

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 149 OF 2016

STATE

-v-

KALAVETI RATU NAWAQAMATE

Counsel : Ms. R. Uce with Ms. S. Navia for the State
Ms. K. Vulimainadave for the Accused

Dates of Trial : 17, 18, 19, 22 October 2018

Date of Summing Up : 25 October 2018

(Name of the victim is suppressed. She is referred to as IN)

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 the Prosecution and the 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. You are free to draw inferences from proved facts if you find those inferences reasonable in the circumstances. 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. But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.
13. 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 have given evidence in court. 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.

14. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told Court contradicts with his/her earlier version. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter.
15. I now wish to direct you on recent complaint evidence. You heard that the victim said that she relayed the incident when she felt a pain in her vagina. Her mother Iliana Mole gave evidence and said that the victim was crying in pain and she checked her to find some visible scratch marks on her vagina. According to Iliana, the victim had told her that her uncle Kalaveti Ratu poked his finger in her vagina.
16. Victim's mother Iliana was not present when the alleged incident happened and therefore, she is not in a position to give evidence as to what actually happened between the victim and the accused. What she heard from the victim is not evidence as to what actually happened between the victim and the accused. Recent complaint evidence is led to show consistency in the conduct of the victim and is relevant in assessing her credibility. If you find Iliana to be a credible witness than you may use the complaint she received to test the consistency and credibility of the victim.
17. Police officers read in evidence the caution statement and the charge statement of the accused. I now direct you as to how you should approach caution statements read in evidence.
18. The Defence says that the caution interview and charge were conducted in Bauan dialect but the accused was conversant with Navosa dialect and therefore he

could not understand its contents. They say that the contents of the interview and charge were never read back to the accused. They also say that the interview officer was rood to the accused and his signature was obtained by trickery. Defence says that the accused was thereby prejudiced and therefore you should not rely upon those statements as true statements of the accused. Prosecution on the other hand denies those allegations and says that the record of interview and the charge statement are voluntary statements of the accused.

19. If you are satisfied that the accused had given those statements in his interview and the charge, it is for you to assess what weight you should give to those statements. It is your duty to consider the caution statements as a whole and other evidence led in trial in deciding where the truth lies. If you are not sure, for whatever reason, that the confession made by the accused is true, you must disregard it. If, on the other hand, you are sure that it is true, you may rely on it.
20. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. 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.
21. In this case, the doctor gave evidence as an expert witness for Defence. Doctor's evidence is not accepted blindly. You will have to decide the issue of rape before you by yourselves and you can make use of doctor's opinion if his reasons are convincing and acceptable to you; and, if his opinion had been 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 led in the trial. You can use doctor's opinion only to test the constancy of victim's story that she was digitally raped.
22. You may consider whether there is a reason or motive on the part of the witnesses to make up an allegation against the accused. If the victim or her

mother had such a motive, then you may think that this allegation has been fabricated.

23. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case.
24. The agreed facts of this case are that:
1. The accused Kalaveti Ratu Nawaqamate [74 years old in 2016] is a farmer. He resides at Namoli Village, Navosa. He is married to Mere Daitiko.
 2. The complainant IN [4 years old in 2016]. She is attending kindergarten at the Sacred Heart Primary School. The complainant's father Kalaveti Ratu is the namesake of the accused.
 3. The complainant went to the accused house.
 4. The matter was reported to the Police. The accused was arrested and interviewed under caution.
 5. The accused was subsequently charged for the offence of Rape: contrary to Section 207 (1) and (2) (b) and (3) and Indecent Assault: contrary to Section 212 (1) of the Crimes Act, 2009.
25. As per the information the accused is charged with two counts. The information is as follows. Please refer to the Information:

Count 1

Representative

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

KALAVETI RATU NAWAQAMATE between the 17th – 19th of July 2016, at Sigatoka in the Western Division penetrated the vagina of **IN** with his fingers.

Count 2

Representative Count

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) the Crimes Decree No. 44 of 2009.

Particulars of Offence

KALAVETI RATU between the 17th – 19th of July 2016, at Sigatoka in the Western Division unlawfully and indecently assaulted **IN** by kissing her cheek.

26. 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.
27. Consent as defined by Section 206 of the Crimes Decree, 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 victim in this case was 4 years of age at the time of the alleged offence and therefore, she did not have the capacity under the law to consent. So, the Prosecution does not have to prove the absence of consent on the part of the victim because law says that she, in any event, cannot consent.

28. The elements of the offence of Rape in this case are that:
 - a. the accused Kalaveti Ratu Nawaqamate,
 - b. penetrated the vagina of the victim, with his finger.

29. Other parts of the offence are irrelevant to the facts of this case.

30. You might wonder what representative count means. It simply means this. The prosecution says that, during the period given in the information, (17th to 19th July 2016) accused raped and indecently assaulted the victim more than once.

31. I will now deal with the elements of the offence of Indecent Assault. A person commits the offence of Indecent Assault if he,
 - (a). Unlawfully and indecently,
 - (b). Assaults another person.

32. For the assault to be indecent it must be accompanied by a circumstance of indecency. A conduct is unlawful when it is done without a lawful excuse. A conduct is indecent when it is as such that ordinary people would so describe it, in light of prevailing standards of morality and, more specifically, in light of whether the victim has consented to the conduct in question. However, Prosecution is under no burden to prove that the particular assault took place without the consent of the victim so long as it constitutes an unlawful and indecent act.

33. 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 victim was a witness who offered direct evidence, if you believe her as to what they saw, heard and felt.

34. You saw victim give evidence hiding behind a screen so she could not see the accused. The screen was put up and other special arrangements were made to make the child victim comfortable because she is an underage vulnerable witness. You must not draw any negative inference from those against the accused.

35. You will appreciate that children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. You have to be mindful about that.

36. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it, and about using words they think are naughty, and therefore find it difficult to speak. Bear in mind that they are being asked questions by an adult they see as being in a position of authority—the policeman in the interview, or a counsel in Court. That can make it difficult for them.

37. Please remember, there is no rule in Fiji for you to look for corroboration of victim'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 victim, depending on how you are going to look at her evidence.

38. I will now remind you of the Prosecution and Defence cases. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision in this case.

Case for the Prosecution

PW 1 Iliana Mole

39. Iliana is the mother of the victim. She is married with four children. In 2016, she had only 3 children and the victim IN is one of them. IN was only 4 years old in 2016.
40. On 19th of July, 2016, Iliana was at home with her kids. Her husband had gone to the farm. At around 1.00 pm she woke up after a short nap and started cleaning the house. IN went out outside to relieve herself and came back with a pancake. IN went out again while she was cleaning the house.
41. Aunt Laite came and informed her that IN was with her and that she was in pain. Laite told her to go and check IN. She went to see IN's vagina because IN had told Laite that she was experiencing a pain in her vagina. When she arrived at Laite's house, she saw IN crying. She noticed visible scratches when she checked IN's vagina.
42. IN informed that her uncle Kalaveti Ratu poked his finger in her vagina. She went to see her husband who had returned from the farm and informed what had happened. She accompanied her husband to check IN who was still with Laite. Aunt Laite went to inform the village nurse. The nurse came and inspected IN's vagina and called the police. Police came and took IN's statement.
43. Iliana said that she was feeling remorse and she cried because that was the first time it had ever happened to her family.
44. Under Cross-examination, Iliana denied that the accused was looking after her children on the 19th July, 2016, when she and her husband went to the farm. She admitted that the accused had refused to give the coconuts to her family from the coconut tree beside accused's house. However she denied that there were disagreements and arguments between her family and the accused. She also

denied that this allegation was made up because of the dispute over the coconuts.

PW 2 IN (The Victim)

45. Victim IN said that she is 6 years of age and attending Sacred Heart Primary School in Namoli village. She said that she came to tell court what uncle Ratu Kalaveti or Momo Levu did to her.
46. Victim said that Momo Levu called her to his house and gave her a pancake. Then Momo Levu took her to his bed and covered her with a mat. He then took off her underwear and poked her vagina. When she was asked to demonstrate as to how Momo Levu poked her vagina, IN demonstrated showing her index finger. She said that Momo Levu poked her vagina three times on the same day. She said that she cried because it was painful. Momo Levu also kissed her cheeks. She heard aunty Laite calling her. She then came to her uncle's house and informed that Momo Levu poked her vagina.
47. When it was suggested to her in cross-examination that Momo Levu Ratu Kalaveti did not poke her vagina, the victim denied the proposition and said "*he poked my vagina*". Under cross examination, the victim said that she was not kissed but under re-examination the victim said that Momo Levu kissed her cheek.

PW 3 D/Inspector Ilario Belo

48. IP Belo formally charged the accused. The charge took place at Navosa Police Station on 21st of July 2016, in the presence of the witnessing officer Dokoni. He said that the accused appeared healthy before the charge. He received no complaints. Accused wished to be charged in the iTaukei language. Witness recognized the charge statement (PE.1) and its English translation (PE2) which he produced. He tendered and read the same in evidence. The witness said that the accused read the charge statement and it was also read back to him. Accused gave the charge statement voluntarily. Witness said that the accused is his uncle.

49. Under cross-examination, the witness denied that he had never read the charge statement back to the accused. He admitted that the contents of the charge statement were explained to the accused in the Navosa dialect and said that the accused knew the Bauan dialect very well.

PW 4 Inspector Esira Dokoni

50. IP Dokoni witnessed when the accused was being charged. The witness said that the accused was charged in the iTaukei language and in the Bauan dialect which was preferred by the accused. Accused did not complain that he did not understand the charge. Considering his age, the accused was treated very well in the police station like a father.
51. Under Cross-examination, the witness said that the Navosa dialect and the Bauan language are not much different altogether, the only difference is 'j' or 'h', and otherwise both are the same.

PW 5 W/Sgt. Liviana

52. When Liviana was based at the Navosa Police Station, she was tasked to be the investigating officer of this case. She also interviewed the accused on 20th July, 2016 which was witnessed by officer Elia.
53. The witness said that the accused is her uncle and he was treated well at the police station like a VIP. Accused looked fit and healthy to be interviewed. Accused chose to be interviewed in iTaukei language and in Bauan dialect since he understood it very well.
54. All legal rights were afforded to the accused. He was treated like a VIP. Accused did not complain of anything. Accused was not threatened, intimidated, promised anything to get a confession from him. Signature of the accused was

not obtained by trickery. Accused did not say that he did not understand the Bauan dialect. Witness said that she took 30 minutes to read the record of interview back to the accused and to explain some parts in Navosa dialect. iTaukei version of the interview was tendered as PE3 and the English translation as PE4.

55. Under cross-examination, the witness said that although the interview was conducted in the Bauan dialect, for further clarifications, she did speak to the accused in the Navosa dialect for his better understanding. Witness admitted that she did not make a record that further clarifications were done in Navosa dialect. The witness denied that the record of interview was never read back to the accused.
56. Under re-examination, the witness said that there is no rule in the Fiji Police Force that if the accused is related to the officer concerned, he or she should withdraw from the investigation.

PW 6 Detective Inspector Elia Waqasoqo

57. IP Eli sat in as the witnessing officer at the interview conducted by Sargent Liviana. He said that the interview was conducted in the Bauan dialect of iTaukei language because the accused opted to be interviewed in that Bauan dialect. Accused did not make any complaints that he did not understand the Bauan dialect. The record of interview was read back to the suspect by Sargent Liviana. Witness said that the suspect gave those answers voluntarily. The suspect was not threatened, forced, oppressed or tricked to sign in the record of interview.
58. Under cross-examination, the witness said that the interview was conducted in Bauan dialect and the interviewing officer used Navosa dialect to clarify certain things. He denied that the interviewing officer intimidated the suspect and had been rude to him when she was questioning the suspect.

59. That is the case for the Prosecution. At the close 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.
60. As you are aware, accused elected to exercise his right to remain silent. By remaining silent, he was exercising his constitutional right. You must not hold against him for his silence and infer that he remained silent because he was guilty. He does not have to prove innocence or anything at all. The burden is always on the prosecution.
61. Defence called Doctor Ame Nasokia as their only witness. Evidence called for defence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

Case for Defence

DW 1 Dr. Ame Nasokia

62. Defence called Doctor Nasokia as their only witness. Doctor Nasokia is a general medical practitioner with a practice of 4 years. He examined the victim at 10.30 p.m. on 19th of July 2016 at Keiyasi Health Centre.
63. Doctor said that the victim did not show any signs of fear or panic when she was presented to him. The victim was stable and she cooperated well. Describing his specific medical findings, the doctor said that no bruises or visible scratches were found in victim's body. Victim's hymen was intact. There was tenderness and pain when he palpated her vagina.
64. Doctor said that the hymen is usually lost in female's first sexual intercourse. Hymen intact means that she hasn't had her first vaginal sexual contact. He said that his professional opinion was inconclusive.

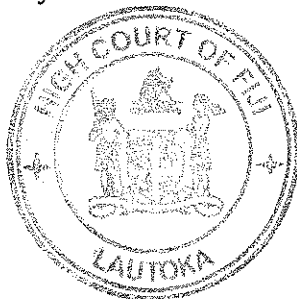
65. Doctor said that if a 4 year old child was poked in her vagina three times with a finger, the findings he would expect will depend on the timing of examination. If the examination is done at the very fresh moment, he would expect to see some marks or bruises, but later on he would expect the hymen not to be intact. He further said that there is also a possibility of penetration with hymen being intact. If it was forced fingering then he will expect some bruises.
66. Under cross-examination, the doctor said that the cause of pain when palpated would be from discomfort by the patient or trauma. If someone had inserted his finger into victim's vagina it would be one of the possible courses of pain. Occurrence of bruising will depend on the extent of the penetration of the finger and it is possible that if a finger is penetrated into the vagina, hymen would still be intact depending on the extent of insertion.
67. That is the case for Defence.


Analysis

68. Ladies and gentleman assessor, the accused is charged with one count of Rape and one count of Indecent Assault. To find accused guilty of rape in this case you must be satisfied beyond reasonable doubt that the accused penetrated victim's vagina with his finger. To find the accused guilty of Indecent Assault, you must be satisfied beyond a reasonable doubt that the accused kissed victim's cheeks in the circumstance of indecency.
69. Prosecution called 6 witnesses to prove the charges. Prosecution's case is substantially based on the evidence of the victim. To support the version of the victim, Prosecution called police officers and relies on the confession alleged to have been made by the accused to police in his caution interview and the charge statement. They also rely on recent complaint evidence to prove consistency of the victim.

70. The accused denies the allegation. The version of the Defence is that the mother of the victim- Iliana has made up this allegation because of the alleged dispute over a coconut tree.
71. If you are satisfied that the evidence victim gave in court is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration of her evidence is required.
72. Prosecution says that the victim is consistent in her conduct because she had promptly informed her mother about the incident. They led evidence to show that the victim made the complaint when she was found crying due to pain in her vagina.
73. The Accused is related to the victim as her uncle. The victim was 4-year old at the time of the offence. Prosecution says that she is a reliable witness. You had the opportunity to observe the demeanor of the victim and her mother. You decide if you could accept their evidence.
74. In the caution interview and the charge statement the accused had allegedly confessed to both offences. He had admitted that he inserted his finger into victim's vagina and that he kissed the victim's cheek. The Defence says that the confession was obtained by police officers by trickery and using unfair practices. They say that the accused could not understand the Bauan dialect in which the interview was conducted and that the interview was never read back to the accused in the dialect which he could understand. They also say that the interviewing officer had been rude to the accused and that he was intimidated at the interview and that the answers were not given by the accused voluntarily.
75. If you are satisfied that accused had given those answers and that he had told the truth to police you can act upon his confessions. If you are not sure that accused had given those answers or that he had not told the truth, you may disregard it.

76. Defence called the doctor Nakosia. The defence says that the medical evidence is not consistent with victim's evidence about the allegation of digital rape. The victim was medically examined by doctor on the same day at 10.30 p.m. Prosecution says that medical evidence is consistent with the allegation of rape. You decide what weight you should give to doctor's evidence and whether his evidence damaged the credibility of prosecution's version of events.
77. It is up to you to decide which version is to believe and whether you could accept the version of the Defence. If you accept the version of the Defence you must find the accused not guilty. Even if you reject the version of the Defence, still the Prosecution should prove their case beyond reasonable doubt.
78. If you believe that the victim is telling you the truth when she said that the accused kissed her cheek you can find him guilty of Indecent Assault, if you find the kissing is indecent in the circumstances of this case. If you are satisfied that the accused inserted his finger at least slightly inside victim's vagina, you should find the accused guilty of Rape. There are two counts and please consider evidence against each count separately. If you do not believe victim's evidence regarding the alleged offences, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty. Your possible opinion is either guilty or not guilty on each count.
79. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
80. Any re-directions?




Aruna Aluthge
Judge

AT LAUTOKA

25th October, 2018

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