

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 235 of 2014

STATE

v.

USAIA BUSELE RADIRIKI

Counsel: Mr. M. Vosawale for State
Ms. T. Kean for Accused

Hearing: 13th and 14th February 2017

Summing Up: 15th February 2017

SUMMING UP

1. Ladies and Gentleman assessors, 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 matter. You must accept the law from me and apply all directions I give you on matters of law.
2. It is my duty 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 in order to form your opinion. 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.

3. 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, both prosecution and defence and the material tendered as exhibits.
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. You have sworn on 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.
5. You must reach your opinion on evidence. Evidence is what the witnesses both from the prosecution and the defence said from the witness box. 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 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 to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof.

9. 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 these offences.
10. The burden of proof of the charges 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 person to prove his innocence, as his innocence is presumed by law.
11. 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, 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

12. The accused is being charged with two counts of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars are before you, hence I do not wish to reproduce them in the summing up.
13. The main elements of the offence of Rape as charged 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 complainant was not consenting for him to insert his penis in that manner.
14. The prosecution has charged the accused with two counts of rape. As judges of facts, you are required to consider each and every count separately. If you find the accused is guilty of one count that does not automatically make him guilty for the remaining count.
15. I now draw your attention to the agreed facts, that the prosecution and the defence have agreed without any dispute. Hence, you are entitled to consider these agreed facts as proven facts beyond reasonable doubt by the prosecution.
16. According to the agreed facts, the prosecution and the defence have agreed that the accused had sexual intercourse with the victim in respect of the first count. The accused has further agreed that he entered into the house of Eseta on the 13th of July 2014. Hence, the identity the accused in respect of the both counts and the penetration in respect of the first count have not been disputed by the prosecution and the defence.

17. Accordingly, the main dispute in relation to the first count is whether the victim gave her consent to the accused to have sexual intercourse with her. In respect of the second count, you are required to consider whether the accused inserted his penis into the vagina of the victim without her consent.
18. Let me now draw your attention to the issue of consent.
19. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of an 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, threat, exercise of authority, use of force or intimidation could not be considered as consent expressed freely and voluntarily. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.
20. The victim must have the freedom to make the choice. It means that she must not be pressured or forced to make that choice. Moreover, the victim must have a mental and physical capacity to make that choice freely.
21. 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.
22. 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 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 the alleged incident took place.

23. 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.
24. 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, a rapist or a victim of rape.
25. 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.
26. 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. Demeanour of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.
27. The prosecution adduced the evidence of two witnesses. Subsequently, the accused gave his evidence. I trust that the evidence presented during the hearing are still fresh in your mind. However, it is my duty to assist you in reminding all of the evidence presented during the hearing. Therefore, let me summarize the evidence presented by the prosecution and the defence during the course of the hearing.

Evidence of the Prosecution

28. The first witness of the prosecution is the victim. I will now summarize the evidence given by her. She was at the home of Eseta in the night on the 13th of July 2014. Eseta had gone to Makoi. The victim in her evidence stated that she did not know how the accused came into the room. She was sleeping at that time. When she turned around, she saw him. He switched off the light. He then came to her and removed her clothes. He had already removed his clothes by then. He then separated her legs and inserted his penis into her vagina. After a while, he stood up and ejaculated. He again laid on her and inserted his penis into her vagina. He then got up and ejaculated again. He then ran out. The victim in her evidence stated that she did not consent or agreed to have sexual intercourse with the accused.
29. According to the evidence given by the victim, no one was at home at that time. She was scared as she did not know him. The victim tried to push him away but he kept on coming on her. She was scared that he might do something to her. Eseta came home while the accused was running out of the house. She put on the lights and asked what was happening. The victim then told Eseta what the accused had done to her. Eseta asked the accused something, but she did not hear it. The accused ran away while Eseta was standing at the door.
30. The victim in her evidence stated that she had been living with Eseta for about a month when this alleged incident took place. She did not know about the other people in the area. Eseta told her that she should report the matter to the police. Accordingly, she reported the matter to the police. She did not see the accused thereafter.
31. In cross examination, the victim said Eseta locked the door when she left. She then said the accused had put his arm through the window and opened the locked from inside. She said that she was sleeping when he entered into the room. The victim denied that she met the accused at the Delainavesi bus stand and came to Eseta's house with him. The victim said that when she turned, she saw the accused had already removed his clothes. He then

switched off the light. The accused then tried to punch her. She then saw the accused ejaculated. She explained that the lights were on when he ejaculated.

32. You may recall that the learned counsel for the defence asked her whether the lights were on when they had sexual intercourse. The victim said it was off. Eseta came and put the lights on. The learned counsel further asked the victim, how did she see the accused was ejaculating two times when the lights were off. The victim said that when she turned, he was facing the wall. The victim then said that she did not shout because she was scared of the accused. She agreed that she should have shouted for help but she did not do so.
33. During the cross examination, the victim further said that she did not do anything because she was scared when she saw the accused had put his hand through the window to open the door. She then said that when she heard the accused, she thought it was Eseta. The victim further said that she did not want to get up because of the boy who entered into the house. She agreed that it has been recorded in her statement made to the police that she went back to sleep because she thought it was Eseta entering into the house.
34. According to the Victim, the lights were off when Eseta came in. The accused was only wearing an undergarment at that time. Eseta asked her what were you two doing. Eseta had seen the victim and the accused were having sexual intercourse.
35. Moreover, the victim said that she was a guest at Eseta's house. Eseta trusted her. She said that she heard the sound that someone was opening the door when Eseta came in. She did not shout or asked for help at that time as she was scared. You may further recall that the learned counsel for the defence asked the victim during the cross examination that the reason the accused did not have sexual intercourse for second time, because Eseta came into the room when they were having it first time. The victim answered, stating that it is true.

36. In re-examination the victim said that she was sleeping when the accused opened the door. She said that she did not take the accused to the house. He took off his clothes before he switch off the lights. The learned counsel for the prosecution then asked her how did she see the accused was ejaculating when the lights were off. She said that she can see through the moonlight that he was taking his clothes off. She then said that I saw him moving. The learned counsel for the prosecution asked her why didn't she escape when the accused tried to have sexual intercourse for the second time. She answered that she cannot say anything. The victim in her re-examination said that what she said in the court is true.
37. The second witness of the prosecution is Eseta Tuicakau. She has been living at Delainavesi for eleven years. In 2014, she was living with her son and late husband. She could recall that she went to Makoi in the evening on the 13th of July 2014. Her aunty, the victim was at home when she left. She was sleeping at that time. When Eseta returned at around 2 to 3 a.m. in the morning, she saw the lights of the house were off. When she reached the door, she felt the smell of liquor and heard the victim was saying "move" "move". She then kicked the door as it was locked from inside. When she opened it, she saw through the moonlight, the accused. He was standing at the door way. She went and switched on the lights. He was only dressed in his undergarment. She called him by his name and he swore at her and left. The victim was lying on the bed, as if she was shocked. Her eyes were reddish. She ran and gave her tablets as she was having high blood pressure. The victim then told her what the accused had done to her. Eseta then waited till the morning. They then went and reported the matter to the Police.
38. On Sunday, the accused came and asked her to return his three quarter pants and round neck t-shirt, which he left in the house. He apologized for what he had done.
39. In cross-examination, Eseta said that she locked the door when she left to Makoi. When she returned and opened the door, she saw the accused was standing and trying to pull up his undergarment. She then ran and switched on the lights. The accused was not sitting on the bed when she entered into the house. She saw the victim was shivering when she

switch on the lights. She heard the voice of the victim saying move, move when she was stepping towards the door step and it was loud enough to hear from outside.

40. Eseta said that she did not see who switched the lights off. The victim was new to the area. When she saw the accused and victim inside the house, she got upset with the accused.

Evidence of the Defence

41. At the conclusion of the prosecution case, you have heard that I explained the accused about his rights in defence. The accused opted to give evidence on oath but did not call any other witness for his defence. I will now summarize you the evidence adduced by the accused.
42. The accused in his evidence denies the allegation made by the prosecution. The accused was in Suva town drinking with his friends in the evening on the 13th of July 2014. He had consumed four cartons of beer with six friends. He then came to Delainavesi, where he met the victim at the bus stand. He spoke to her and both of them then agreed to have sex. She took him to Eseta's house. He did not know her name at that time. She opened the house for him and took him inside. She then went and switched off the lights. They then had sexual intercourse. While they were having sexual intercourse, Eseta opened the door and came in. She was very angry and asked the victim what were you two doing. The accused was wearing his undergarment when Eseta came and switched on the lights. The accused said that he felt ashamed as Eseta found him having sexual intercourse with her aunty and he was only dressed in his undergarment. He walked out and stayed outside the house. He heard Eseta and the victim were talking. He heard the victim was changing the story, claiming the accused forcefully came inside the house and raped her. He then went back to his house.
43. The accused came and met Eseta on the following day. He wanted to seek forgiveness for having sexual intercourse at their house. Eseta then told him that he has raped her aunty and wait for the police to come and arrest him. The accused said that he did not have sexual intercourse twice with the victim.

44. In cross examination, the accused denied the allegation made by the prosecution. He said he knew Eseta, but did not associate them well. He has not been to her place before this incident. The accused said that was the first time he went to Eseta's house. The accused admitted that he should have explained Eseta that he was having consensual sexual intercourse with her aunt, instead of walking out. He said that he felt ashamed and was dressed in only with his undergarment and that was the reasons he walked out. He went and explained to Eseta about the incident on the following morning. The accused further said that he could recall everything that took place on that night and he was not drunk.
45. I have summarized the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Analysis

46. You heard that the prosecution and the defence presented conflicting versions of events. The prosecution alleges the victim did not consent to have sexual intercourse with the accused. She claims that he entered into the house while she was sleeping and then forcefully had sexual intercourse twice with her. The victim claims that she did not consent to him to have sexual intercourse with her.
47. In contrast, the defence claims the accused met the victim at the bus stand. Both of them agreed to have sexual intercourse and went to the house of Eseta. They then had sexual intercourse. While they were having sexual intercourse, Eseta came into the house.
48. The issue of the existence of consent for an alleged sexual intercourse that took place in private between two persons is always involving with believing of the version of a person against another's. Hence, in order to determine whether the victim gave the consent, it is

important to consider how the victim and the accused behave before, during and after the alleged sexual intercourse.

49. As I mentioned above, there is no stereotype of circumstances for a rape, a rapist, or a victim of rape. You are required to consider all the circumstances of this incident. Having considered all the circumstances as a whole, if it leads to an indisputable and inescapable conclusion that she had not given her consent freely and voluntarily to have sexual intercourse with the accused, you can then conclude that the victim has not given her consent to the accused to insert his penis into her vagina.
50. In order to determine whether the prosecution has proven beyond reasonable doubt that the accused is guilty for the offences as charged, you have to consider 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.
51. 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 testifying 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.
52. It is your duty as judges of facts to consider the demeanour of the witnesses, how they react to being cross examined and re-examined, whether they were evasive in order to decide the credibility of the witness and the evidence.

53. Ladies and Gentleman, you may recall Eseta in her evidence stated that victim told her what the accused has done to her. She then, in her evidence, went on and explained what she heard from the victim in relation to this alleged incident. These form of evidence are known as evidence of recent complaint.
54. The evidence of recent complaint is not an evidence as to what actually happened between the victim and the accused. Eseta was not present and witnessed what happened between them. You are entitled to consider the evidence of recent complaint in order to decide whether or not the victim has told the truth. It is for you to decide whether the evidence of recent complain helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the victim and the accused. It therefore cannot of itself prove that the complaint is true.
55. The learned counsel for the defence proposed you to consider the inconsistent nature of the evidence given by the victim with her own evidence and also with other evidence presented by the prosecution. Hence, being judges of facts, you are allowed to consider whether the evidence given by the victim is inconsistent with her own evidence and also with the evidence given by other witnesses.
56. You may recall that the learned counsel for the accused person questioned the victim during the cross examination about the inconsistent nature of her evidence given in court and the statements she made to the police regarding this alleged incident.
57. I will now explain you the purpose of considering the inconstant nature of the evidence given by a witness with his or her own evidence or the evidence of other witnesses. You can also apply this direction in considering the inconsistent nature of the evidence given in court and the previously made statement of a witness. You are allowed to take into consideration about such inconsistencies and the omissions when you consider credibility and reliability of the evidence given by the witness. However, the previously made

statements are not evidence of the truth of its contents. The evidence is what a witness testified in the court.

58. 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.
59. 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.
60. 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 you could consider the evidence presented by the accused as reliable and truthful. I must again remind you that the accused has no responsibility to prove his innocence.
61. You heard the evidence presented by the accused, where he denied this allegation. If you accept the version of the accused as reliable and truthful, or consider it as reasonably true, although you are not convinced that it is true, then the case of the prosecution fails. You must then acquit the accused from these two counts.

62. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case in respect of each of these two counts of rape. You must then acquit the accused.
63. Even if you reject the version of the accused person that does not mean that the prosecution has established that the accused is guilty for these two counts. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed these two offences as charged.
64. Upon consideration of all evidence, if you are satisfied that the count of rape as charged under count one is proved beyond reasonable doubt, you can find the accused is guilty. If you are not satisfied or have reasonable doubt that that offence of rape as charged under count one is not proved beyond reasonable doubt, then you must find the accused not guilty.
65. Likewise if you are satisfied that the count of rape as charged under count two is proved beyond reasonable doubt, you can find the accused is guilty. If you are not satisfied or have reasonable doubt that that offence of rape as charged under count two is not proved beyond reasonable doubt, then you must find the accused not guilty.
66. Ladies and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions on the charge against the accused person. You will be asked individually for your opinion and are not required to give reasons for your opinion. Once you have reached your opinion, you may please inform the clerks, so that the court could be reconvened.

67. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R.D.R.T. Ragasinghe
Judge

At Suva
15th February 2017

Solicitors
Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Accused