

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

CRIMINAL CASE NO: HAC. 314 of 2015

STATE

V

AVNEEL CHAND

Counsel : Ms. S. Serukai for State  
Mr. J. Reddy for Accused

Dates of Hearing : 27<sup>th</sup> -29<sup>th</sup> September 2016

Date of Summing up: 30<sup>th</sup> September 2016

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as SSL)

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 in 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. 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.
2. Evidence is what the witnesses said from the witness box in this court room, the exhibits tendered 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. 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. 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. 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.
6. 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 proven facts. You should

decide what happened in this case, taking into account those proven facts and reasonable inferences.

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. 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 an inconsistency to be material and relevant, then you must consider whether there is any explanation for that 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.
9. 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.
10. 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 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. The complainant in this case, was 15 years old during the time of the alleged incident and was 16 years old when she gave evidence. You may have come across children of that age. You will have an idea of the way they think, talk and the way they describe things. The main task you have in this case therefore is to judge whether what this child witness said in her evidence is true and whether the account of the events she gave is reliable.
13. Experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.
14. 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 him guilty of the offence. You must be sure of the accused person's guilt.
15. 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 of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.

16. You are not required to decide every point which has been raised by 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 charge against the accused has been proved.
17. 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.
18. Let us now look at the Information. 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*

**AVNEEL CHAND** on the 19<sup>th</sup> day of September, 2015 at Koronivia, Korovou, Nausori in the Central Division, penetrated the vagina of SSL, with his penis without her consent.

19. Now let me summarise the evidence led by the prosecution. 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.
20. The complainant said that she was living with her mother, stepfather, stepsister and stepbrother during the time material to this case. In the morning on

19/09/15 her mother and stepfather were not at home. She went to her aunt's house which is nearby where there was a wedding the previous day. Because her stepsister came and informed her that the stepsister and stepbrother were hungry, she came back to her house and prepared food for them. She locked the main door when she came inside the house. She gave them the food to eat while they watch a cartoon and went to the washroom.

21. Then she went to her mother's bedroom because her room is dark. She saw the accused who was only wearing shorts standing beside the bed when she went inside her mother's bedroom. She asked him 'brother, what are you doing here', but he did not say anything. While she was standing at the door way the accused came to her and pushed her onto the bed. Then the accused held her hands with one hand and with the other hand he removed her skirt and then all her clothes. Then he removed all his clothes. She felt bad because the accused is her brother.
22. Then the accused put his penis inside her vagina and it was very painful. She said she did not give permission for the accused to insert his penis. She shouted for help but no one was there inside her house or near her house. She tried to push him but he was very strong. When the accused went back, she saw blood on the bed and she got afraid. After that her brother and the sister came in and when she asked, they told her that the accused locked them inside the accused's house. Then she went to sleep inside her room. She was frightened to go to the mother's room because there was blood. Her stepfather came around 2 o'clock, but she did not tell him about the incident because she had not told him anything of that nature.
23. She told her mother about the incident when the mother came home around 6.00pm. Her mother then confronted the accused, but she did not hear what they were talking. Her real brother having heard the conversation with her mother and the accused, asked her what happened and she told him everything. Then her brother reported the matter to police. When the police

came, she gave the police a wrong statement because the accused's parents and his sister told her to do so. They had told her that if she tells the truth, she will be sent out from the house. The house they lived belonged to the accused's father. Thereafter the police left. Later she gave the correct statement to police and she was subject to a medical examination after her mother told the police what happened.

24. During cross examination, she admitted that there are houses close to the house she lived in. She said there were two doors in her house. The 2<sup>nd</sup> door was in the kitchen. She said she had known the accused for 10 years. She was raped around 12 o'clock. Her sister and the brother locked the main door when she left for her aunt's house. She said when she came from the washroom her sister and the brother were not there and she thought they are playing with the small girl in the accused's house. She said she went to the mother's room because she was having a headache. She said she was shocked to see the accused in her mother's room. She was scared and yelled saying "bachao". She admitted that her uncle Jaswanth who stays home lived in a house that was very close to hers and if she shouts the people in Jaswanth's house will hear.
25. She admitted that the accused was standing in the inner side of the bedroom when she saw him, and she did not turn back and run because she was frightened and couldn't think of what to do. She admitted that she had the opportunity to escape but did not. She said her uncle and the others were not there at their house that time. She confirmed that the accused removed her skirt, her tights, her panty and then his clothes with one hand while holding her hands with his other hand. She said he held her hands when he pushed her onto the bed and the accused was still standing and was still holding her hands. She did not kick the accused because she was scared and did not know what to do.
26. She admitted that it is difficult to remove her skirt, tights and her panty while she lay flat unless she raises the lower part of her body but said that she did not

lift her body. She admitted that if she didn't want the accused to take her tights and her panty off, she could have crossed her legs but she did not do that. She said the accused did not remove her top and her bra. She said that the accused inserted his penis while he was standing. She said she was not having menses on that day. She said she was shouting "bachao" when the accused inserted his penis. She denied being in a relationship with the accused for one year and that she had sexual intercourse with the accused on four occasions within that year. She admitted that she did not tell the police that she tried to push the accused.

27. She said she tried to get down from the bed, but the accused put her back on the bed. She said she does not know how many times this happened. She admitted that she told the police that when she tried to climb down from the bed, the accused came over her and held her on the bed. She said the statement she gave police is true. She also admitted that the statement she made to police that the accused lifted her skirt and pulled down her panty and threw it away is the correct version, but not what she said on oath. She said she does not know whether the accused ejaculated.
28. She was shown photographs of two T-shirts and she identified them as the T-shirts the accused's mother used on her vagina to stop the bleeding. She denied giving the accused a pink towel to wipe his penis. She said, the first person she met after the incident was her stepsister and she did not tell her anything about the incident because the sister was young. She was living with the stepfather for 10 years but she was shy to tell him about the incident. That day she went to her aunt's place with her sister to bring back the stove her stepfather had given to the aunt. She did not want to tell the aunt about the incident. She admitted that her mother told the police that she was having menstruation and that was because the accused's mother and the sister coached them.
29. She admitted that she told the doctor who examined her that the accused dragged her sister and her brother by force to the accused's house. She denied telling the doctor that the accused forcefully took her to her bedroom. Even



though the doctor had made a note in the medical report saying “day 2 of menstruation”, she maintained that she was not having menstruation. But she is not sure about the afternoon because she was already bleeding. It was put to her that she planned with the accused to have sex when she met the accused on her way back from her aunt’s house; that she told the accused to wait in her mother’s bedroom while she go to the washroom; that in the bedroom they kissed each other; that she took her clothes off and the accused took his clothes off; and then both of them lay on the bed and had sexual intercourse. She denied those suggestions.

30. She said while having sex she did not say anything else apart from shouting, “bachao”. She denied spreading her legs voluntarily for the accused to insert his penis. When she was asked who spread her legs if she did not do it voluntarily, she said she does not know. When she was asked again, whether she still maintains that the accused inserted his penis while he was standing and while she was lying down, she said she does not know and she is not sure.
31. 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.
32. The accused gave evidence and said that he is 20 years old and he is a fisherman. He admitted that he had sexual intercourse with the complainant, but he said the complainant consented. He said he did not force himself on her.
33. On 19/09/15, the complainant came from her aunt’s house and served food to the sisters. He knew her from a young age. They lived in the same building but in different flats. She came out when he knocked at the door and then they had a chat. He said he told her that he wants to have sex with her and she agreed. She told him to take her brother and sister to his house and told him to come to her mother’s room.

34. He said he had had sex with her on three occasions previously in her mother's room. They were in love for one year. The complainant let him inside the house and she closed the main door. He went first to the room. Then the complainant came in and they kissed each other. She took her clothes off and he took off his. Then they lay on the bed and started having sex and kissing. After having sex for 4-5 minutes, he stood up and the complainant gave him her pink towel to wipe. She used her clothes to wipe herself. He then kissed her and went away. He said the complainant didn't shout but told him that she is enjoying it. He or his family members did not tell the complainant to give a false statement to police.
35. During cross examination, he said the property the complainant lived in is owned by his father. He said the complainant and her family were not paying a rent. He said he gave his phone to the complainant's brother and sister to play with it at his house, as planned with the complainant. He said the complainant sent her brother and then brought her sister to his house herself. Then he locked the grill and went to the complainant as they have planned. He said he told the police that he shook the door to scare the complainant because he was beaten by the police. He said the reason he did not tell the police that the complainant invited him to her house was because he was scared as a result of being beaten up, but after a while he told them that. It was suggested to him that he pushed the complainant; then she fell; and as she fell, he pulled down his shorts. The accused denied those suggestions.
36. He denied that the complainant was scared when he inserted his penis inside her vagina. He admitted that the fact that they had sexual intercourse on three occasions previously was kept as a secret. He said the complainant should have kept this incident which is the 4<sup>th</sup> incident as a secret and he does not know why she did not do that. He admitted that the complainant's mother asked him about the incident and that she was saying he raped the complainant. He said

his lawyer informed the magistrate that he was beaten by the police when he was produced.

37. In re-examination he said that the complainant invited him to her mother's bedroom.
38. That is a brief summary of the evidence. As I have already explained, which evidence you would accept and do not accept is a matter for you to decide. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those agreed facts. You should consider those facts as proven beyond reasonable doubt.
39. The medical examination report of the complainant was tendered with consent as DE 09. That document contains the opinion of the doctor based on what she observed when she examined the complainant. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the doctor in DE 09.
40. Now, let me explain to you the elements of the offence you have to deal with. 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 penis;
  - c) without the consent of the complainant; and
  - d) the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not she was consenting
41. The first element is concerned with the identity of the person who committed the offence. Second element involves penetration of the complainant's vagina with the accused's penis.

42. In this case, it is an admitted fact that the accused had sexual intercourse with the complainant on 19<sup>th</sup> September, 2015 and that the complainant was 15 years old at the time of the alleged offence. Therefore, you should consider that the first two elements of the offence of rape are proven beyond reasonable doubt.
43. The two elements that are disputed in this case are based on consent. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina with his penis without her consent.
44. The prosecution should also prove either that the accused knew or believed that the complainant was not consenting; or that the accused was reckless as to whether or not the complainant was consenting.
45. 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 inside her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina with his penis, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
46. In the event you have a reasonable doubt as to whether the prosecution has proven the two elements based on consent beyond reasonable doubt and therefore the offence of rape is not established, then you have to consider whether the accused is guilty of the lesser offence of defilement. A person who penetrates the vagina of a complainant who is between the age of 13 and 16 with his penis is guilty of the offence of defilement under section 215(1) of the Crimes Decree. It is a defence to this offence if it appears to you that the accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years. However, it is not a defence


that the complainant consented to sexual intercourse when it comes to the offence of defilement.

47. The prosecution says that the complainant did not consent for the accused to have sexual intercourse with her. The defence says that the accused and the complainant had a love affair for about one year and on the day in question the complainant gave her consent for the accused to insert her penis inside her vagina. The defence points out that the account the complainant gave in court is improbable.
48. 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 beyond reasonable doubt.
49. 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.
50. 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.

51. Any re-directions?
52. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. You may peruse the exhibits tendered in court if you wish to do so. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
53. Your possible opinion should be as follows;
- Rape - guilty or not guilty
- If not guilty;  
Defilement - guilty or not guilty



  
Vinsent S. Perera  
JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.  
Solicitor for the Accused : Jiten Reddy Lawyers, Nasinu.