

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 163 OF 2013

STATE

-v-

VINIT VIKASH CHAND

Counsel : Mr. Seruvatu with Ms. Kiran for State
Ms. P. Chand with Ms. Singh for the Accused

Dates of Trial : 20th, 22nd and 25th September, 2017

Date of Summing Up : 26th September, 2017

(Name of the Complainant is suppressed. He is referred to as R)

SUMMING UP

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the Accused person.
2. I will direct you on matters of law which you must accept and act upon.

3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of facts. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The Counsel for Prosecution and Accused made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the Accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the Accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this Courtroom. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts and draw reasonable inferences from facts proved. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As Assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

12. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gives evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.
13. In this case the Prosecution and the Defence have agreed on following facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth.

The Accused in this case is one Vinit Vikash Chand.

The Complainant in this case is R.

It is agreed that the Complainant was born on the 16th of February, 2005.

It is agreed that the Accused and the Complainant are distant cousins.

It is agreed that on the 08th of July, 2013, the Complainant and the Accused together were selling coriander leaves.

The Accused was arrested by Police on the 16th of July, 2013.

The Complainant was medically examined on the 16th of July, 2013.

14. The Accused is charged with the following counts:

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

VINIT VIKASH CHAND on the 08th of July, 2013 at Nadi in the Western Division, inserted his penis into the mouth of **R**, an 8 year old boy.

SECOND COUNT

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to Section 208 of the Crimes Decree 44 of 2009.

Particulars of Offence

VINIT VIKASH CHAND on the 08th of July, 2013 at Nadi in the Western Division, attempted to insert his penis into the anus of **R**, an 8 year old boy.

15. I will now deal with the elements of the offence of Rape. A person rapes another person if:
- (a) The person has carnal knowledge with or of the other person without other person's consent; or
 - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
 - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
16. Consent means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent. A person under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The Complainant in this case was 8 years of age at the time of the alleged offence and therefore, he did not have the capacity under the law to give consent. So, the Prosecution does not have to prove the absence of consent on the part of the R because law says that he, in any event, cannot consent. The elements of the offence of Rape in this case are that:
- a. the Accused,
 - b. penetrated the mouth of the Complainant, with his penis.
17. Other parts of the offence of Rape are irrelevant to the facts of this case.
18. I will now deal with the elements of the offence of Attempt to Commit Rape. Elements of Attempt to Rape in this case are that:
- a. The Accused,
 - b. Attempted to penetrate of the anus of the Complainant with his penis.
19. In respect of the element of Attempt to Commit Rape, you have to consider two things. First is that whether Accused intended to penetrate the anus of the Complainant with his penis. 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. Accordingly, you have to be satisfied that the Accused had an intention to penetrate the anus of the Complainant with his penis and, with that intention; he made the Complainant sit on his penis and rubbed his erected penis on Complainant's anus.

20. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.
21. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a Complainant who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence, if you believe him as to what he saw, heard and felt.
22. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, caution statement is an example if you believe that such a record was made. Then you can act on such evidence.
23. In evaluating evidence, you should see whether the story related in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.
24. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers or were they evasive? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
25. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.

26. You can consider whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.
27. Prosecution adduced evidence of Complainant's uncle Ami Chand, his mother Jyoti Prasad and Headmaster Amal Kishore Kumar to prove that R had made prompt complaints about the incident.
28. This form of evidence is known as evidence of recent complaint. Recent complaint evidence can only be used to test the consistency and truthfulness of the Complainant's evidence in Court. None of them were present to witness what had actually happened between Complainant and the Accused and therefore, their testimony is not evidence as to what actually happened between the Complainant and the Accused.
29. You are entitled to consider the evidence of recent complaint in order to decide whether or not Complainant has told the truth. The Prosecution says that Complainant's complaint to those people is consistent with Complainant's account of this alleged incident and therefore he 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 had happened between the Accused and the Complainant. It therefore cannot of itself prove that the complaint is true.
30. Please remember, there is no rule in Fiji for you to look for corroboration of Complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of Complainant, depending on how you are going to look at his evidence.
31. I now direct you how you should approach confessions made by the Accused in his caution interview.
32. Prosecution presented in evidence the record of caution interview conducted by police with the Accused. At answer to question 62 and 63 of the caution interview, Accused admits that he made Complainant suck his penis in back and forth motion and pushed and pulled it 3-4 times inside Complainant's mouth. At answer to question 60, Accused admits that he made the Complainant sit on his knees and started rubbing erected penis into his anus.

33. Prosecution presented evidence to establish that confessions of the Accused have been recorded in the caution interview accurately and truly. Prosecution further says the Accused was accorded his rights and treated well and he gave those answers freely and voluntarily. They further claims that the interview was recorded in Hindi, the language of his choice, and it was read back to him before the signature was obtained. The interviewing officer in his evidence said that he recorded those answers as exactly as the way that the Accused gave his answers.
34. Meanwhile the Accused claims that the confession was obtained by force using police brutality. He also claims that he could not read or write Hindi and he did not know what the police had written in his interview.
35. In order to determine whether you can safely act upon confessions made by an accused to police, you must be satisfied as to two issues.
36. Firstly, you ask yourselves whether the Accused in fact make those confessions. Having considered the evidence presented during the course of the hearing, if you are not satisfied or not sure that the Accused had actually made those confessions, you must ignore them.
37. Secondly, if you are satisfied, that the Accused had made those confessions, then, it is for you to decide whether the contents of those confessions are truthful, and what weight you should attach to them. It is for you to decide whether 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.
38. I will now remind you of the Prosecution and Defence cases. In doing this it would not be practical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. It was a short trial and I am sure things are still fresh in your minds. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

CASE FOR PROSECUTION

PW 1 R, the Complainant

39. R, the Complainant, was the first witness for Prosecution. R was born on the 16th of February, 2005. Accused Vinit Vikash Chand is his cousin. On the 08th of July, 2013, R was with Vinit, selling coriander or dhania. Vinit took him to a tree and told him to suck his penis.
40. Vinit got hold of him when R was trying to run away. Vinit took off R's pants and t-shirt and told R to suck his penis. Having forcefully opened R's mouth, Vinit inserted his penis in R's mouth. After that, Vinit spat in R's anus and told him to sit on his penis. He was forcing him to sit on his penis.
41. Then an I-Taukei man came and asked to wear R's clothes and asked him to go from here. Vinit told R not to say this to any one at home.
42. R's mother was waiting for him by the road side. When R saw his uncle Ami Chand, he went to him and told uncle about the incident. His uncle asked Vinit whether he had done this to R. Vinit denied having done such a thing.
43. Then R went home and told his mother what had happened. His mother told him to inform his Headmaster of the school in regards to this incident. When he went to school, he informed the Headmaster.
44. Under cross examination, R admitted that he went to sell dhania with Vinit on the bicycle Vinit was riding. He could not recall whether Vinit had gone to a school with him and Vinit was helping somebody to fix a pipe.
45. R denied that he had taken Vinit's bicycle while Vinit was fixing the pipe and then throwing it to a swampy place. He also denied that Vinit had slapped him because he had thrown his bicycle in swampy place. He also denied that he had made up an allegation against Vinit because he was angry of the slap.
46. R admitted that his mother was angrily awaiting him, holding a belt, because he was late in that afternoon and that he had gone to his uncle Ami Chand due to fear of his mother. However, he denied making up an allegation against Vinit because he was scared of his mother.

47. R admitted that he informed the Headmaster on the 10th, two day after the incident because he did not go to school on Tuesday. He said that he went to the Headmaster and reported the incident voluntarily.

PW 2 Ami Chand

48. R's uncle Ami Chand told us about what he heard from R on 08th of July, 2013. R had told him that Vinit had dragged him to a sugar cane field and made him suck Vinit's penis and made him sit on his penis and inserted it in his anus.
49. Upon hearing this, he took R to his house. After that, Vinit's parents came to R's house and tried to settle.
50. Ami Chand said under cross examination that R's mother was walking around angrily with a belt looking for R. R was scared of his mother and ran towards him to inform the incident. R did not want to tell his mother anything, but told him the whole story. Then he went and talked to Vinit's father and asked him about the allegation. Vinit had denied the allegation.

PW3: Jyotika Jyoteshni Prasad

51. R's mother Jyotika was the next witness for Prosecution. She said that on, 8th of July, 2013, R had come from school in the afternoon and wanted to sell some dhanias for his pocket money. She permitted R to go and sell dhanias in nearby places. Then he left home. R did not return home until it was dark. She was worried. Having given her new-born baby to her sister-in-law, Jyotika left home in search of R and went to Vinit's house. Vinit's father told her that R had gone with Vinit to sell coriander. Shortly, R and Vinit came there. When R saw her, he started to run towards the house. She followed him. R went to his uncle Ami Chand and told something. Then R was sent back to her.
52. Jyotika told us about the complaint she then received from R about a sexual abuse. Vinit had undressed R and then Vinit had undressed himself and asked to suck his penis. After that Vinit spat on his 'toilet path', and told him to sit on his penis.
53. R's father was not home at that time. She did not have a mobile phone to contact the police. Therefore, she asked R to complain to the Headmaster. Headmaster later visited her to verify the complaint R had made to him.

54. Under Cross Examination Jyotika said that she could not find a mobile phone form neighbours. She was not in a position to go to the school and ask for assistance from the Headmaster to contact the Police because he had a small baby to look after.

PW4: Amal Kishore Kumar

55. Then the Headmaster gave evidence and told us how he received the complaint from R on the 10th of July 2013. R had wanted to share something with him. Then he took R to an isolated place where R told him how he was sexual abused on Monday by Vinit.

56. We heard what he heard from R. Vinit had taken him to a tree and put his penis in his mouth. Vinit had then done something to his anus; R told him that Vinit put his penis in his mouth and, when he was refusing, he pushed him and put his hands on the mouth and pushed his penis in his anus.

57. He reported the incidence to the relevant authority under the Child Decree of 2010. Before making the report, he went to R's house and discussed the issue with R's mother to get the complaint clarified.

58. Under cross examination, Headmaster said that when R had approached him about the allegation, he had no doubts, but because R was a small boy, he found it it's his responsibility to discuss the matter with the parents.

PW 5 DC Vishal Kumar

59. You will recall, the last two witnesses for Prosecution were police witnesses. On 16th and 17th of July, 2013, DC Vishal Kumar conducted the police interview of the Accused. Interview was conducted under caution, in the presence of witnessing officer ex-sgt. Shindu Raj. It was conducted and recorded in Hindi because suspect understood Hindi well. The suspect was accorded his right to counsel and to have a family member or social welfare officer present at the interview. Accused exercised his rights. His father was present during the commencement of the interview and he was allowed to speak to his mother who had visited him on the 17th.

60. Accused had no visible injuries. He was physically and mentally fit to be interviewed. He did not complain of anything. The suspect was not forced, assaulted, threatened or offered any inducement to give a confession. Accused

answered all the questions voluntarily. He vehemently denied the allegation that he and other police officers had assaulted and forced the accused to confess.

61. PW 6 PC Jese was the last witness for the Prosecution. He searched and locked the Accused. No injuries were found on Accused's body. He denied that he had threatened and assaulted Vinit.
62. That is the case for the Prosecution. At the closure of the Prosecution case, you heard me explain to the Accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
63. Accused elected to give evidence. That is his right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

CASE FOR DEFENCE

Vinit Vikash Chand

64. In 08th of July, 2013, Vinit was released from work early. He came home around 4.30 pm., His cousin R came when he was riding his bicycle in the compound. Vinit's father told him to accompany R and help him to sell coriander. He went with R to his uncle's place, to sell coriander. R was on his foot. He did not allow R to sit on the bicycle because there was no brake.
65. He came near the school and parked the bicycle there to help Pulu to repair the pipe. After repairing the pipe, he came looking for the bicycle, but he could not find it there. After that he found out from an iTaukei man that R had taken the bicycle and thrown it near a slope.
66. He got angry because bicycle was broken. Then he rode the bicycle very fast looking for R. He found R walking towards his house. He stopped and slapped him once. R told him that he will go home and tell that 'you had done vulgar things to me'. And at that time R's mother was coming. R didn't tell his mother anything. R told his uncle about the incident.

67. R's face was swollen because of the slap he gave him. R's uncle came with a long stick to hit him. After that his father asked whether he had done such things to R, he said no. After that his father, R's parents and the Priest Sanjay, came to a settlement.
68. Accused completely denied the allegation that he took R to a mango tree and put his penis in R's mouth forcefully, He also denied that he tried to put his penis in his anus forcefully. He also denied he had told R not to tell anyone about this incident.
69. Accused said that he was assaulted by police officers during transportation and at the Nadi Police Station and that the confession was obtained forcefully. He confessed to police because he was severely assaulted by officers. He did not tell the truth to police.
70. He admitted his father and family members visited him during the interview. He admitted that he did not complain to the Magistrate about police assaults and painful swollen injuries because he was not aware about the Court system. However, he complained to his father when he was taken to the Magistrate Court.
71. Under cross examination Vinit said he was punched, kicked, slapped and hit with a hammer, poked with a nail and punched. He had visible swollen internal injuries and was limping after the interview. He complained about police assaults to his family members at the Police Station. He agreed that he rode the bicycle slowly because R had broken the gears.

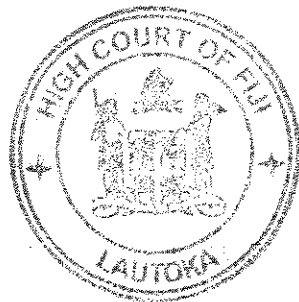
ANALYSIS


72. Ladies and gentleman assessor, the Accused is charged with one count of Rape and one count of Attempt to Commit Rape. Before you could find the Accused guilty, you must be satisfied beyond reasonable doubt that he had done those acts.
73. There is no dispute as to the identity of the Accused. It is agreed that Accused is Complainant's cousin. There is also no dispute that the Complainant was eight years old at the time of the incident. Therefore, the consent is not an issue in this case.

74. Prosecution called four civilian witnesses and two police witnesses. They based their case substantially on the evidence of the Complainant and the confessions made by Accused to police. Recent complaint evidence was also led to prove consistency of child Complainant's evidence.
75. First, you have to be satisfied that the evidence Complainant gave is truthful and believable. If you are satisfied that the evidence Complainant gave is truthful and believable, you can safely act upon his evidence in coming to your conclusion. No corroboration is required from an independent source.
76. Prosecution says that the Complainant told the truth in Court because he maintained his consistency and had promptly complained to his uncle Ami Chand, his mother and Headmaster. They say that the Complainant was 8 years old student and he was not mature enough to make up such a serious allegation of sexual nature in such a short time.
77. Accused on the other hand completely denies the allegation. He says that R made up this allegation because he was angry about him being slapped. He also says R was scared of his mother and made up this allegation to cover himself up when he came home late that evening. Accused also says R is a naughty boy and he, having watched pornographic material, was oriented in sexual affairs.
78. Defence Counsel argues that R's complaints to different people are not consistent. You consider whether the discrepancies are so critical so as to discredit the version of the child witness. It is up to you to decide what weight you give to the version of the Prosecution and that of the Defence. Please bear in mind, even if you do not believe a single word Accused uttered in Court that does not relieve the burden on the Prosecution to prove their case beyond a reasonable doubt.
79. The Prosecution contends that the Accused confessed to police and his confessions are voluntary truthful statements of Accused. If you are sure that Accused in fact made those confessions and that he had told truth to police you can safely act upon his confessions. If you have any doubt for whatever reason that Accused did not tell the truth to police, then you must disregard those confessions.
80. You decide what version you accept and what version you reject. Remember, the burden to prove the Accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the Accused at any stage of the trial.

81. The Accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty.
82. You have to consider evidence against each count separately. If you find Accused guilty on one count, that does not mean that he should be guilty on the other count as well.
83. If you accept the Prosecutions' version of events, and you are satisfied that the Prosecution has proved the case beyond reasonable doubt on each count, so that you are sure of Accused's guilt you must find him guilty on each count.
84. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

Any re-directions?




Aruna Aluthge
Judge

AT LAUTOKA

26th September, 2017

**Solicitor: Office of the Director of Public Prosecution for State
Legal Aid Commission for Accused**