

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 249 of 2016

STATE

v.

VILIVE VIALA

Counsel: Ms. U. Tamanikaiyaroi for State
Ms. T. Kean with Ms. S. Hazelman for Accused

Hearing: 29th, 30th August 2017

Summing Up: 31st August 2017

SUMMING UP

1. 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.
2. 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.
3. 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.

4. 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.
5. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witness 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 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.
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 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.
7. 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

8. 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.
9. 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.
10. 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

11. The accused is charged with one count of Rape, contrary to Section 207(1) and (2) (b) of the Crimes Act and one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act. The particulars of the offences are before you. Therefore, I do not wish to reproduce them in my summing up.

Rape

12. The main elements of the offence of Rape as charged are that:

- i) The Accused,
 - ii) Penetrated into the anus of the victim with his penis,
 - iii) The victim did not consent to the accused to penetrate into her anus with his penis,
 - iv) The Accused knew or believed that the victim was not consenting for him to insert his penis in that manner.
13. It is the responsibility of the Prosecution to prove beyond reasonable doubt that it was the accused who actually had this alleged sexual intercourse with the victim.
14. Evidence of slightest penetration of the penis of the accused into the anus of the victim is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.
15. 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 anus.
16. 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.
17. The victim must have the freedom to make the choice. It means that she must not being pressured or forced to make that choice. Moreover, the victim must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. A person can consent for certain forms sexual conduct, but not consent for another form of such sexual acts. 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.

18. If you are satisfied, that the accused had inserted his penis into the anus 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 or knew 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 or knew that the victim was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that was prevailed at the time of the alleged incident took place.

Evidence of Corroboration

19. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. The offence of Rape falls within this category. It means that if you are satisfied with the evidence given by the victim and accept it as reliable and credible beyond reasonable doubt, you are then not required to look for any other evidence to support the account given by the victim.
20. 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.
21. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You heard that the accused is the husband of the victim. A mere fact, that a person married to another, does not automatically give him/ her an authority or a freedom to engage in any form of sexual intercourse with his/ her spouse

without the consent of the spouse. 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 during the course of the hearing.

22. It is your duty as judges of facts to assess the evidence in order to determine whether the accused penetrated the anus of the victim with his penis without her consent. 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. Demeanours of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

Assault Causing Actual Bodily Harm

23. Let me now take your attention to the main elements of the offence of Assault Causing Actual Bodily Harm.
- i) The Accused,
 - ii) Assaulted the victim,
 - iii) Caused bodily harm
24. Assault is an act by which a person intentionally or recklessly causes another to apprehend unlawful violence.

Agreed Facts

25. 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.

Separate Consideration

26. The accused is charged with one count of Rape and one count of Assault Causing Actual Bodily Harm. It is your duty to consider each of these two 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.
27. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

Evidence of the Prosecution

28. The Prosecution only adduced the evidence of the victim. According to the evidence given by the victim, she went fishing to Baravi with the accused in the morning of 31st of March 2016. The accused is her husband. They have left for fishing at 8 a.m. However, they did not manage to catch any fish. The accused told the victim that she is a rat and bad woman. He then punched her on her head. He punched her because they failed to catch any fish. They then went to get some breadfruits. On their way, the accused said that he wanted to have sexual intercourse with her. She agreed for it. He then took her to nearby pine trees, where they had sexual intercourse. While having a vaginal intercourse, the accused said that he wanted to have anal intercourse as her vagina is too big. The victim refused that. He then punched on the side of her ribs. Irrespective of her refusal, the accused penetrated into the anus of the victim with his penis. It was painful. The victim said that stools came out while he penetrated her anus with his penis. When she told him that it was painful, he stopped it. They then went to get breadfruits and gone back home.
29. On the following day, she went to Vunisea to collect the Social Welfare grant and the funds of Cyclone Winston Relief. She received \$600. She then spent \$90 to buy groceries and left them at home. The victim then came to Suva without informing the accused. She said that she was angry as the accused did not return home from Lomaji, where he has his farm. That was the reason she left home. She called him from Suva and asked him to come with the kids to live in Suva. The accused was angry as she left home taking the money. The accused told her that she drinks too much and have many affairs. Therefore, he does

not want to come to Suva. He said that he will stay in Kadavu with the kids. The victim got angry as he disconnected the telephone conversation. She then reported this matter to Nasinu Police Station on the 4th of April 2016.

30. The victim in her evidence said that she did not want to report this matter, but her brother influenced and forced her to make this report to the Police. The victim has made another report to Kadavu Police Station on 28th of September 2016.

Evidence of the Defence

31. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted not to give evidence.
32. The accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

Analysis

33. You have heard the evidence given by the victim during the course of this hearing. According to the evidence given by the victim, this alleged incident had taken place in private between the accused and victim at an isolated place. She claims that the accused assaulted her and then forcefully penetrated into her anus with his penis without her consent. The accused opted not to give evidence, but extensively cross examined the victim during the cross examination, specially emphasizing the inconsistent nature of the evidence given by the victim.

Evaluation of Evidence

34. In order to determine whether the prosecution has proven beyond reasonable doubt that the accused penetrated the anus of the victim with his penis without her consent, you have to consider the credibility of the witness, and the reliability of her evidence. It is for you to decide whether you accept the whole of what the 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 the witness is telling the truth and is correctly recalling the facts about which she has testified. You can accept part of the witness's evidence and reject other parts. The witness may tell the truth about one matter and lie about another; she may be accurate in saying one thing and not accurate in another thing.

35. In assessing evidence of the witness, 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 her own evidence but also with other evidence presented in the case.
36. It is your duty as judges of facts to consider the demeanours of the witness, how she react to being cross examined and re-examined, was she evasive, in order to decide the credibility of the witness and the evidence.

Victim's intention to withdraw the Complaint

37. The Victim in her evidence stated that she wants to withdraw this complaint against the accused, as she does not want that the accused to go to Prison. The victim further said that she needs the accused as her children are alone in Kadavu.
38. The evidence in respect of her intention to withdraw the complaint should not be construed adversely against the accused unless there is evidence to establish that she was forced, influenced or threatened by the accused to do so. However, that evidence is allowed to take into consideration together with all other evidence adduced in the hearing, in order to determine the credibility and reliability of the evidence given by the victim.

Delay

39. It has been said on behalf of the accused that the fact the victim did not report what had happened to her as soon as possible makes it less likely that the complaint she eventually made was true. It is a matter for you to consider and resolve. However, it would be wrong

to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise an immediate complaint does not necessarily demonstrate a true complaint.

40. You have to consider the reasons or the explanation given by the Prosecution for the delay of reporting the matter. The victim in her evidence said that she did not report this matter in Kadavu as the accused has many relatives there. She did not tell about this incident to anyone at her house as she thought it was a matter between her and her husband. Furthermore, the victim said that she did not want to report this matter even after she came to Suva as well. However, her brother forced and influenced her to report this matter to the Police. You have to take into consideration this evidence when you consider the issue of delay and how it affects the credibility, reliability and truthfulness of the evidence given by the victim.

Inconsistent Nature of the evidence given by the Victim

41. I now take your attention to the inconsistent nature of the evidence given by the victim as suggested by the learned counsel for the defence.
42. According to the evidence given by the victim during the evidence-in-chief, the accused assaulted her on her head when he failed to catch any fish. Once again the accused assaulted her on the side of her ribs when she refused to have anal intercourse as he demanded. However, in cross examination, the victim affirmatively answered “yes” when she was asked by the learned counsel for the defence that this assault had never occurred as the accused was at his farm at Lomaji on the 31st of March 2016. She was further suggested by the defence that this alleged rape had never happened on the 31st of March 2016 as the accused was at his farm on that day. Answering to that proposition, the victim

said that the accused left to Lomaji after having sexual intercourse. During re-examination, the victim said that the accused only assaulted but he never raped her.

43. Accordingly, the victim in her evidence-in-chief said that the accused assaulted her twice. Firstly on her head when they were fishing and then on the left side of her ribs when she refused to have anal intercourse as demanded by the accused. He then penetrated her anus with his penis without her consent. During cross examination, the victim said that he did not assault. However, he had sexual intercourse with her before he left to the farm. The victim, in re-examination, said that he never raped but only assaulted her. The victim did not give any explanation for these inconsistencies, apart from saying that she wants to withdraw this complaint.
44. You have to consider these inconsistent natures of the evidence given by the victim, when you evaluate her evidence in order to determine whether you can satisfy and accept the evidence given by the victim as credible, reliable and truthful evidence beyond reasonable doubt.

Inconsistencies and Omissions

45. Madam and Gentlemen, you have heard that the learned counsel for the accused cross examined the victim about the omissions and inconsistencies in the two statements that she made to the police and the evidence given in the court.
46. The victim admitted in her evidence that she has stated in the first statement that she made to the Police on the 4th of April 2016, that the accused assaulted her because he was angry as her brother had chased them from the house of her brother in Omkar because the accused failed to repair the kitchen of that house. The victim in her evidence said that he assaulted her because they failed to catch any fish. When she was asked about this inconsistent nature of her evidence, she explained that the version that she has given to the Police in her statement is true.

47. The victim further admitted in her evidence that there are inconsistencies between the evidence given by her in court and the first statement that she made to the Police regarding the time and the manner that the accused assaulted her. In the first statement made to the Police, the victim has stated that the accused assaulted on her stomach after he inserted his penis into her anus. In her evidence, she said that the accused punched on the side of her ribs when she refused to have anal intercourse as he demanded. He then penetrated his penis into her anus irrespective of her refusal.
48. Furthermore, the victim agreed that she has not stated in any of her two statements that the accused told her that she is a rat when he smacked her as she testified in her evidence. Moreover, she has not stated any of the statements that the accused told her that her vagina is too big and he want to have her anus.
49. You may recall that the learned counsel for the defence in her closing address proposed you that the two statements made by the victim to the police are in conflict with the evidence given by her in the court. The evidence of victim is what she told us in court on oath.
50. I now explain to 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 statements 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.
51. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
52. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation. for the change, you may

then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

53. Having considered above discussed issues of delay, the victim's intention to withdraw the complaint and the inconsistencies of her evidence, you have to determine whether any reasonable doubts are existing regarding the following issues, that:
- i) Whether this alleged assault and the rape actually took place,
 - ii) Whether this alleged incident took place in the day time as explained by the victim in her evidence or in the night time as stated in her statement made to the Police,
 - iii) Whether the accused assaulted the stomach of the victim or the side of her ribs as explained in her evidence,
 - iv) Whether the accused assaulted her before or after he penetrated the anus of the victim with his penis without her consent,
 - v) Whether he assaulted the victim because of the argument over his failure to repair the kitchen of her brother's house or he failed to catch any fish.

Directions

54. Madam and gentlemen, 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.
55. 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.
56. Likewise, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Assault Causing Actual Bodily Harm as charged,

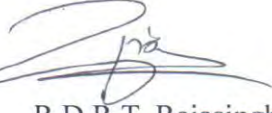
you can find the accused is guilty for the said offence of Assault Causing Actual Bodily Harm.

57. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Assault Causing Actual Bodily Harm as charged, you must find the accused is not guilty for the said count of Assault Causing Actual Bodily Harm.

Conclusion

58. Madam and Gentlemen 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.
59. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R.D.R.T. Rajasinghe
Judge

At Suva
31st August 2017

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