

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 400 of 2016

[CRIMINAL JURISDICTION]

STATE

V

INIA RAYALO

Counsel : Ms. S. Serukai for State
Mr. L. Qetaki and Ms. E. Radrole for Accused

Dates of Hearing : 25th- 27th April 2017

Date of Summing up: 28th April 2017

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

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 in this case is what the witnesses said from the witness box inside this court room, and the exhibit tendered. 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 that information.

3. Please remember that I will not be reproducing the entire evidence in this summing up. 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.
4. 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.
5. You have to bear in mind that a previous statement made out of court is not evidence. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court.
6. 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 the complainant. Your emotions should not influence your decision.
7. 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,

their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

8. The complainant in this case said she is 04 years old. The main task before you in this case 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. 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. 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 reliable account of her experience concerning the offence the accused is charged with.
9. 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. Sometimes we honestly forget things or make mistakes regarding what we remember.
10. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it.

You may perhaps think it 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. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.

11. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is for you to decide.
12. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
13. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness 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.
14. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.

15. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an 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. You must be sure of the accused person's guilt.
16. In order to prove that the accused is guilty, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence, then you must find the accused not guilty. 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.
17. You are not required to decide every point 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 is proved.
18. I must explain to you as to the reason for the complainant to give evidence via Skype from a different room. That course of action was allowed simply to make the complainant who was a child relatively more comfortable when she gave her evidence. You must not infer that such a protection to the complainant was warranted due to the accused's behaviour and should not draw any adverse inference against the accused on that account.
19. 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. But it is not necessary.
20. 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)(b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

INIA RAYALO on the 20th of October 2016, at Vunuku Village, Rewa in the Central Division, penetrated the vagina of TN with his finger.

21. Now, let me explain the elements of the offence. The elements of the offence of rape are;
 - a) the accused;
 - b) penetrated the vagina of the complainant with his finger;
 - c) without the consent of the complainant or,
that the complainant was below the age of 13 years at the time of the incident
22. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence.
23. Second element of the offence of rape involves penetration. To establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his fingers. A slightest penetration is sufficient to satisfy this element.
24. Law says that 'a child under the age of thirteen years is incapable of giving consent'. The prosecution says that the complainant was 4 years old at the time of the alleged incident. You have to be satisfied beyond reasonable doubt that the complainant was below the age of 13 years at the time of the alleged incident.
25. In the event you find the accused not guilty of the offence of rape, where you are not sure whether there was penetration, you may consider whether the accused is guilty of the offence of sexual assault. The elements of the offence of sexual assault are;

- a) the accused;
 - b) unlawfully assaulted the complainant; and
 - c) the said assault is indecent and sexual.
26. Assault is the use of unlawful force. A touch constitutes an assault if it is done without a lawful excuse.
27. The word "unlawfully" simply means without lawful excuse.
28. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. You should also ask yourself, firstly, whether you consider that indecent assault could also have been sexual because of its nature; and if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.

Prosecution Case

29. The complainant said in her evidence that;
- a) *She is 4 years old. In 2016, she was living at her grandmother's house in the village. She said, Inia called her and took her to the kitchen by holding her hands. Then he pulled down her tights and her panty after closing the door. He then pulled down his pants and showed her his penis. Then he shook his penis in front of her and she saw something like water coming out of it.*
 - b) *Then her mother called out for her. When she heard her mother she was on top of the fridge. Inia put her down, he opened the door and she ran outside.*
 - c) *This incident happened during day time and she saw Inia clearly. She knew Inia and he is Grandfather Semi's son.*
 - d) *She again said when she heard her mother, she climbed on the fridge, opened the door and ran outside. When she ran outside, Inia was still there in the kitchen. She could not remember what she told the mother when she met her.*
 - e) *She said that Inia touched her pussy after removing her tights and her panty. She pointed out in between her upper thighs as the place Inia touched. When she was asked whether he touched outside or inside of her pussy, she said that he touched*

- inside. She said it was painful when he did that. When she was asked from which part of the hand Inia touched her, she showed her index finger.*
- f) During cross examination she said that on that day, she was playing with Amelia and her brother Ilaijia. When she was asked whether her mother brought cookies when she returned from the market, she said 'no'.*
 - g) When it was suggested to her that Inia was inside his kitchen and she went to him, she said 'yes'. She agreed that Inia was lying down on the floor in the kitchen when she went inside the kitchen. She also agreed that when she saw Inia lying down, she climbed on top of the fridge.*
 - h) Then when it was suggested that when she climbed onto the fridge her mother started calling her, she said when her mother called, she climbed onto the fridge, opened the door and ran outside. She admitted that she was not in the kitchen for long. When it was suggested to her that nothing happened in the kitchen because she was not there for long, she said Inia did something to her. When it was suggested to her that Inia did not do anything because he was lying down in the kitchen, she said 'yes'.*
 - i) When she was asked whether she agrees that Inia never opened his shorts and showed her his penis, she started crying. After a short break, when it was again suggested to her that Inia never opened his shorts, she said Inia did open his shorts.*
 - j) She said that she went to the police on the same day. Later she agreed that she was taken to the police at least three days after the incident.*
30. The second prosecution witness said in her evidence that;
- a) She is the complainant's mother. The complainant is four years old and her date of birth is 13/09/12.*
 - b) In October 2016 she was living in Vunuku village with the mother-in-law, husband and her two kids. One day she went to the market to sell their produce and came back around 1.30pm. She gave the two kids cookies for them to share when they came from Bu Liku's house.*
 - c) Then the two kids went back to play. After she prepared tea, she went looking for the complainant and called out for her. Then she saw the complainant running out from Semi's kitchen. This happened around 5.00pm.*

- d) *The complainant came to her and she saw that the complainant was holding something. She said the complainant looked scared. She pulled up the complainant's T-shirt and then she saw that the complainant was holding her skirt. She saw that the zip was open and she could see the complainant's panty. She noted that the complainant's panty and tights were not pulled up properly.*
- e) *When she asked the complainant who opened her zip the complainant said that Inia opened her zip and touched her pussy.*
- f) *Then she took the complainant back inside Semi's kitchen and she noted that the kitchen door was closed. She said Semi is Inia's father. When she pushed the door and went inside, she saw the accused lying down on the bed inside the kitchen. She asked him what he did with the complainant and the accused told her that he didn't do anything.*
- g) *After that the matter was reported to the police. She said it was reported on 22/10/16. She said there are two persons by the name of Inia in Vunuku village. She pointed at the accused saying that it was the Inia whom she saw in the kitchen. She said she had a clear view of the accused and on that day she saw him for about 10 minutes. She said the kitchen was a bit dark at that time.*
- h) *During cross examination, she said that this incident took place on 22/10/16 which was a Saturday. She said she reported the matter on the same day at MSP. She agreed that her statement to police was recorded on 25/10/16. She agreed that it is not stated in her statement to police that the complainant told her that Inia touched the complainant's pussy.*
- i) *During re-examination she said she had to wait for three days to take the complainant to the police because when she called MSP she was told to wait at home till the police come there.*

31. The third prosecution witness, Doctor Elvira Ongbit said that;

- a) *She examined the complainant on 25/10/16. She tendered the medical examination form she filled as PE 1. When she examined, the complainant was cooperative and was consistent with her answers. During the vaginal examination she observed that the complainant's hymen was intact but there was a bruise on the inner lip between the vaginal opening and labia minora. She said that the hymen covers the vaginal opening.*

- b) *In her opinion something used with pressure on that area could have caused the bruise. She said it could be caused by rubbing with a certain amount of force.*
- c) *During cross examination she said the hymen could be injured only if something went through it. She said that it is not possible for the bruise to be an outcome of rough playing.*

- 32. At the end of the prosecution case you heard me explain several options to the accused. He had those options because an accused does not have to prove anything. The burden of proving the accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose remain silent. It is his right to do so. You must not draw any adverse inference from exercising his right to remain silent.
- 33. The accused denies the allegation. Defence says that the complainant's evidence was not consistent and the evidence on identification is not sufficient.

Analysis

- 34. To prove the first count, the prosecution should prove beyond reasonable doubt that the accused penetrated the complainant's vagina with his finger and he had the intention to penetrate the complainant's vagina. A person has intention when he means to engage in the conduct in question. Intention is something which can only be inferred. You have to be therefore satisfied beyond reasonable doubt that the accused penetrated the complainant's vagina and he meant to penetrate the complainant's vagina.
- 35. The defence says that the evidence on identification is not sufficient. It was pointed out that there were two persons by the name 'Inia' in the village. When you consider the evidence on the identification of the accused, please bear in mind that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate

the evidence given by the complainant and the second witness on identification of the accused;

- a) Duration of observation;
- b) The distance within which the observation was made;
- c) The lighting condition at the time the observation was made;
- d) Whether there were any impediments to the observation or was something obstructing the view;
- e) Whether the complainant knew the accused and for how long;
- f) How often the witness has seen the accused before;
- g) Any special reason to remember;
- h) Duration between original observation and identification; and
- i) Any discrepancy between description given to police and the appearance.

36. Defence says that there are inconsistencies in the evidence given by the complainant. It was pointed out that the complainant gave two versions as to how she ended up in the kitchen. That is, she said in her evidence that Inia took her and she admitted during cross examination that she went to Inia when Inia was in the kitchen. During examination in chief, the complainant initially said that when her mother called out for her she was on the fridge and Inia put her down and opened the door. Later she said, when the mother called, she climbed on to the fridge, opened the door and ran outside. You should consider these inconsistencies and any other inconsistency you may have noted according to the direction I have already given you on how to deal with inconsistencies.

37. You heard in this case that the complainant had made a complaint to her mother, the second prosecution witness after the incident. You should consider whether she made that complaint without delay and whether she sufficiently complained of the offence the accused is charged with.

38. The complainant need not specifically disclose all of the ingredients of the offence and describe every detail of the incident, but the complaint should

contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that she made a prompt and a proper complaint, then and then only you may consider that her credibility is strengthened in view of that recent complaint.

39. However, the complainant said that she cannot remember what she told her mother after the incident. The second prosecution witness said that when she asked the complainant who opened the zip, the complainant told her that Inia opened her zip and touched her pussy. She admitted that it is not mentioned in her statement given to the police that the complainant told her that Inia touched the complainant's pussy. However she said that she did mention it to the police. Therefore, there is an inconsistency between her evidence and her statement recorded by the police.
40. The defence points out that there is a delay of 3 days in making a complainant to police and if something happened on the particular day, the second prosecution witness would have taken the complainant straight to the police. The second prosecution witness said that she complained to 'MSP' on the same day and she was told to wait for the police to come to her house. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. You may consider whether there is a reasonable explanation for the delay in making the complaint to the police. It is for you to decide whether the delay in making the complaint affects the credibility and the reliability of the evidence presented by the prosecution in this case.
41. You heard the evidence of the third prosecution witness, the doctor who examined the complainant. The defence says that the complainant's hymen was intact because no force was used. The third prosecution witness said that there was a bruise on the inner lip between the vaginal opening and labia minora. She explained that when she conducts the vaginal examination, she would first examine labia majora; then separate the labia majora to examine labia minora; and then separate labia minora to examine the vaginal opening. She gave her

opinion 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.

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. You may peruse the exhibit 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.
44. Your possible opinion should be as follows;
- First Count (rape) - guilty or not guilty
 - If not guilty
 - Sexual assault - guilty or not guilty



Vinsent S. Perera

JUDGE

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