

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 258 of 2016

STATE

v.

“AB”

Counsel: Ms. K. Semisi for State
Ms. C. Choy for Accused

Hearing: 19th to 20th July 2017

Summing Up: 21st July 2017

SUMMING UP

1. The name of the victim and the accused are suppressed.
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
3. Our functions are different. It is my task to ensure that the trial is conducted according to law. 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.
4. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

5. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion. I say so because you are the judges of the facts.
6. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes 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 defence 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 testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. 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 I will give the greatest possible weight on your opinions when I form and deliver 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 as judges of facts 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 the offence.
10. The burden of proof of the charge against the accused 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.
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 presented, 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 charged with two counts of rape contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offence are before you. Hence, I do not wish to reproduce them in my 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 victim was not consenting for him to insert his penis in that manner.
14. The accused is charged with two separate counts of Rape. It is your duty to consider each of these counts separately. If you found the accused is guilty for one count, that does not automatically make him guilty for the remaining count for which he is charged with.
15. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.
16. The accused has admitted in the agreed fact that he had sexual intercourse with the victim on the 2nd and 3rd of July 2016 respectively. The prosecution alleges that the victim did not give her consent for the accused to have such sexual intercourse with her. However, the accused claims otherwise. Accordingly, the main dispute in this matter is the consent of the victim.
17. 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 into her vagina.
18. 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, by threat, by exercise of authority, 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.

19. 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. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given.
20. Sexual Intercourse is normally a mutually agreed recreational and pleasurable act of two persons. Accordingly, the consent for sexual intercourse must be comfortable to the person who made such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.
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. 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 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.
22. 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 accept it as reliable and truthful; you are not required to look for any other evidence to support the account given by the victim.
23. 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.

24. 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.
25. 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. Demeanour of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.
26. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

Evidence of the Prosecution

27. The only witness of the prosecution is the victim. She knocked off her duties at around 10 pm on the 2nd of July 2016. She then went to drop off the workers at the village. She was accompanied by her husband, the accused. Thereafter, both of them came to their house. When they came to the house, the accused got mad and started to shout at her. He said that she is a bitch and would give herself to any man. She went into the bedroom in order to leave her bag. When she came back to the sitting room, she found the accused was standing naked in the sitting room. He pointed out his private parts and demanded her to have sex with him. The victim told him that she is tired and cannot do it. The accused got angry and asked her whether she loves him. She said no. He then threatened her that he will carry her head and intestine and cut her breast. While threatening her, the accused started to move towards her. He was looking at the two knives that were placed under the kitchen table. The victim was scared and felt that her life was in danger. Out of fear, she

submitted herself to the accused to have sexual intercourse. The victim said that she did not consent but had to submit herself against her own free will and involuntarily as she was scared. The accused then had sexual intercourse with her. Subsequent to having sexual intercourse, the accused got up and went to sleep. She stayed in the sitting room thinking of what the accused had done to her.

28. The following day, that was the 3rd of July 2016, she went to work. She knocked off at around 10 pm and went to drop off the workers at the village. The accused accompanied her. As of the previous day, the accused was mad at her when they came home. She found him standing naked in the sitting room, demanding her to have sex. She refused and said no. He threatened her that he will carry her head and intestine and cut her breast. Once again he was looking at the two knives that were placed under the kitchen table. She was scared and had to submit herself to the accused to have sexual intercourse. The victim said that she did not consent to have sexual intercourse, but had to submit herself as she was scared. After having sexual intercourse, the accused went to sleep. The victim could not go to sleep and was thinking of what he did to her. The following day, she went to the Police Station and reported the matter.

Evidence of the Defence

29. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted to give evidence on oaths. However, he advised the court that he does not wish to call any other witnesses for his defence.
30. The accused did not deny that he had sexual intercourse with the victim in the night of 2nd and 3rd of July 2016 respectively. He claims that both occasions, they had consensual sexual intercourse. According to his evidence, the victim called and asked him to make hot water for her to have a massage upon she returned home from work. He accordingly prepared hot water. When she came home, he massaged her in the sitting room. She then asked her what are you looking for and told him to have sexual intercourse. He then had sexual intercourse with her.

31. On the 3rd of July 2016, he massaged her as of the previous night upon she returned home from work. After a while, she asked him what are you waiting for and said that they can have sexual intercourse. He then had sexual intercourse with her.
32. 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

33. The prosecution and the defence presented conflicting versions of events, which took place in private between the victim and the accused. The victim claims that the accused forcefully had sexual intercourse with her without her consent. The accused claims that it was a consensual intercourse. Both the prosecution and the defence did not dispute having sexual intercourse on the 2nd and 3rd of July 2016.
34. 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 and after the alleged sexual intercourse.
35. As I mentioned above, there is no stereotype of circumstances for a rape, a rapist, or a victim of rape. A mere fact that a woman is married to a man and live with him in one house does not automatically constitute that she has given her consent to have sexual intercourse with the man at any time. 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.

36. In order to determine whether the prosecution has proven beyond reasonable doubt that the victim did not give her consent, 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.
37. 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.
38. 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, were they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he or she is testifying, his or her disinterestedness, his or her integrity, and his or her veracity in order to determine the credibility of the witness and his evidence.

Inconsistency and omissions

39. The learned counsel for the defence proposed you to consider the inconsistent nature of the evidence given by the victim in court with the statement she made to the police on the 4th of July 2016. The victim in her evidence said that the accused threatened her that he will carry her head and intestine and cut her breast. The defence suggested that such information has not been recorded in the statement given by the victim to the police on the 4th of July 2016 which the victim agreed in her evidence.

40. I will now explain you the purpose of considering the inconstant nature of the evidence given by a witness in court with the previously made statement to the police. 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.
41. 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.
42. 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.

Evidence of the Defence

43. I now take your attention to the evidence adduced by the defence. The accused elected to give evidence on oath. The accused is not obliged to give evidence. He does not have to prove his innocence.

44. However, the accused decided to give evidence. Therefore, you have to take into consideration the evidence adduced by him when determining the issues of fact of this case.
45. Accordingly, it is for you to decide whether you believe the evidence given by the accused. If you consider that the account given by the accused is or may be true, then the accused must be acquitted.
46. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.
47. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.

Final Directions

48. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of rape as charged under the first count, you can find the accused is guilty for the said offence of Rape.
49. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under the first count, you must find the accused is not guilty for the said count of Rape and acquit him accordingly.
50. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused

has committed the offence of Rape as charged under the second count, you can find the accused is guilty for the said offence of Rape.

51. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused is not guilty for the said count of Rape as charged under second count and acquit him accordingly.
52. 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. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
53. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R.D.R.T. Rajasinghe
Judge

At Suva
21st July 2017

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