

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 234 of 2014

STATE

v.

MITIELI WAIVONO

Counsel: Ms. Tivao for State
Mr. Waqainabete S., Mr Ali. S for Accused

Hearing: 25th, 26th and 27th January 2017

Summing Up: 30th January 2017

SUMMING UP

Introduction

1. Ladies and Gentleman assessors, you have heard the evidence adduced by the prosecution and the defence and also the respective closing submissions of the learned counsel for the prosecution and the defence. Now, it is my duty to sum up the case to you. As part of that, I will direct you on the law that applies in this matter. You must accept the law from me and apply all directions I give you on matters of law.
2. Our functions in this trial have been and remain quite different. Throughout this trial the law has been my area of responsibility, and I must now give you directions as to the law which applies in this case. When I do so, you must accept those directions and follow them.

3. It is also my function to remind you of the prominent features of the evidence. However, it has always been your responsibility to judge the evidence and decide all the relevant facts of this case. You and you alone must decide what evidence you accept, what evidence you do not accept and what evidence you are not sure about; and when you come to consider your opinion, you and you alone, must do that.
4. You do not have to decide every point which has been raised; only such matters as will enable you to say whether the charge laid against the accused has been proved. You will do that by having regard to the whole of the evidence including the material tendered as exhibits and forming your own opinion about the witnesses, and which evidence is reliable and which is not. The evidence consisted of the oral testimony of witnesses, both prosecution and defence and the material tendered as exhibits and agreed facts.
5. You all have been chosen from the community and represent a pool of common sense, knowledge and experience of the conduct of human beings in our community. You have sworn on oath or affirmed that you will deliver a true opinion according to the evidence. Therefore you must decide this case only on the evidence which has been placed before you. There will be no more.
6. You must reach your opinion on evidence. Evidence is what the witnesses both from the prosecution and the defence said from the witness box, documents and other materials received as exhibits and agreed facts. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel of the prosecution is not evidence. The purpose of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the accused are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
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 testimonies and the exhibits put before you in this

courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.

8. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that your opinion will assist me in reaching my judgment.
9. 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.

10. I now draw your attention to the issue of burden and standard of proof. The accused person 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 person is guilty for these offences.
11. The burden of proof of the charges against the accused is on the prosecution. It is because the accused person is presumed to be innocent until they are proven guilty. Accordingly, the burden of proof rest on the prosecution throughout the trial and it never shifts to the accused. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
12. 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

13. The accused is being charged with eight counts of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars are before you, hence I do not wish to reproduce them in the summing up.
14. The main elements of the offence of Rape as charged in the information are that;
 - a) The Accused,
 - b) Penetrated into the vagina of the victim with his penis,
 - c) The victim did not consent to the accused to penetrate into her vagina with his penis,
 - d) The Accused knew the complainant was not consenting for him to insert his penis in that manner.
15. The prosecution has charged the accused with eight counts of rape. As judges of facts, you are required to consider each and every count separately. If you find the accused is guilty of one count that does not automatically make him guilty for the remaining counts.
16. I now draw your attention to the agreed facts, that the prosecution and the defence have agreed without any dispute. Hence, you are entitled to consider these agreed facts as proven facts beyond reasonable doubt by the prosecution.
17. According to the agreed facts, the prosecution and the defence have agreed that the accused had sexual intercourse with the victim on eight occasions on the 9th, 14th, 19th of July and 4th, 5th, 6th, 7th, and 8th of August 2014 respectively. Hence, the identity the accused and the penetration has not been disputed by the prosecution and the defence. Accordingly, the main dispute is whether the victim gave her consent to the

accused to have sexual intercourse with her on each of these eight occasions as charged in the information.

18. 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 as charged.
19. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of an offence of rape, the victim consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, threat, exercise of authority, use of force or intimidation could not be considered as consent expressed freely and voluntarily. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.
20. The victim must have the freedom to make the choice. It means that she must not be pressured or forced to make that choice. Moreover, the victim must have a mental and physical capacity to make that choice freely. The consent perhaps may be limited to some sort of sexual or intimate activities but not for another form of sexual activity. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. 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 that the victim was not in a condition or a position to make a choice freely and voluntarily, or the victim had made no choice to agree to sexual intercourse. If you conclude that the accused believed that the victim was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that prevailed at the time the alleged incident took place.

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 accepts 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. Demeanor 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 first witness of the prosecution is Unaisi Naiobasali. She lives at Taviya village, Levuka, Ovalau. She was eighteen years old in 2014. She has been suffering from a heart decease since 2014.

28. On the 9th of July 2014, Unaisi had gone to the school of the accused's son to give his lunch on the request of the accused. When she returned, she had her tea with the accused at his house. The accused then went and closed the door and told her not to worry and be relaxed. He had then pulled her into the sitting room and took off her clothes. He put her on to the bed. He then sucked her breast and leaked her vagina. He then had sexual intercourse with her. Unaisi states that she was scared and speechless when he did this. He had threatened her not to tell anyone. If so, he will do something to her and her family. He was on top of her and she could not move away. When she tried to shout, he closed her mouth by his hands. Unaisi states that she did not consent to the accused to have sex with her on the 9th of July 2014. She did not tell anyone about this incident as she was scared of the accused.
29. On the 14th of July 2014, the accused again called her to come to his house to make a free call on his mobile phone, when she was hanging her clothes outside of her house. He kept on calling her. When she went to the door of the kitchen, he pulled her inside and took her to the sitting room. He had then removed her clothes and came on top of her. He then had sexual intercourse with her. Unaisi states that she was scared and thought that he might do something to her and her family. She explained that she went to his house again on 14th of July 2014, after the first incident because he kept on calling and followed her wherever she went. Unaisi said that she did not consent to the accused to have sex with her on the 14th of July 2014. After having sex with her, he forced her to take a recharge card. He had threatened her not to tell anyone, if she does so, he will punch her or do something.
30. On the 19th of July 2014, she went to drop the accused's son's lunch box at his house. He came and got hold of her. He then pulled her into the sitting room and removed her clothes. He then had sexual intercourse with her. She says she did not consent for him to have sexual intercourse with her. Moreover, she says that she could not do anything as he was strong. He had threatened her once again not to tell anyone about this.
31. She went to the accused's house to drop the lunch box of the accused son's on the 4th of August 2014. He pulled her inside and forcefully had sexual intercourse with her without her consent. He threatened her not to tell anyone. She was scared of him and did not tell anyone. The same thing repeatedly happened on the 5th, 6th and 7th of

August 2014, when she went to his house to drop his son's lunch box. Unaisi said that she did not consent to the accused at any of these occasions and was scared of him. He had threatened her continuously not to tell anyone. Unaisi said that she had to go to his house because he continuously called her and she was scared that he might come to her house and do something. She was alone at her house at all of these occasions. She was afraid that he might follow her in the village and do something if she did not go to his house.

32. On the 8th of August 2014, the accused called her to his house to adjust his mobile phone. She went there because she was afraid if she did not go, he might come to her house and punch her or do something. He pulled her inside the sitting room and had sexual intercourse with her. She found blood stain on her 'sulu', when she got up from the bed after the incident. The accused gave her another 'sulu' to cover up the blood stain on her 'sulu'.
33. The victim explained in her evidence that all of these eight occasions, the accused threatened her and did not allow her to escape. She was scared of him as he kept on threatening her. She did not tell anyone because of her fear of the accused. No one else was present at his house during these eight occasions.
34. Unaisi had told her mother about what had been happening to her on the 10th of August 2014. She said that she was fed up with the accused and wanted to stop what he had been doing to her. She said that she actually believed that he will do something to her and her family, if she tells anyone about this.
35. Ladies and gentleman assessors, you may recall that the victim was extensively cross examined by the learned counsel for the accused. I will now briefly summarize the evidence adduced during the cross examination of the victim.
36. During the cross examination, Unaisi said that she should have reported the matter to the police when she went to hospital to have her injection. However, she was afraid of the accused that prevented her reporting the matter to the police. She did not report this to anyone in the village, including the village headman, the chief, the pastor, the head teacher as she was scared of the accused that he will do something to her or her family.

37. Unaisi further stated that she could not shout for help as the accused threatened her and she was scared of him. The accused held her and prevented her from running away. She explained the vicinity of her house and the house of the accused. Unaisi denies that she asked Saimoni to go and inform the accused that she wants to meet him on 8th, 18th of July and 3rd of August 2014 respectively. She denies that she met the accused at the beach on the 8th of July 2014. Unaisi said that she went to Accused's house because he kept on calling her to go and drop his son's lunch box. Moreover, she denies that she had an affair with the accused. She further denies that she initiated any of these alleged sexual intercourse. She did not consent for them. The accused threatened her and forcefully had sexual intercourse with her.
38. Unaisi said that she went to have grog at Seva's place and the accused also joined later. The accused's wife came, then the accused went back with her. Sometimes later, the wife of the accused came and started to talk bad things about her family. Unaisi said the wife of the accused came to her aunt's house when she was there on the 10th of August 2014. The accused then called her on her mobile, not knowing that his wife was also there. Unaisi put the speaker of the phone on, letting the wife of the accused to hear what he was saying. She denies that she sought forgiveness from the wife of the accused. On the same night, the accused and his wife came to see her parents and told them about this incident. By that time, her mother had already knew it.

The Evidence of the Defence

39. At the conclusion of the prosecution case, you have heard that I explained the accused about his rights in defence. The accused opted to give evidence on oath and informed the court that he will call three other witnesses for his defence.
40. The accused in his evidence denies the allegation and said that Unaisi came by her own and consented to have sex with him. She used to ask money after having sex at each occasions. The accused in his evidence said one Saimoni came to his house in the night on 8th of July 2014. Saimoni told him that Unaisi wanted to see him at the beach. He then went to the beach and met her. She said she wants him and started to hug him. He then told her to come to his house next day.

41. On the 9th of July 2014, Unaisi came to his house and pulled him to the sitting room. She removed her clothes and so did he remove his clothes. She then started to kiss him and then had sexual intercourse. After that she asked him money to buy recharge card. Likewise, she came to his house on the 14 and 19th of July 2014 and has consensual sexual intercourse with him. She sent Saimoni on the 18th of July and 3rd of August 2014 informing the accused that she wanted to meet him on the following day. She came to his house on the 4th, 5th, 6th, 7th and 8th of August 2014. They had consensual sexual intercourse on the 4th, 5th, 6th, and 7th of August 2014. However, on the 8th of August 2014, she was having her menstruation, that prevented them to have sexual intercourse on that day.
42. The accused stated in his evidence that he had grog with Unaisi at Seva's house in the evening of 8th of August 2014. His wife came and asked him to go home. At home, his wife asked him what he was doing with Unaisi. She had heard stories from the villagers. The accused had then apologized to her for what he had been doing with Unaisi. Unaisi also came and apologized to his wife. They went to see Unaisi's parent on the 10th of August 2014 and extended his apology to them.
43. The second witness of the defence is Maca Kayaga, the wife of the accused. She said that she went to Seva's place to bring the accused back home in the night on 8th of August 2014. He was drinking grog with Unaisi. She asked the accused whether he was having an affair with Unaisi. He admitted that he had sex with Unaisi and sought apology from her. She had forgiven him as he admitted the allegation. Sometimes later, Unaisi came to her and sought her apology. She cried. Maca had forgiven both of them. On the 10th of August 2014, Unaisi came and requested her to come and meet her parent with the accused. She went to meet her parent with the accused and told them what the accused and Unaisi had been doing. Accused sought forgiveness from her parent.
44. During the cross examination Maca said that she only heard from the accused, but never saw what actually happened between the accused and Unaisi. She was angry with both of them, but had forgiven them.

45. The third witness for the defence is Maca Ravulo. She recalls that in the month of July 2014, Unaisi came to see her. Unaisi told her that she was having sex with the accused and he was giving her money to buy cigarettes and Kava.
46. During the cross examination, she said that she did not see the accused was having sex with Unaisi, but had seen him giving her money.
47. The last witness of the defence is Saimoni Naivalu. He explained in his evidence that Unaisi asked him to convey messages to the accused on the 8th, 13th, 18th of July and 3rd of August 2014.
48. 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

49. You heard that the prosecution and the defence presented conflicting versions of events. The prosecution alleges Unaisi did not consent to have sexual intercourse with the accused. She claims that he forcefully pulled her inside the house whenever she went there to drop his son's lunch box and forcefully had sexual intercourse without her consent. The accused had threatened her that he will do something to her and her family if she tells this to anyone. She had believed that he would do such and did not tell anyone. She was scared of him. She was alone at home whenever he had called her to his place. She said that she had to go as she was alone at her house. If she did not go, he might come to her house and do something to her.
50. In contrast, the defence claims Unaisi wanted the accused. She came to see him by herself. She made arrangements to see him through Saimoni. She willingly and actively participated in sexual intercourse with the accused.

51. In order to determine whether the prosecution has proven beyond reasonable doubt that the accused is guilty for the offences as charged, you have to consider the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.
52. 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.
53. It is your duty as judges of facts to consider the demeanour of the witnesses, how they react to being cross examined and re-examined, whether they were evasive in order to decide the credibility of the witness and the evidence.
54. You may recall Saimoni in his evidence stated that Unaisi told him about her relationship with the accused when she met him. This proposition was never put to Unaisi when she gave evidence.
55. It is a rule of evidence in criminal trials that if one party is going to present a different version of events from the other, witnesses for the opposing party who are in a position to comment on that version should be given an opportunity to comment on them. The failure to such questions could be used to draw an inference that the accused did not give that account of events to his counsel. That in turn, may have a bearing on whether you accept what the accused said on that particular point or event. However, before you draw such an inference you should consider other possible explanations for the failure of counsel to put questions about such different versions.

56. In preparation for trial, usually counsel would be given his client's instructions: that is, what his client has to say about the matter in written form or in oral form or both. Counsel then uses that information from his client to ask questions of the opposing side's witnesses. However, communication between individuals is seldom perfect; misunderstandings may occur. The counsel may miss something of what their client is telling them. In the pressures of a trial, counsel may simply forget to put questions on an important matter. You should consider whether there are other reasonable explanations for the failure to ask the victim about such different versions. You should not draw any inference adverse to the accused's credibility unless there is no other reasonable explanation for that failure.
57. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath and also decided to call witnesses for his defence. The accused person is not obliged to give evidence. He is not obliged to call any witnesses. He is not required to prove his innocence. He does not have to prove anything.
58. However, the accused person decided to give evidence and also to call witnesses on his behalf. You must then take what the accused person and his respective witnesses adduced in evidence into account when considering the issues of fact which you are determining.
59. In determining the evidence adduced by the defence, I must draw your attention to the evidence given by the accused and the agreed facts filed by the parties. As I directed you, you are entailed to consider the agreed facts as proven facts beyond reasonable doubt by the prosecution. The prosecution and the defence have agreed in the agreed facts that the victim came to the house of the accused to drop the lunch box of the accused's son on 9th, 19th of July 2014 and 4th, 5th, 6th, 7th, of August 2014 respectively. However, the accused in his evidence stated that the victim came to his house by her own and made plans prior to such visits through Saimoni. Moreover, the prosecution and the defence have agreed that the accused and the victim had sexual intercourse on the 8th of August 2014 at the house of the accused. However, the accused in his evidence said that he did not have sexual intercourse with the victim on the 8th of August 2014 as she was having her menstruation. You as judges of the facts,

have to take that into consideration in your deliberation what weight you give to this inconsistency nature of the evidence given by the accused in order to determine the credibility and truthfulness of his evidence.

60. It is for you to decide whether you believe the evidence of the accused and their witnesses. If you considered that the account given by the defence through the evidence is or may be true, then the accused must be acquitted.
61. Even if you entirely reject the account given by the defence, that would not relieve the prosecution of its burden of making you sure by evidence that the accused person guilty for these offences as charged in the information.
62. 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 count one of the information, you can find the accused is guilty for the said count of rape.
63. Likewise, you have to consider each of these eight counts separately and make your conclusion.
64. 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 count one of the information, you must find the accused is not guilty for the said count of rape and acquit him accordingly.
65. Likewise, you have to consider each of these eight counts separately and make your conclusion.
66. Ladies and gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinion on the charges against the accused person. Each of you have taken an oath or affirmation to return a true opinion according to the evidence. This is a responsibility you must fulfill. Each of you takes into this penal of assessors your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening and giving

due consideration to the views of others. At all time, you must stay true to your oath or affirmation to give a true opinion according to the evidence.

67. Once you have reached your opinion, you may please inform the clerks, so that the court could be reconvened.
68. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



R.D.R.T. Ragasinghe
Judge

At Suva

30th January 2017

Solicitors

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