIELI KACIKACI

Counsel : Ms. M. Chowdhury for State
Mr. L. Qetaki for Accused

Dates of Hearing : 05th - 06th September 2016

Date of Summing up: 08th September 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. 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.

3. Your opinion should be based only on the evidence presented inside this court room. Evidence in this case is what you heard from the witnesses who took the stand in the witness box inside this court room and the admitted facts. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard such information.
4. Please remember that 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 if you consider it appropriate.
5. 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.
6. 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. Having listened to the evidence of each witness and having seen how he/she gave evidence, 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.

7. 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.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. Obviously, you may have a difficulty in believing someone who is not consistent. 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 particular witness seem reliable when compared with other evidence you have decided to accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
9. Based on the evidence you would decide to accept, you should decide what facts are proved and what reasonable inferences you can properly draw from those facts which you consider as proven. It is for you to decide what happened in this particular case taking into account those proven facts and reasonable inferences.
10. You are not required to decide every point which has been raised by the lawyers in this case. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the elements of that offence have been proved.

11. As a matter of law you should remember that the burden of proof always lies on the prosecution. The accused is presumed to be innocent until proven guilty. 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. The prosecution should prove the guilt of the accused beyond reasonable doubt. In order for you to find the accused guilty of a particular offence you must be sure that he is guilty.
12. 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 the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty. However, if you find that the prosecution has proved all the elements of the offence beyond reasonable doubt, you should find the accused guilty. I will explain you the elements of the offence in a short while.
13. 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.
14. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of offence

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

Particulars of offence

MITIELI KACIKACI on the 29th May 2014 at Nasinu in the Central Division had carnal knowledge of Torika Korotabua without her consent.

15. To prove the offence of *rape* in this case, the prosecution must prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) penetrated the vagina of the complainant with his penis;
 - c) without the consent of the complainant;
 - d) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not the complainant was consenting
16. The first element of the offence 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.
17. The second element of the offence of rape involves penetration. That is penetrating the complainant's vagina by the accused with his penis.
18. In this case, the accused has admitted in the agreed facts before you that on 29th May 2014, he had sexual intercourse with the complainant by inserting his penis into her vagina. Therefore, the first element which involves identity and the second element based on penetration are not disputed and you should consider that the first and the second elements above are proven beyond reasonable doubt.
19. The only issue you should decide in this case is consent.
20. With regard to the element on consent, not only that the prosecution should prove that the accused had carnal knowledge of the complainant without her consent, but should also prove that the accused knew that she did not consent to the act or the accused was reckless as to whether or not she was not consenting.

21. 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 penis into 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 penis, you may find that the accused was reckless as to whether or not she was not consenting. Simply put, you have to see whether the accused did not care whether she was consenting or not.
22. You should also bear in mind that consent means consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
- a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
23. Now let me summarise the evidence led by the prosecution and the defence. Please remember that I will not be reproducing the entire evidence of the case. 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.

Case for the prosecution

24. The complainant said she is 23 years old. She said on 29/05/14 around midnight when she was sleeping with her kids in the sitting room, the accused started to touch her, he took her clothes off, took her panty off and then they had sex. She said, the accused did not ask her whether he can have sex with her. When the accused was about to insert his penis, she did not say anything because she was afraid that the accused would do something to the two girls

who were with her. She said she willingly gave herself to the accused because she was afraid for the children.

25. After the accused finished having sex with her, he went inside the bedroom and told his cousin to come and sleep with her. She saw that cousin of the accused for the first time that night. Accused told her to have sex with this cousin and that he will give \$10 for sugar. She told him that she don't want it. She refused to have sex with the accused's cousin.
26. During cross examination, she admitted that she knew the accused very well. She denied the suggestion that she used to visit the accused when his wife is not at home and that she had had sexual intercourse with the accused before this incident. She admitted calling the accused on the day in question when she saw the accused walking through the shortcut and she said it was because she cared for him. When it was suggested to her that at this point in time when they were talking, the accused asked her whether he can come over that night, she said that the accused told her that he will come through the window and she thought that he was joking. She denied showing the accused the window for him to get into the house. She said when the incident took place, the house was dark and the only light came from the accused's phone. She denied smiling back with him when he saw her. She said when they had sex, her youngest brother and her sister's daughter were still awake. She admitted that the only reason she say that she did not consent to have sex is because the children had seen her having sex with the accused. She admitted that she felt embarrassed and that is why she said she did not consent. When it was suggested to her that she felt more embarrassed when the accused asked her whether his friend could have a turn, she denied and said she was not embarrassed because she has brothers. When the same question was put to her later, she admitted that she felt embarrassed. She admitted that she told the accused that she does not want to have sex with his friend.

27. She admitted that her brother complained to her father about the incident the following morning. Then she agreed with the suggestion that, because her father was told about the incident she tried to save herself by saying that she did not consent to have sex. At the end, she again said that she gave consent for the sake of the children.

Case for the Defence

28. 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.
29. The accused denied having sex with the complainant without her consent. He said he had sex with her on two occasions before this incident. He said on the day the incident took place, when he was on his way to have a bath, the complainant called him and they talked. He asked her whether he could come back and the complainant said yes. He said that the complainant told him how to enter her house and told him about a window at the back of her house. This conversation took place in the afternoon.
30. That night he went inside the complainant's house. He used the light in his phone as it was dark. When he switched on the phone light, he saw that the complainant smiling. He went closer to her and asked her whether they can have sex and she said yes. He then removed her panty and had sex with her. Thereafter he asked her if the friend who came with him can also have sex with her and she said 'no'. Then he left with his friend.
31. When he was asked about the allegation that the complainant only gave her consent because he would do something to the two girls, he said he knew the children very well, they are small and he could not do that to them. He said on

the two occasions he had sex with the complainant previously, there was no one else around and on this third occasion there were children.

32. During cross examination, he said the complainant agreed to have sex with him, as they already had a conversation. When he was asked whether it was even remotely possible that the complainant did not want to have sex with him, he said the complainant told him to come that night. He said if the complainant did not give her consent, he would not have had sex with her that night. When it was suggested that she only consented to have sex because she was afraid that he would do something to the children, he said he cannot do that because he knew the children very well.

Analysis

33. As I have already explained, what you have to decide in this case is whether the complainant did not consent for the accused to insert his penis inside her vagina and whether the accused knew that she was not consenting or whether the accused did not care whether the complainant was consenting or not when he inserted his penis inside her vagina.
34. The prosecution says that the complainant gave her consent only because the accused would do something to the two girls who were sleeping with her. Therefore, prosecution says that the consent was not given freely and voluntarily and it was given due to fear.
35. The defence says that the complainant did consent for him to have sexual intercourse with the complainant that night and he would not have had sexual intercourse with the complainant if she did not consent. Defence says that the complainant may have regretted the fact that she gave consent later when she realised that her brother saw her having sex with the accused. Defence says that there is no evidence that the complainant said 'no' to the accused and points out that after the accused had sexual intercourse with her the complainant said

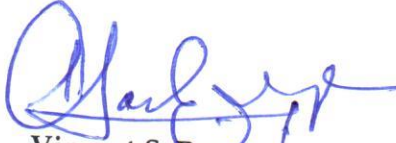
'no' when she was asked whether the accused's friend can also have sex with her.

36. Defence also says that there are inconsistencies in the evidence given by the complainant. 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 or insignificant and irrelevant. If you find the inconsistency to be material and relevant, then you must consider whether there is any explanation given by the witness in question with regard to the inconsistency. If there is no such explanation or if you are not satisfied with the explanation, again you have two options. You may either conclude that that particular witness is generally not to be relied upon or you may decide to disregard only part of his/her evidence which you consider unreliable.
37. On the other hand, if you consider the inconsistencies to be insignificant and irrelevant, or if you are satisfied with the explanation given, then you may consider such witness as a reliable witness notwithstanding the inconsistency.
38. Considering all the evidence, if you are satisfied that the prosecution has proved beyond reasonable doubt that the complainant did not consent for the accused to insert his penis inside her vagina and the accused knew or believed that she was not consenting or the accused did not care whether she was consenting or not, then you should find the accused guilty of rape as charged. If you are not sure, then you should find the accused not guilty.
39. 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.

40. 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.
41. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
- (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.
42. Any re-directions?
43. 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.

44. Your possible opinion should be;
Rape - guilty or not guilty




Vincent S. Perera
JUDGE

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