

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 49 OF 2016

STATE

-v-

SIMELI BARAVILALA

Counsel : Mr. A. Singh for State
Ms. K. Vulimainadave for Accused

Dates of Trial : 04th, 09th and 11th October, 2017
Date of Summing Up : 11th October, 2017

(Name of the Complainant is suppressed. She 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. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to. I will deal with the law as it is applicable to the offence with which the accused-person is charged, in a short while.
14. 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.
 - I. *The Complainant in this matter was born on the 10th of April, 2002.*
 - II. *R resides at Bulileke Street with her father, mother Seini Naioba and 3 other siblings. They had moved to Bulikeke Street in year 2016 after staying at Velovelo, Lautoka for a while.*
 - III. *The Accused, Simeli Baravilala is R's cousin.*
 - IV. *Simeli Baravilala had been residing with R and her family in Velovelo and also at Bulileke Street.*
15. The Accused is charged on following Information:

Statement of Offence

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

Particulars of Offence

SIMELI BARAVILALA between the 01st of November, 2015 and 30th of November, 2015 at Lautoka in the Western Division penetrated the vagina of **R** with his finger.

16. 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.
 - (d) The person knew or believed that the complainant was not consenting or he was reckless as to whether or not she was consenting.
17. 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. In this case, the Complainant is 13 years of age during the period of offence. Therefore, the Prosecution must prove that Accused had penetrated Complainant's vagina without her consent.
18. You might wonder what it means by representative count. It simply means this. Prosecution says that this incident happened not only once but on a number of occasions during the period mentioned in the amended Information.

19. The elements of the offence of Rape in this case are that:
 - a. the Accused,
 - b. penetrated the vagina of the Complainant, with his finger,
 - c. without her consent.
20. Other parts of the offence of Rape are irrelevant to the facts of this case.
21. A slightest of penetration of the Complainant's vagina by the Accused's finger is sufficient to constitute the 2nd element of Rape in this case.
22. 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.
23. 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 her as to what she saw, heard and felt.
24. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, medical report is an example if you believe that such a record was made. Then you can act on such evidence. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time on the document upon examination of the Complainant.
25. Expert evidence is also led in this case. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before Court on the basis of their learning, skill and experience. Doctor in this case gave evidence as an expert witness. That evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if such opinion is reached by considering all necessary matters that you

think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence in the case.

26. In evaluating evidence, you should see whether the story relayed 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.
27. 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.
28. 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.
29. 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.
30. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. There can be a reasonable explanation for the delay. It is a matter for you to determine whether, in this case, the lateness of the complaint and what weight you attach to it. It is also for you to decide, when Complainant did eventually complain, whether it was genuine.
31. 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. Victim's reluctance to report the incident could also be due to shame,

coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. It takes a while for self- confidence to reassert itself. There is, in other words, no classic or typical response by victims of Rape.

32. The offence of Rape requires proof that the Complainant did not consent. The offence may or may not be accompanied by violence, force or the threat of force, but please note that it is no part of the Prosecution's obligation to prove that the accused used force or the threat of force.
33. During the course of closing address of the Defence it was suggested that Complainant could have screamed or otherwise objected to what the Accused were doing. It was also suggested that she could have reported to her mother immediately. You heard the Complainant's explanations. In her closing argument Defence Counsel submitted to you that her failure to protest, demonstrates that she was not telling the truth. This is an argument which you should consider with care when you do, you should not assume that there is any classic or typical response to an unwelcome demand for sexual activity. The experience of the courts is that people who are being subjected to nonconsensual sexual activity may respond in variety of different ways.
34. 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 her evidence.
35. 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

Evidence of Seini Naioba

36. You heard evidence from Seini. She is the mother of the Complainant. In the year 2015, she was residing at Velovelo with her husband and children.
37. Her nephew, Simeli Baravilala (Accused) was also staying with them ever since he was little because his mom couldn't look after his education. Seini was taking care of him and looking after his education and well-being. She treated the Accused as her own son and her children interacted with each other like brothers and sisters. They got along very well.
38. In the year 2015, R was schooling at Jasper Williams High School. R was 13 years old and was in Form 3. In 2016 January, they moved to a four bedroomed house at Bulileke Street, Lautoka.
39. In January, 2016, whilst residing in Bulileke Street, Seini witnessed something bad happening to her daughter, R. Seini was sleeping when she was woken up by mosquito bites around 2 am. She found Simeli sitting right next to R, 3 – 4 m. away from her. She saw Simeli's right hand inside R's pants, as if he was 'digging'. Less than half of Simeli's hand was in R's pants.
40. When Seini saw this, she thought that R was aware of what Simeli was doing. So she smacked R's bum twice. R didn't wake up as she was in deep sleep and was not aware of what was happening. Simeli removed his hands from R's pants. Seini then chased Simeli from there and asked him to go and sleep. She did not question Simeli as to what he was doing.
41. However, Seini did question R about this. R said *'there was nothing happening'*. Seini waited for three days, and then on the third day, she sat R down and vigorously questioned. Seini asked her, *'do you feel anything happening when you were asleep or you feel anyone touching you or disturbing you while you were asleep?'*
42. R was scared, she started to cry. When she saw R's expression, she knew that something had been happening. R then opened up and said that every time she was asleep, she was awoken and disturbed by Simeli's touching. Simeli used to touch her buttocks, breast and vagina. R further said that this had been happening since November 2015 when they were residing at Velovelo. R said that she never informed back in November when all this was happening, because she was afraid. R further said that this incident happened more than three times.
43. Seini said that she had a good and healthy relationship with R. R was very quiet and shy person. After hearing all this from R, she did not approach Simeli about

this. She told her husband of what had happened and lodged a report to Police the day after she questioned R.

44. Under cross examination, Seini said that the report was lodged on 6th February 2016. She saw the incident on 28th of January. She later said that she is not really sure about the date, but definitely in January.

Evidence of R (Complainant)

45. R was born on the 10th of April, 2002. Prior to residing in Bulileke she was residing at Velovelo, Lautoka with her family and her cousin Simeli.
46. Whilst residing in Velovelo, R had her own bedroom and a bed. Simeli used to sleep in the sitting room. One night, when she was sleeping she could feel someone touching. She recognised Simeli. Simeli was touching her buttocks, private part and breasts. After a while he removed his pants and she could feel that something was inserted on her back. Simeli was rubbing his penis on her buttocks. In November 2015, Simeli used to touch her like that many times while she was sleeping.
47. Simeli was touching her vagina with his hand. He inserted it into her vagina and was pushing it in and out for 3-4 minutes. She was in fear. She did not consent to what Simeli was doing to her. Her mother and siblings were sleeping in another room when Simeli was doing this.
48. R did not ask Simeli to stop. She was crying when he had left. She didn't tell anyone about this incident because she was scared that if she had relayed the story to her mother, her mother or Simeli might do something to her.
49. In the month of November 2015, this incident happened 4 or 5 times during night time. Simeli always repeated what he was doing. Even After moving to Bulileke Street in January 2016, Simeli continued to do this bad thing to her. She informed her mother about this and what Simeli was doing to her when they were residing at Velovelo.
50. 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.

51. 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

Simeli Temo Baravilala (Accused)

52. Simeli said that he was staying at Velovelo, Lautoka with R and her family since 2010. Upon completion of Form 7, he left the school in 2013. In the beginning of the year 2016, he moved from Velovelo to Bulileke with R's family and stayed there for about a month.
53. He had maintained a good relationship with R's family during his stay until January 2016. His satay with them did not last long, because R's mother reported the matter to Police when she noticed his hand inside the complainant's pants.
54. In 2015, November, he used to help R during her examination. He used to play jokingly with each other. After some time, things got a bit different. She preferred to study in the room rather than in the sitting room and tried to get his attention.
55. In one night as R was sleeping on the bed he heard sounds of 'mourning' as if she was seeking sexual pleasure or masturbating. She kept on playing with herself. He felt like if she was inviting and tempting him to come and lie next to her. He waited for some time just to confirm whether she was trying to invite him.
56. Then he just couldn't hold it. He was 'horny'. Every time she was playing with herself, he couldn't hold it anymore, so he went and lay next to her and started touching her breast downwards till her buttocks and vagina. It was just a smooth touch to give her a sense of pleasure only for 2-3 minutes. He touched R in the same way for more than two nights. He knew R was awake when he was doing this because she didn't move his hand.

57. Accused's relationship with R was very good. Accused denied the allegation that he had penetrated R with his finger. Accused admitted under cross-examination that her hand was inside R's pants in January 2016 when he was caught in the act. He also admitted that, in November 2015, on more than two occasions, he had touched or fondled R's vagina.
58. Accused admitted R's family had always looked after him and sent him to school and, despite all these, he 'violated' R. He got the confirmation that she wanted him when she kept on playing with herself on the bed while he was still awake. He was on the floor. She couldn't see him as she was on the bed.
59. Accused said he had already confessed to her aunty about all he did, but he could not confess to penetration because he did not penetrate.
60. Under re-examination, Accused described the 'violation' as touching the breasts, buttocks and vagina without R's consent.
61. Last witness for Defence is doctor Kelera. She had examined the Complainant on the 9th February, 2016 at the Lautoka Hospital. Her examination was based on the history related to her by the patient that she was sexually assaulted by cousin from November to 1st week of December, 2015. Doctor read the exact words in the report- 'fondled her breast, touched her vagina and buttock and rubbed himself on her'.
62. Doctor's specific medical findings were that patient's hymen was intact, and no bruising noted. Her professional opinion was that sexual assault was of non-penetrative nature in the sense that a penis had not penetrated her vagina. It was from the history given by the patient itself and from the examination that the hymen was still intact that doctor had come to the conclusion that it was a non-penetrative sexual assault.
63. If a vagina was penetrated 4-5 times with two big fingers of an adult with some force, doctor would have expected some bruising around the orifice or vaginal opening, if the examination was immediately done after the act itself. If it was case of a younger child, the size of the fingers was big; she would have expected some disruption of her hymen.
64. Under cross examination, doctor did not rule out the possibility of hymen being still intact if somebody was playing around vaginal orifice because the hymen is

located a bit inside of the opening. She would still classify such a situation as 'non-penetrative'. In this case Doctor wrote her professional opinion on the basis that a penis did not enter her vagina because the hymen was intact. She did not rule out the fact that the finger could have entered the vagina.

65. That is the case for Defence.

ANALYSIS

66. Ladies and gentleman assessor, the Accused is charged with one representative count of Rape during the period between 01st of November, 2015 and 30th November, 2015. Before you could find the Accused guilty, you must be satisfied beyond reasonable doubt that Accused had penetrated at least slightly the vagina of the Complainant without her consent.
67. There is no dispute as to the identity of the Accused. It is agreed that Accused is Complainant's cousin. Accused admitted that he touched or fondled Complainant's vagina more than once during the period mentioned in the amended Information. He also admitted that Complainant's mother saw his hand inside R's panty.
68. Prosecution called two witnesses. They based their case substantially on the evidence of the Complainant and her mother Seini.
69. 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 her evidence in coming to your conclusion. No corroboration is required from an independent source.
70. Prosecution says that the Complainant told the truth in Court when she said that Accused inserted his fingers into her vagina without her consent. Accused on the other hand, having admitted fondling Complainant's vagina more than once, denies that he had penetrated her with his finger or fingers. It is up to you to decide what weight you give to the version of the Prosecution and that of the Defence.
71. Defence argues that Complainant did not complain to her mother about any of the incidents alleged to have occurred during November, 2015 until she was questioned by her mother in January 2016.

72. Complainant explained the delay in reporting. She said she was scared of her mother and also of Accused that they might do something to her. Seini said her daughter was a shy and reserved type girl. Doctor's initial impression was that Complainant was a shy person. You had the opportunity to observe demeanour of Complainant and her manner of giving evidence. It is up to form your own opinion as to why she refrained from complaining to her mother. You ask yourselves whether the complaint she ultimately made to police was genuine.
73. Doctor's evidence might help you to come to a decision as to the issue of penetration if you think her evidence is logical in light of other evidence led in the trial. Doctor, in her medical opinion, states that sexual assault would have been non penetrative in nature. She explained the dual basis on which she formed that opinion. She had considered the history related to her by the patient and her own finding that Complainant's hymen was intact and nil bruising in vaginal area. She did not rule out the possibility of penetrating the vagina with a finger or fingers without damaging the hymen which is located a bit inside of the vaginal opening or orifice.
74. You may also consider Complainant's previous statement to her mother and to the doctor in light of her evidence led in court to assess the consistency of her evidence.
75. Accused flatly denies that he had penetrated. You must consider his evidence also in coming to your conclusion. If you happen to believe Accused's evidence, then it means that you have a doubt in the Prosecution case, and in that event, you must find him not guilty. 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.
76. If you are sure that Accused had penetrated R's vagina, at least slightly with his finger or fingers, without her consent and you are satisfied that the Prosecution has proved the case beyond reasonable doubt, then you must find him guilty. If you are not sure if Accused had penetrated her vagina or not then you must find him not guilty.
77. Now I must tell you before I wind up that the fact that Accused had admitted committing some lesser sexual offences does not mean that he should have been guilty of rape also. You must consider the Rape count independent of other offences. Accused has already been convicted and sentenced for the offences he

has admitted. You must not draw any negative inference against the Accused by his previous convictions.

78. 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?



AT LAUTOKA
11th October, 2017


Aruna Aluthge
Judge

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