

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

Crim. Case No: HAC 281 of 2016

STATE

v.

GV

Counsel: Ms. K. Semisi for State
Ms. V. Filipe for Accused

Hearing: 21st, 22nd, 23rd and 25th August 2017

Summing Up: 28th August 2017

SUMMING UP

1. The names 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 and the documents tendered as exhibits. 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 and it is not evidence. 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.

Information

12. The accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act. He is further charged with one alternative count of Sexual Assault, contrary to Section 210 (1) (a) and (2) of the Crimes Act. The particulars of the offences are before you. Hence, I do not wish to reproduce them.

13. The Prosecution alleges that the accused came to the bathroom while the victim was washing her uniform in the afternoon of the 10th of July 2016. He is the uncle of the victim. He pulled her shorts down and then licked the vagina. While licking the vagina, he had penetrated the vagina of the victim with his tongue.
14. The accused denies the allegation of penetration. The accused admits that he licked the top part of the vagina of the victim. However, he denies that he did not penetrate the vagina of the victim with his tongue.

Elements of the Offence

15. Let me now explain you the main elements of the offence of Rape.
16. Section 207 (1) and (2) (b) and (3) of the Crimes Act states that:

A person rapes another person if—

b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

c)

iii) for this section, a child under the age of 13 years is incapable of giving consent.

17. Accordingly the main elements of this offence of Rape are that:
 - i) The Accused,
 - ii) Penetrate the vagina of the victim with his tongue.
18. The victim was eleven years old at the time of this offence took place. The defence has not disputed the age of the victim. Hence, she is incapable of giving consent to any form of penetration in to her vagina as defined under Section 207 of the Crimes Act.

19. I now take your attention to the agreed facts. They are the facts that the Prosecution and the Defence agreed to without any dispute. Hence, you are allowed to consider the agreed facts as proven facts beyond reasonable doubt by the Prosecution.
20. Let me allow to explain you the element of penetration. Evidence of slightest penetration of the tongue of the accused into 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.

Alternative Counts

21. If you find the accused did not penetrate the vagina of the victim with his tongue as charged, you are then allowed to consider a lesser alternative count of "Attempt to Commit Rape, though it is not formally charged in the information. The main elements of the offence " of "Attempt to Commit Rape" are that:
 - i) The accused,
 - ii) Attempt to penetrate of the vagina of the victim with his tongue.
22. In respect of the element of Attempt, you have to consider two things. First is that whether he intended to penetrate the vagina of the victim with his tongue. The second is that, with that intention, whether he did something which was more than mere preparation for committing that offence. It is for you to decide whether what he did was more than mere preparation.
23. Accordingly, you have to be satisfied that the accused had an intention to penetrate the vagina of the victim with his tongue and with that intention he licked the vagina of the victim.
24. If you find that the accused is neither guilty for the offence of Rape nor the offence of Attempt to Commit Rape, you are still allowed to consider another alternative count, that is

Sexual Assault as charged in the information. The main elements of the offence of Sexual Assault are that:

- i) The accused,
- ii) Unlawfully and Indecently,
- iii) Assault the victim.

25. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. It is your duty as Assessors to consider and decide whether the acts of licking of the vagina of the victim by the accused with his tongue is an indecent act amounting to sexual assault.

Evidence of Corroboration

26. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. 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.

27. 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.

28. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. As I said above, it is your duty to determine the legal culpability of the alleged act committed by the accused according to law and not the moral or emotional culpability. 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.

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

Evidence of Prosecution

30. The first witness of the Prosecution is the victim. She could recall that her uncle, the accused came into the bathroom while she was washing her uniform in there in the afternoon of 10th of July 2016. Once he entered into the bathroom, she came out and waited outside. In a while, the accused came out. She then went into the bathroom. Both the toilet and the bathroom are located in the same place. When she went into the bathroom, the accused also came into it again. He was standing at the door. She wanted to go out, but could not as the accused was standing at the door. He came and pulls her shorts down. The accused then started to lick her vagina. He leaked the place where her menstruation coming from. It is inside the vagina. She felt pain. The pain came from inside the vagina. She pulled his head when he did it. At that time her mother came. He suddenly walked out. Her mother asked him what was he doing inside the bathroom. He said that he did not do anything. The victim was standing while holding her shorts when her mother came in. Her mother then asked her what the accused did. She then told her mother that he pulled her shorts down and licked her vagina. Mother then took her to the room where her father was sleeping. She woke him up and told him about this incident.
31. During the cross examination, the victim said that she does not know the meaning of "*Piam*" in Rabi language. However, when she was suggested by the learned counsel for the defence that "*piam*" also means the outside of the vagina, she answered affirmatively. She was standing up when the accused licked her vagina. She did not look at him to see which place he was exactly licking. She said it was very painful. The pain came from inside the vagina. She said that he could have licked outside of the vagina.
32. The victim further explained that her mother not only spoke to the accused, but also spoke to her when she came to the bathroom while the accused was licking her vagina. The victim then told her mother what the accused did to her.

33. The second witness of the Prosecution is the mother of the victim. She recalls that when she went to the bathroom, she saw the accused was coming out from it. She then went inside and shocked to found that the victim was inside it. She asked the accused what was he doing inside the bathroom when her child was inside it. He said that he went to answer the nature's call. She then asked the victim. The victim then told her that the accused pulled her shorts down and licked her vagina. She then confronted the accused, and he answered saying that he did not do anything. She then took the victim into the room and told her husband about this incident. The accused is the husband of one of her two sisters who also lived with them in the same house in 2016.
34. In cross examination, she said that they use Rabi language in their normal communication in the house. The victim explained the incident to her in Rabi language. She used the word "*piam*" in explaining the vagina. *Piam* and *Kim* in Rabi language mean my vagina. It means lady's private part. The victim told her that she felt pain. The victim did not complain about continuous pain. She felt pain only at the time the accused licked her vagina.
35. The third witness of the Prosecution is DC Tevita Savou. He is the Investigating and Interview Officer of this matter. He led his team to arrest the accused. He then conducted the caution interview of the accused on the 15th of July 2016. The caution interview commenced at 9.57 a.m. and concluded at 12.30 p.m. The accused did not make any complaint or request before or during the recording of the caution interview. The accused was given all his rights. He signed the caution interview and acknowledging the same. The caution interview was conducted in i-taukei language in a question and answer format. DC Savou asked the questions and the accused answered to them accordingly. He then recorded the questions and the respective answers given by the accused as exactly as the way that the accused answered. The accused understood the questions and answered accordingly. DC Farasiko was present as the Witnessing Officer until the fifth page of the caution interview. He then had to attend another operation, hence, he left. WDC Sereima translated the original caution interview into English language.

36. DC Savou specifically stated that the accused understood the question 44, 45 and 46 properly. He then answered to them. DC Savou then recorded them as exactly as the way that the accused answered. The accused appeared normal throughout the recording of the caution interview.
37. During the cross examination, DC Savou said that he used the words of private parts and hole in question 46. He did not introduce or suggest the accused the word "clito". He denied that he introduced the word "clito" and the accused then accepted it.

Evidence of the Defence

38. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted to give evidence on oath. He further informed the court that he would call another witness for his defence.
39. The accused in his evidence said that he only licked the top part of her vagina. The accused gave evidence in i-taukei language. The court interpreter translated his evidence into English Language. He used the word of "*delana*" in i-taukei to explain that he licked the vagina of the victim. He licked it for about five seconds. He then heard that someone was coming. He stopped it and came out of the bathroom. He met the mother of the victim. She asked him what was he doing inside. He said he went to answer the nature's call.
40. In respect of the caution interview, the accused said that he does not know the word "clito". The police officer suggested the word "clito". He then said yes and the Police Officer recorded it accordingly.
41. In cross examination, the accused said that he chose i-taukei language for the caution interview. He understood the questions and then answered to them by himself. He gave his answers freely and voluntarily. He further said that he gave the answer pertaining to question 45. He did not make any complain after the conduct of the caution interview. He confirmed that he understood the questions. He has signed the record of the caution interview at the end of the recording.

42. Moreover, the accused said that he licked the vagina of the victim. He used the word “*magana*” in i-taukei to describe the vagina. He further confirmed that he heard that the mother of the victim asked the victim about what he did in the bathroom. He further heard that the victim was telling her mother that the accused licked her vagina.
43. In re-examination the accused said that he gave his answer pertaining to question 45 saying that he licked the top part of the vagina. The Police Officer then suggested him that it was “clito”. The accused in his re-examination further said that he did not go right down of the vagina as he was bending down and licking it.
44. The second witness of the Defence is Dr. Elvira Ongbit. She is a medical doctor attached to Medical Service Pacific and the Ministry of Health. Dr. Ongbit explained in her evidence about the vaginal opening. The menstruation blood comes from the vaginal opening. Vaginal opening is covered by *labia minora* and *labia majora*.
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. 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 penetrated her vagina with his tongue. The accused denies it though he admits that he licked the vagina of the victim. You have heard that the accused said, during the cross examination, that he licked the vagina of the victim with his tongue.
47. In view of the evidence adduced by the Prosecution and the Defence, the main dispute in this matter is whether the accused penetrate the vagina of the victim with his tongue when he licked the vagina of the victim with his tongue.

48. The Prosecution mainly relies on the evidence of the victim and the confession made by the accused in his caution interview in order to prove that the accused penetrated the vagina of the victim with his tongue.

Evaluation of Evidence

49. In order to determine whether the prosecution has proven beyond reasonable doubt that the accused penetrated the vagina of the victim with his tongue, 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.
50. 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.
51. It is your duty as judges of facts to consider the demeanours 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.

Presentation of the Evidence by the Victim

52. You have seen that the victim gave evidence behind a screen. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence given by the

victim. The fact that the evidence has been given in this manner must not in any way be considered by you as prejudicial to the accused.

Evidence of the Child Victim

53. The most important part of your task is to judge whether the child witness has told the truth, and has given a reliable account of the events that she was describing. Some of you will have children and grandchildren who are of a similar age to the victim. If so, I think you will recognize the sense of the advice I am going to offer you about your judgment of the evidence of the child victim, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice and if you do not agree with it you should reject it.
54. Children do not have the same life experience as adults. They do not have the same standards of logic and consistency. Their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it, and about using words they think are naughty, and therefore find it difficult to speak.
55. Experience has shown a number of things. A child may not fully understand the significance of activity which is sexual and that may be reflected in the way they remember it or describe it. A child's perception of the passage of time is very likely to be different from that of an adult. A child's memory can fade even in the short term. When recounting events later, even a fairly short time later, a child's recall of when and in what order events occurred may not be accurate. She may well not be able to speak of the context in which those events occurred. A child may have particular difficulty dealing with conceptual questions such as how she felt some time ago, or why she did or did not take a particular course of action.

56. Remember how you normally talk to children of this age. You should bear those difficulties in mind when you consider the answers given by the child victim. All decisions about the evidence are for you to make.

Caution Interview of the Accused.

57. I now draw your attention to the confessionary statement made by the accused in his caution interview.
58. The prosecution presented in evidence the record of the caution interview that the police was conducted with the accused. The prosecution contends that the accused in fact made an admission that he licked the vagina of the victim. In question 45 of the caution interview the accused has admitted that he licked the “clito” of the vagina. The Prosecution further presented evidence to establish that those admissions of the accused have been recorded in the caution interview accurately and truly. The prosecution says the accused was treated well and he gave those answers in the caution interview freely and voluntarily. The Interviewing Officer in his evidence said that he recorded those answers in the caution interview as exactly as the way that the accused gave his answers.
59. Meanwhile the accused claims that the answer that he gave pertaining to question 45 was introduced to him by the Interviewing Officer. He suggested to the accused the word “clito”. The accused then accepted it. The accused did not allege that he was mistreated. He said that he understood the questions posed to him by the Interviewing Officer and then answered to them accordingly. During the cross examination, the accused said that he gave the answer pertaining to question 45.
60. In order to determine whether you can safely reply upon the admissions made by the accused in the caution interview, you must decide two issues,
61. Firstly, did the accused in fact make the admissions? Having considered the evidence presented during the course of the hearing, if you are not satisfied or not sure of that the

accused has actually made the confessions in his caution interview, you must ignore the admission made in the caution interview.

62. Secondly, if you are satisfied, that the accused has made the admission in his caution interview, then it is for you to decide whether the contents of the caution interview are truthful, and what weight you give them as evidence. It is for you to decide whether you consider the whole of the caution interview or part of it or none of it as truthful and credible. You must consider all other evidence adduced during the course of the hearing in deciding the truthfulness and the reliability of the confessions and its acceptability.

Evidence of Recent Complaint

63. You have heard the evidence that the victim told her mother that the accused pulled down her shorts and licked her vagina when the mother came and asked her. The accused also in his evidence confirmed that he heard the victim was telling her mother about this incident. The mother of the victim in her evidence further said that the victim told her that she felt pain when the accused licked her vagina.
64. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between the victim and the accused. Mother of the victim was not present and witnessed what happened between victim and the accused.
65. You are entitled to consider the evidence of recent complaint in order to decide whether or not victim has told the truth. The prosecution proposed you that victim's complaints to her mother is consistent with her account of this alleged incident and therefore she is more likely to be truthful. It is for you to decide whether the evidence of recent complaint 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 accused and the victim. It therefore cannot of itself prove that the complaint is true.

Inconsistency and Omissions

66. Ladies and Gentleman, you might recall that the learned counsel for the accused cross examined the victim about the omissions and inconsistencies in her statements made to the police and the evidence given in the court. The victim has not mentioned about the pain she felt in the statement made to the Police. Furthermore, she has not stated in the statement that her mother asked her about this incident when she came to the bathroom. However, the accused in his evidence concurred with the version of the Prosecution saying that the mother of the victim asked the victim about this incident after she inquired from him. He then heard that the victim was telling her mother about this incident.
67. Having questioned the victim about these inconsistencies and the omissions, the learned counsel for the accused proposed you that the statement made by the victim to the police is in conflict with the evidence given by her in the court. The evidence of victim is what she told us in court on oath.
68. I now explain you the purpose of considering the previously made statement of the victim with 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 victim is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents.
69. 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.
70. 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 Accused.

71. 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. However, the accused decided to give evidence. Moreover, he called one witness to give evidence for his defence. Therefore, you have to take into consideration the evidence adduced by the defence when determining the issues of fact of this case.
72. Accordingly, it is for you to decide whether you believe the evidence given by the defence. If you consider that the account given by the accused is or may be true, then the accused must be acquitted.
73. 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.
74. 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.

Directions

75. Ladies and gentleman, I now take your attention to the final directions of the summing up.
76. 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, you can find the accused is guilty for the said offence of Rape.


77. 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 and acquit him accordingly.
78. If you found him not guilty for the offence of Rape, you are then allowed to consider the alternative count of Attempt to Commit Rape. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Attempt to Commit Rape, you can find him guilty of the alternative count of Attempt to Commit Rape.
79. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Attempt to Commit Rape, you must find the accused is not guilty for the said count of Attempt to Commit Rape.
80. If you found him not guilty for the offence of Rape and Attempt to Commit Rape, you are then allowed to consider the alternative count of Sexual Assault. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you can find him guilty of the alternative count of Sexual Assault.
81. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you must find the accused is not guilty for the said count of Sexual Assault.

Conclusion

82. 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.

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




R.D.R.T. Rajasinghe
Judge

At Suva
28th August 2017

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