

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 51 OF 2016

STATE

-v-

IFEREIMI KUBUKAWA

Counsel : **Ms. S. Kiran with Ms. S. Naibe for State**
Ms. K. Vulimainadave for Accused

Dates of Trial : **20, 21, 22 of November, 2018**

Date of Summing Up : **23 November 2018**

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

SUMMING UP

Lady and Gentlemen Assessors:

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 a 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. Interviewing Officer PC Bibi read in evidence the caution statement alleged to have been given by the accused. I now direct you as to how you should approach caution statements read in evidence.
16. The Defence says that the caution interview was conducted unfairly and the confession was obtained using police brutality. They say that the accused was thereby prejudiced and you should not rely upon the confession as a true statement of the accused. Prosecution on the other hand denies those allegations and says that the record of interview is a voluntary statement of the accused.
17. If you are satisfied that the accused had given those answers in his interview, it is for you to assess what weight you should give to the confession. 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.
18. 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.

19. In this case, the Doctor Bulatale gave evidence as an expert witness. 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 her reasons are convincing and acceptable to you; and, if her 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. Doctor's report does not implicate the accused. You can use doctor's opinion only to test the constancy of the version of the Prosecution that MM was digitally raped.
20. 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 witnesses had such a motive, then you may think that this allegation has been fabricated.
21. 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.
22. The agreed facts of this case are that:
 1. *It is admitted that the accused person in this case is Ifereimi Kubukawa (hereto referred as the Accused), 29 years, unemployed of Vagadra Village, Nadi.*
 2. *It is admitted that Ifereimi Kubukawa is in a de-facto relationship with Litiana Daunibau.*
 3. *It is admitted that the accused and Litiana Daunibau has a 6 months old baby girl.*

4. *It is admitted that the name of the girl is MM.*
 5. *It is admitted that MM is the victim in this case.*
23. As per the Information the accused is charged with one count of Rape. The Information is as follows. Please refer to the Information:

Representative Count

Statement of Offence

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

Particulars of Offence

IFEREIMI KUBUKAWA between the 1st day of October, 2015 and the 31st day of December, 2015 at Nadi in the Western Division penetrated the vagina of **MM**, with his finger.

24. 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.
25. Consent as defined by Section 206 of the Crimes Act, 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 6 months old 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.

26. The elements of the offence of Rape in this case are that:
 - a. the accused Ifereimi Kubukawa,
 - b. penetrated the vagina of the MM, with his finger.

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

28. The charge states it is a representative count. You might wonder what representative count means. It simply means this. The Prosecution says that, during the period given in the information, (01st October, 2015 – 31st December, 2015) accused raped the victim more than once.

29. 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 or from circumstantial evidence. In this case, the complainant was only six months old at the time of the alleged incident and is incapable of giving evidence as to the alleged offence.

30. The Prosecution relies on circumstantial evidence to prove that the accused person had raped the victim- MM and that there is no other reasonable explanation than that the accused had committed this offence. The law on circumstantial evidence is that if, on considering a series of pieces of evidence, you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn is the guilt of the accused, and there is no other reasonable explanation

for the circumstances which is consistent with the accused's innocence, then you may find the accused guilty of the offence charged.

31. 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 PC Edward Bibi

32. On 14th and 15th of February, 2016, PC Bibi conducted the interview of suspect Ifereimi Kubukawa under caution. The interview was conducted in iTaukei language at the Nadi police Station. Cpl. Saiasi who was the witnessing officer came to witness the interview after the interview had commenced at question No. 2. The suspect was cautioned in iTaukei language which he understood.
33. PC Bibi said that all constitutional rights were given to the suspect and that the interview was conducted fairly. The suspect gave all answers voluntarily. Before, during or after the interview, nobody forced, threatened or assaulted the suspect in any way. The suspect did not make any complaint of assaults or of anything. No injuries were noted on his body. The suspect was not given promises or inducements in order to get a confession from him. At the conclusion of the interview, suspect was given his right to read the interview as it was being recorded on computer and also at the end of the interview when a print-out was generated. The suspect answered all the questions in iTaukei and all his answers recorded in the interview are the statements of the suspect. He was given the right to alter, delete or amend the interview notes. The suspect signed the interview notes voluntarily. The original record of interview was translated into English and exhibited. PC Bibi tendered the record of interview and read it in evidence.

34. Under cross-examination, the PC Bibi admitted that the fact that the suspect was given an opportunity to alter or amend the answers whilst they were being typed was not recorded in the interview. He also admitted that the point at which the witnessing officer stepped into the interview was not recorded. Witness also admitted that the suspect having made admissions straight from questions 42, onwards had later denied raping his daughter at questions 65 and 66.
35. PC Bibi denied that, during the caution interview, the suspect was punched on the sides of his left ribs and intimidated by two iTaukei police officers. He also denied that the admissions in the caution interview were a result of police brutality. He under re-examination said that he typed exactly what the accused was saying.

PW 2 Litiana Roko Daunibau

36. Litiana said that she was living at Village Headmen's house in Vagadra Village before he got married to Ifereimi Kubukawa. She gave birth to MM in Suva and came to live in the house of Ifereimi's uncle at Vagadra village with her husband and two children.
37. Litiana said that she noticed pus and blood coming out from her daughter -MM's vagina during her stay at Vagadra village. MM was only three months old when she saw the pus for the first time. She again saw blood and pus when MM was 5 months old.
38. One day when she came back from the river she went to change MM's napkin because she didn't want Radini to find out what was happening to her daughter. Radini had already changed MM's clothes and seen pus and blood while she was still changing MM's napkin. Radini questioned her as to why there was pus and blood coming out from MM's vagina.

39. During that time, she asked Ifereimi to look after MM while she was washing napkins in the river. She had left MM with Ifereimi for three times. She was concerned when she saw pus and the blood and gave MM one Fijian herbal medicine called 'Batimadramadra'.
40. Litiana said that she took MM to be seen by a doctor during her monthly clinic. After the medical examination at the clinic she was informed to go to the police station. At the Nadi police station, the Social Welfare officer came and took the baby to Lautoka Hospital. She then lodged a complaint at the Nadi Police Station on 12th February, 2016.
41. Litiana said that she told the police that she had left the baby with the father and when she came back the baby was with another mother and the father could not be located. She also informed the police regarding the pus and the blood that was coming out from the vagina of the baby.
42. Litiana said that she noticed physical changes in her baby's body. Baby started losing weight and sometimes she could not even sit properly and when she passed urine she used to cry in pain.
43. She saw pus plenty times but saw blood only two times. When MM was 3 months old, the pus was the only thing coming out from her vagina. When she was 5 to 6 months, pus came with blood. When the doctor or the nurse opened her napkin at the clinic, there was blood coming out.
44. Litiana said that she went and stayed with Maria Radini after arguments broke out with Ifereimi. Ifereimi told her to go back to Suva because she was a burden to him.
45. Whilst she was living with Maria, Ifereimi had come back to see her daughter twice and the third time he visited, he had taken the baby away. When he returned the baby, the baby already had had a bath and was feeling sleepy.

When she took the baby to change her napkin, she saw blood in baby's napkin. She suspected that

Ifereimi had done something and questioned him because he was the only person staying with them. Ifereimi denied doing anything to the baby.

46. By looking at her statement, Litiana confirmed that she made the complaint to police on 21st July, 2015 and at that time MM was only 6 months old.
47. Under cross-examination, Litiana admitted that she gave only Fijian herbal medicine and did not inform a doctor about the pus or blood until MM was 6 months old.
48. Litiana admitted that she was chased away by Ifereimi and she came to stay with Radini after a heated argument in relation to a suspected affair Ifereimi was having with Maria's niece.
49. She said that the baby was left with Ifereimi because she trusted that he is the father of the baby.
50. Under re-examination, Litiana said that she did not want Maria to see the blood and the pus and earn a bad reputation. She questioned Ifereimi about what she noticed in her daughter so they could have sorted it out within the family if he admitted.

PW 3 Dr. Sainimili Bulatale

51. Doctor Bulatale said that she examined MM on 12th February, 2016, when she was based at Nadi hospital. In the vaginal examination of the patient, she found her hymen to be not intact. A gaping and purulent discharge was noted, but the

pus was of nil foul smelling. She further said that in order for the hymen to be broken it has to be penetrated by an object such as penis or finger.

52. When she noted the discharge in MM's vagina, she thought that the baby had actually been assaulted sexually. She didn't see any bruising or anything on the chest or abdomen.
53. Doctor said that it is abnormal for a 6 months old baby to be having those discharges. Usually a vaginal discharge could be caused by sexually transmitted infections or by just bacterial infections.
54. Under Cross-examination, the doctor admitted that her examination was incomplete, because she had to send the baby over to Lautoka Hospital for further examination. She excluded the possibility that a bacterial infection could damage the hymen. She also dismissed the possibility that the pus could be a result of a sexually transmitted disease. Doctor said that usually, all female infants are born with a hymen. There are some rare cases where new born babies have perforated hymen but for this baby it was not the case because she had some discharge.

PW 4 Maria Rogoni (Radini)

55. Maria said that she was living in Vagadra village with her family. In 2016, Litiana and her two children also came and stayed with her when Ifereimi chased Litiana away from home.
56. At one time, Litiana went to wash the baby's clothes and came back to change the MM's napkins. While Litiana was changing the napkin, she saw blood and pus on baby's napkin. Blood and pus was coming out from baby's vagina. She was confused why blood and pus coming out, so she informed Litiana to take the baby to the hospital. She saw it 3 – 4 times. They took the baby to hospital when the transport was available.

57. At the hospital, when nurse opened the diaper, they saw blood and pus coming out. She asked the nurse if they could medically examine the baby to find out what sickness she was suffering from.

58. On the 14th February, 2016, she gave a statement to police. By refreshing her memory from the statement, she said that on 8th of February, 2016, she went to the river with Litiana to wash the clothes, leaving MM with her mother. On their return from the river, her mother informed that Ifereimi came and took the baby. When Ifereimi returned the baby back, the baby was feeling weak. When they were changeling the baby's napkin, they found blood and pus on baby's napkin. The blood and pus were coming out from baby's private part or '*pasa*'. Before Ifereimi had taken the baby, the baby could manage to crawl or lean on doors and walk but when the baby returned, the baby was just lying down and could not move.

59. Under cross-examination, the witness admitted that she is also known as Radini. When the Defence Counsel questioned her on her statement dated 14th of February, 2016, that there is nothing recorded there that she had seen the pus and blood coming out from the baby on three or four occasions, the witness said that she told everything to police.

60. Maria admitted having told police that when she and Litiana returned from washing, it was she who had found the pus on the napkin of the daughter and when she told Litiana what she saw, Litiana told her that she had already seen it since October, 2015.

61. That is the case for Prosecution. At the close of the Prosecution's 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.

62. 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. The Counsel for Defence put accused's case to the witnesses for Prosecution and you heard what the Defence case is about when the Counsel made her closing address. You must take into account the defence case when you form your individual opinions.

Analysis

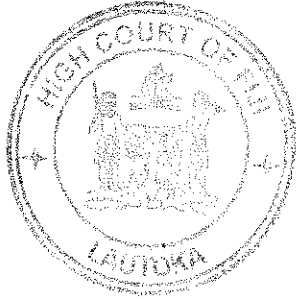
63. Lady and gentlemen assessors, the accused is charged with one count of Rape. To find the accused guilty of rape in this case you must be satisfied beyond reasonable doubt that the accused had penetrated MM's vagina with his finger.
64. Prosecution called 4 witnesses to prove the charge. The alleged victim in this case was not in a position to testify as to the alleged rape because she was only 6 months old at that time. Prosecution's case is substantially based on circumstantial evidence, medical evidence and the alleged confession of the accused.
65. Prosecution adduced following pieces of circumstantial evidence:
- MM starts discharging pus from her vagina when she was 3 months old and later pus with blood.
 - Litiana suspects that accused had done something to MM and questions him because accused was the only person living in the house at that time. But accused denies doing anything to the daughter.
 - The accused chases Litiana away from home after an argument and, when Litiana was staying with Radini, accused takes MM

from home when Litiana was not in. When the accused returns the baby, Litiana finds that MM had had a bath and was feeling weak and sleepy. When Litiana takes the baby to change her napkin, she sees blood in MM's napkin.

- When Litiana takes MM to the clinic on Radini's intervention, MM is referred to the Social Welfare Office and then to police.
- MM is examined by Dr. Bulatale at the Nadi Hospital. The doctor suspects that MM had been sexually abused based on her findings that MM's hymen to be not intact and pus and blood present in her vagina.
- Accused is interviewed under caution. Accused admits inserting his finger into MM's vagina on several occasions.

66. Considering all pieces of evidence, if you accept the evidence of the Prosecution, you decide if you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn from these pieces of evidence is that the accused had penetrated MM's vagina with his finger more than once.
67. Prosecution called police officers and relies on the confession alleged to have been made by the accused. In the caution interview the accused had allegedly confessed to the offence and admitted that he inserted his finger into MM's vagina on more than one occasion.
68. The Defence says that the confession was obtained using police brutality and unfair practices. They say that the answers were not given by the accused voluntarily and therefore you should not rely upon the confession.
69. If you are satisfied that the accused had given those answers and that he had told the truth to police you can act upon his confession. If you are not sure that accused had given those answers or that he had not told the truth, you may disregard it.

70. Prosecution called Dr. Bulatale and says that the medical evidence is consistent with the allegation of digital rape. Having considered other evidence led in trial, you decide what weight you should give to doctor's evidence and whether her evidence bolstered the credibility of prosecution's version of events.
71. The accused denies the allegation and his Counsel cross-examined the witnesses for prosecution to discredit the version of the Prosecution. They say that the witnesses called by Prosecution are not reliable and therefore the evidence they gave should be rejected.
72. 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.
73. If you believe that the evidence of the Prosecution to be true and you are satisfied that the accused inserted his finger at least slightly into victim's vagina more than once, you should find the accused guilty of Rape. If you do not believe evidence of the Prosecution, 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.
74. 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.
75. Any re-directions?



Aruna Aluthge

Judge

AT LAUTOKA

23rd November 2018

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