

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 179 OF 2013

BETWEEN : STATE

AND : MUNENDRA

Counsel : Ms Latu for State
Mrs. Baleilevuka for Accused

Date of Hearing : 12th October 2016

Date of Closing Submissions: 13th October 2016

Date of Summing Up : 14th October 2016

SUMMING UP

1. Madam assessors and Gentleman assessor, you have heard the evidence adduced by the prosecution and the defence and also the respective closing submissions of the learned counsel for the prosecution and the defence. Now, it is my duty to sum up the case to you. 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. Our functions in this trial have been and remain quite different. Throughout this trial the law has been my area of responsibility, and I must now give you directions as to the law which applies in this case.
3. It is also my function to remind you of the prominent features of the evidence. However, it has always been your responsibility to judge the evidence and decide all the relevant facts of this case. You and you alone must decide what evidence you accept, what

evidence you do not accept and what evidence you are not sure about; and when you come to consider your opinion, you and you alone, must do that.

4. You do not have to decide every point which has been raised; only such matters as will enable you to say whether the charge laid against the accused has been proved. You will do that by having regard to the whole of the evidence including the material tendered as exhibits and forming your own opinion about the witnesses, and which evidence is reliable and which is not. The evidence consisted of the oral testimony of witnesses and the material tendered as exhibits.
5. 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. You have sworn an oath or affirmed that you will deliver a true opinion according to the evidence. Therefore you must decide this case only on the evidence which has been placed before you.
6. 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.
7. 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.

8. 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.
9. 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.
10. 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.
11. 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 or her own evidence but also with other evidence presented in the case.

12. 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, whether they were evasive, in order to decide the credibility of the witness and the evidence.

Burden and Standard of Proof

13. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offences.
14. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
15. 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

16. The accused is being charged with one count of Criminal Trespass, contrary to Section 387 (1) (a) of the Crimes Decree, one count of Common Assault, contrary to Section 274(1) of the Crimes Decree and one count of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Decree and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars of the offences are before you, hence I do not wish to reproduce them in my summing up.

17. The prosecution has charged the accused with four counts. As judges of facts, you are required to consider each and every count separately. If you found the accused is guilty of one count that does not automatically make him guilty for the remaining counts.
18. The prosecution alleges that the accused entered into the house of the victim in the night of 7th of July 2010 with intent to commit an offence. He then punched on her arms and dragged her inside the bed room. He then inserted his finger into her vagina without her consent and then inserted his penis into her vagina without her consent and had sexual intercourse with her.
19. Accordingly the main elements of the first count of Criminal Trespass are that;
 - i) The accused,
 - ii) Entered into the property of the victim,
 - iii) With an intent to commit an offence on the victim ,
20. The main elements of the second count of Common Assault are that;
 - i) The accused,
 - ii) Unlawfully,
 - iii) Assault the victim by punching on her right arm.
21. Assault means any form of hostile or adverse act done towards the victim. If such hostile or adverse act was done on the victim without any lawful ground, then accused has committed an offence of Common Assault.

22. The main elements of the offence of Rape as charged under count three are that;
- i) The Accused,
 - ii) Penetrated into the vagina of the victim with his finger,
 - iii) The victim did not consent to the accused to penetrate into her vagina with his finger,
 - iv) The Accused knew the complainant was not consenting for him to insert his finger in that manner.
23. The main elements of the offence of Rape as charged under count four of 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 complainant was not consenting for him to insert his penis in that manner.
24. I now draw your attention to the agreed facts that are before you. They are the facts that the prosecution and the defence have agreed without any dispute. Hence, you are allowed to consider them as proven facts beyond reasonable doubt.
25. The accused has stated in his caution interview given to the police that he was not present at the house of the victim during the time material to these offences. He has completely denied these charges. The caution interview of the accused is tendered as one of the prosecution's exhibits. Hence, it is the onus of the prosecution to prove beyond

reasonable doubt that it was the accused who allegedly entered into the house of the victim and committed these crimes on her.

26. I now draw your attention to the element of penetration. Evidence of slightest penetration of the penis of the accused and/ or his finger in to the vagina of the victim is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.
27. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the victim did not give her consent to the accused to insert his penis and/ or his finger into her vagina as charged in the third and fourth counts.
28. 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.
29. The victim must have the freedom to make the choice. It means that she must not being pressured or forced to make that choice. Moreover, the victim must have a mental and physical capacity to make that choice freely. The consent perhaps may be limited to some sort of sexual or intimate activities but not for another form of sexual activity. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given.
30. If you are satisfied, that the accused had inserted his penis and/or his finger 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. I must advice 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.

31. 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.
32. One or more of you may have assumptions as to what constitutes 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.
33. 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 of the hearing.
34. It is your duty as judges of facts to assess the evidence in order to determine whether the victim gave her consent to the accused 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.

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

Evidence

36. The first witness of the prosecution is Roshni Mudaliar. She is the victim of this case. I will now summarise the evidence presented by the victim.

37. She was at home in the night of 7th of July 2010. Her husband has gone to work as he was doing the night shift on that day. Her son and daughter were sleeping in the room, while she was watching TV around 10 p.m. At that time, she received a call from the accused, who is her immediate neighbour. He called and told her to close the gate of the house as it was open. Subsequent to the said call, she did not go out, but still watched TV for a while. She then went out to feed the dog. While she was feeding the dog, she saw the accused entered into the compound and came towards the house. He was carrying his shoes in his hands. He went straight in to the kitchen. When she went back to the kitchen, she saw him, standing beside the door of the kitchen. She asked him what was he doing and where was his wife. He said his wife was sleeping at their house and swore at her. He then punched on her left arm and pulled her inside the house. He kissed her on her mouth, preventing her to shout. He then dragged her to the bed room and put her on the bed. He laid top of her. He started to kiss her lips and face. She told him what he was doing it wrong. But he did not listen to her and tried to remove her night dress. He actually tore it and pulled it down. He then started to fondle her breast with his mouth for about ten to fifteen minutes. While doing it, he inserted his finger into her vagina. She told him what he was doing is wrong. He did not listen to her and continued what he was doing. He told her that her vagina was wet and then tried to put his penis into it. He pulled her hand and let her touch his penis. She felt it and it was very big. When he could not properly insert his penis into her vagina, he told her don't be like a girl and put her legs up. He then forcefully put her legs up and inserted his penis into her vagina and had a sexual

intercourse for about two to three minutes. He then sat beside her and told her very sorry for what he has done to her. He then got up and went to the bathroom. He was still naked. She also got up and went to the kitchen. She was also naked. She saw him coming out of the bathroom. She was still naked and standing in the kitchen. He then took his cloths and put them on the bonnet of the car and got dressed. He then went away. While he was leaving he told her that he will come again on another day.

38. Her husband came home around 12.30 a.m. of that night. She was sleeping and feeling pain in her body. She did not tell her husband about this incident on same day. The victim stated that she did not shout or scream because her daughter was sleeping inside the house. She explained that it took three days for her to tell her husband about this incident. She was afraid that her husband might leave her if she told him about this. She has no one apart from her husband. Three days later, she told her husband about this alleged incident. He then told two members of their religious group. They were Sundar Raj and Shalend Naidu.
39. The victim in her evidence explained that the accused was her immediate neighbour and she clearly saw him in that night. He had been living there for five years and his house is just opposite to her's.
40. Her husband has given the accused twenty one days to fast and then take an oath on Ramayan about this alleged incident. However, at the end of the said twenty one day's time, he refused to do so. Her husband then reported the matter to the police.
41. During the cross examination, the victim was questioned about the inconsistency nature of the evidence given in court and the statement she made to the police. It has not been recorded in the statement that she asked the accused what was he doing, when she saw him standing in her kitchen. Moreover, it has not been recorded in the statement that the accused swore at her when he punched on her shoulder. The victim in her evidence stated that those things actually took place and she told them to the police.

42. Moreover, the victim in her evidence in chief said that the accused dragged her into her bed room. However, it has been recorded in the statement that she was dragged into a spare room. The victim during the cross examination explained that the spare room is also a bed room. It was a big house with five bed rooms. She used to sleep all of the five rooms in turns.
43. During the cross examination, she stated that she did not ask the accused why he was coming into the house, when he came in through the gate, while she was feeding the dogs. She did not ask it because he was five to seven meter away from her. She did not run out or shout for help because her daughter was sleeping inside the house. There was no one to ask for help. The police never came to her house for the investigation. She explained that once she told her husband, it was up to him to make a decision about this matter. He first decided to deal this issue at the community level as they are highly respected people in their community. She said that there was a police post close to her house.
44. The second witness of the prosecution is Mr. Velladan Mudaliar. He is the husband of the victim. He stated that his wife told him about this incident three days after it was taken place. He then spoke to Sundar Raj and Shalesh Krishna about it and asked them to go and inquire it from the accused. They came back and informed him that the accused had denied the allegation. Mr. Mudaliar then gave the accused twenty one days to do the fasting and make an oath on Ramayan. At the end of the said twenty one day's time, the accused refused to do it. He then reported the matter to the police. He was at work in the night of 7th of July 2010.
45. During the cross examination, he denied that his wife had an extra marital affair with the accused. He waited for twenty one day because he wanted to confirm the allegation made by his wife was true or not.
46. At the conclusion of the prosecution case, the accused person was explained about his rights in defence. The accused person opted not to give evidence. Neither had he called any other witness for his defence. It is his right to remain in silent. He does not require to

prove his defence. It is on us of the prosecution to prove the charges. Hence, you must not assume that he is guilty because of the fact that he did not give evidence.

Analysis and Directions


47. The learned counsel for the defence proposed you that the lateness of the victim in reporting this matter to her husband makes the eventual complaint she made less reliable and credible. 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 has shown 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, fear, 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.
48. The victim in her evidence explained the reasons for not reporting the matter to her husband immediately. You have heard the evidence of Mr. Mudaliar. He is the husband of the victim. He in his evidence stated that victim told him about what the accused did to her in that night. What he heard from the victim are not evidence as to what actually happened between the victim and the accused. He was not present and witnessed what happened between the victim and the accused. The content of the evidence of Mr. Mudaliar in to that extend 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.
49. You have heard that the learned counsel for the defence cross examined the victim about the inconsistent nature of the statements she made to the police and the evidence given in court.

50. 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. The evidence is what the witness testified in court on oath.
51. 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, especially 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.
52. 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.
53. Upon consideration of all evidence, if you are satisfied that first count of Criminal Trespass is proved beyond reasonable doubt, you can find the accused is guilty for the said count of Criminal Trespass. If you are not satisfied that the first count of Criminal Trespass is proved beyond reasonable doubt, then you must find the accused not guilty for the said offence.
54. Likewise, if you are satisfied that second count of Common Assault is proved beyond reasonable doubt, you can find the accused is guilty for the said count of Common

Assault. If you are not satisfied that the second count of Common Assault is proved beyond reasonable doubt, then you must find the accused not guilty for the said offence.

55. If you are satisfied that third count of Rape is proved beyond reasonable doubt, you can find the accused is guilty for the said count of Rape. If you are not satisfied that the third count of Rape is proved beyond reasonable doubt, then you must find the accused not guilty for the said offence.
56. If you are satisfied that fourth count of Rape is proved beyond reasonable doubt, you can find the accused is guilty for the said count of Rape. If you are not satisfied that the third count of Rape is proved beyond reasonable doubt, then you must find the accused not guilty for the said offence.
57. 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.
58. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R. D. R. Thushara Rajasinghe
Judge

At Lautoka
14th October 2016

Solicitors : Office of the Director of Public Prosecutions
Messrs Iqbal Khan & Associates