

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 53 of 2015

STATE

V

SAKARAIA QORO

Counsel : Mr. A. Singh for the State.
: Ms. N. Sharma and Ms. V. Narara [LAC] for the
Accused.

Dates of Hearing : 21, 26 March, 2018
Closing Speeches : 27 March, 2018
Date of Summing Up : 28 March, 2018

SUMMING UP

(The name of the complainant is suppressed she will be referred to as "MW").

Madam and Gentlemen Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters

entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

13. The accused is charged with one count of rape. (A copy of the information is with you).

COUNT ONE

Statement of Offence

RAPE: Contrary to section 207 (1) & (2) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

SAKARAIA QORO on the 24th day of March, 2015 at Lautoka in the Western Division, penetrated the vagina of "**MW**" with his penis without the consent of the said "**MW**"

14. To prove the above count, the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant “**MW**” with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant “**MW**” was not consenting or didn’t care if she was not consenting at the time.
15. It is not necessary for the prosecution to prove that there was ejaculation or full penetration of the vagina by the penis. The slightest of penetration of the complainant’s vagina by the accused’s penis is sufficient to satisfy the act of penetration.
16. The first element of the offence of rape is concerned with the identity of the person who allegedly committed the offence. There is no dispute that it was not the accused as alleged. You are to consider this element of the offence as proven beyond reasonable doubt.
17. The second element is the act of penetration of the complainant’s vagina by the accused with his penis. Like the first element the accused does not dispute this element as well. You are to consider this element of the offence as proven beyond reasonable doubt as well.
18. In respect of the third element that is of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
19. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the

accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.

20. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
21. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of rape as explained above, then you must find the accused guilty of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty.
22. The issue that needs to be determined in respect of the count of rape is whether the complainant consented to the penetration of her vagina by the accused with his penis.
23. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
24. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your mind. I will refresh your memory and summarize the important 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 opinion in this case.

PROSECUTION CASE

25. The prosecution called four (4) witnesses to prove its case against the accused.
26. The first witness was the complainant "MW". In the year 2015 she was 15 years of age and a Form 3 student. The complainant lived at Galba Street, Rifle Range, Lautoka with her paternal aunt Mereoni Raitala and her family. The complainant's parents were in Viwa, Yasawa and she came to Lautoka to study.
27. On 24 March, 2015 the complainant did not go to school since she was sick. At about 2pm the complainant received a call from the accused. The accused is the paternal uncle of the complainant. The accused asked the complainant to accompany him to town so that she could assist him in doing a research assignment for his daughter.
28. After seeking permission from her aunt Mereoni the complainant walked to the roadside where the accused was waiting she was walking in front and the accused was walking behind her. As the complainant was walking past the cassava patch the accused got hold of her hands from behind and dragged her back to the cassava patch.
29. At the cassava patch, the accused pushed her on the big grass since the complainant was facing downwards the accused turned her by her chest so that she could face him. At this time the complainant asked the accused what he was doing, the accused replied "*Qi tara lia boto na kwa*" meaning "*I just do one thing*".
30. The complainant was very scared and she said "*Na ava o tara*" meaning "*why did you do this to me*". The accused then pressed her mouth whilst on his knees pulling her panty down and he also pulled her skirt up to her

stomach. The accused removed his $\frac{3}{4}$ pants then laid on top of the complainant, he then forced his erected penis into her vagina. When the accused was doing this to her she was scared and shaking and also felt pain.

31. The complainant managed to push the accused away, picked her panty and ran home. When she reached home she told her aunty everything the accused had done to her.
32. The complainant further stated that there were no houses around the cassava patch but she had cried for help saying "*help, help*", "*can anyone help me*" but no one was around.
33. The complainant did not consent to what the accused had done to her, the matter was reported to the Police the same day.
34. In cross examination the complainant stated that although she was sick she had accompanied the accused after he sought her assistance to do his daughter's research assignment. It was the accused's insistence that made her go with him. The complainant denied she had called the accused and wanted to meet him she further denied telling the accused that she wanted him. The complainant also stated that the accused had used his right hand to press her mouth and with his left hand removed her panty and then took off his pants. The complainant denied she consented to have sexual intercourse with the accused.
35. During cross examination the complainant was referred to her police statement dated 24 March, 2015 which she had given to the police when facts were fresh in her mind. The complainant agreed that nowhere in her police statement it was written that she had screamed for help or that when she went home she had informed her aunt about the incident. The complainant explained that she had told the police officer of the above but it was not written in her statement.

Madam and Gentlemen Assessors

36. The learned counsel for the accused in this regard was cross examining the complainant about some inconsistencies in the statement she gave to the police immediately after the incident when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant with her evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.
37. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
38. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of the witness.
39. The complainant agreed that before coming to give evidence in court she had memorized her police statement.
40. The second prosecution witness was Mereoni Raitala the aunt of the complainant. In the year 2015 the complainant was living with the witness and her family.

41. On 24 March, 2015 the complainant was sick so the witness told the complainant not to go to school. After lunch the witness heard the complainant talking on the phone upon inquiry as to who was on the phone the witness was told by the complainant that it was her uncle the accused.
42. According to the witness it was the accused who had called the complainant. After the conversation finished the complainant asked the witness if she could go to town with the accused. The witness refused since the complainant was sick, however, the complainant insisted on going.
43. At about 3pm the complainant left home, when the complainant returned half an hour later she was crying. The witness asked her the reason for crying the complainant told the witness that when she went to the roadside the accused grabbed her and dragged her to the cassava patch and did something bad to her.
44. The witness observed that the complainant looked miserable and she could make out that the complainant had gone through something bad. The witness felt sorry for the complainant. The matter was reported to the police the same day, and the witness went with the complainant to the hospital for a medical examination.
45. In cross examination the witness confirmed that even after knowing the reason why the complainant was going with the accused she had advised the complainant not to go. The cassava patch referred to by the complainant was weeded by the roadside and the witness had visited the alleged scene that same day.

Madam and Gentlemen Assessors

46. Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for a child of 15 years not to complain in detail to

her aunt about what she had gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

47. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in this case did not inform her aunt in detail about what had happened to her on that day.
48. This is commonly known as recent complaint evidence. The evidence given by Mereoni is not evidence as to what actually happened between the complainant and the accused since Mereoni was not present and did not see what had happened between them.
49. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant complained to her aunt about what the accused had done to her immediately after the alleged incident and therefore is more likely to be truthful. On the other hand, the defence says that the complainant did not complain to her aunt since it was not in her police statement and therefore she should not be believed.
50. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.

51. The third prosecution witness was Dr. Poonam Pala who graduated with an MBBS degree from the Fiji School of Medicine in 2012.
52. On 25 March, 2015 the Doctor examined the complainant "MW" at the Lautoka Hospital. The history related by the complainant to the Doctor was stated at D (10) of the Medical Examination Form as:

"was taken to cassava patch by uncle where she was pushed and hit then raped by uncle at 2pm yesterday."

53. The Doctor explained her specific medical findings as follows:
 - (a) External genitalia had no bruising or laceration, external genitalia is the part of the patient that is exposed when the patient is lying flat without any clothing specifically her private part. Nil bruising or lacerations meant the Doctor did not see any external injury from superficial examination.
 - (b) Examination of the vagina: bruising noted on the right hand side of the vagina internal injuries. The Doctor could not tell the size of the bruising.
 - (c) Hymen, this was not intact on the patient blood was noted in the hymen. Hymen is synonymous with the virginity of the patient which was a thin membrane that is intact in children who are not sexually active. According to the Doctor hymen not intact meant the patient had been penetrated. The hymen was located at the entrance of the vagina. There was minimal bleeding which was recent. The cause of the bleeding could be by the superficial lacerations noted on the hymen. The Doctor further explained that the superficial lacerations were not deep laceration meant there was a cut on the patient's right side of the hymen. The Doctor further stated that a

forceful sexual intercourse by a penis could cause superficial laceration or a cut.

54. The professional opinion of the Doctor was that hymen was not intact, however, she was not able to comment on the mechanism of the injury because she could not confirm whether the injury was due to forceful penetration by a penis or a finger or a foreign object. The Doctor stated that the patient had told her that she had been raped but did not say how she was raped.
55. The Doctor confirmed that her findings were consistent with the penetration by a penis. The Fiji Police Medical Examination Form of the complainant dated 25 March, 2015 was tendered as prosecution exhibit no. 1.
56. In cross examination the Doctor stated that the blood she had seen was fresh blood which could have been due to menstruation but she had not asked the patient if she was menstruating. The witness agreed if a person was pushed, hit and dragged there would be injuries on the patient's body. The Doctor disagreed with the suggestion that the injuries noted could have been caused due to consensual sex because the lacerations and bruising seen on the patient were a result of force and trauma rather than consensual activity.
57. The Doctor agreed it was possible that the injuries seen could be due to dry penetration and also if the vagina was not elongated. The Doctor confirmed that her findings were consistent with forceful penetration although she was not sure whether the penetration was done by a penis, a finger or a foreign object and that she was fairly certain that there was penetration against the will of the patient.

Madam and Gentleman Assessors

58. You have heard the evidence of Dr. Pala who has been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the Doctor said in her evidence as a whole is to assist you.
59. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the Doctor.
60. You should remember that this evidence of the Doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
61. The final prosecution witness was Detective Constable Irene Singh the Investigating Officer in this case. The witness attended to the complainant by recording her statement and escorted her to the Lautoka Hospital and also went for the crime scene visit. The complainant was accompanied by her aunty Mereoni.
62. During the crime scene visit the complainant had pointed to the exact location where the incident had happened. The witness noticed that the cassava patch had big grass which was fallen at the actual spot of the

incident. The nearest house was about 40 to 50 meters away from the cassava patch.

63. In cross examination the witness stated that she had recorded everything the complainant had told her in the police statement of the complainant. The witness agreed that nowhere in the police statement of the complainant it was written that the complainant had screamed for help or that the complainant had relayed the incident to her aunty. According to the witness the version of the complainant was that she had become a victim.
64. The witness disagreed that the nearest house from the scene of the crime was about 7 to 8 meters away. The crime scene was photographed by the other Police Officers and it was not with her.
65. In re-examination the witness stated the photographs were kept at the office which was not part of the evidence but it was in the file to be given to the court when required.
66. This was the prosecution case.

DEFENCE CASE

Madam and Gentlemen Assessors

67. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent and not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent.

68. According to the line of cross examination, the accused takes up the position that he had sexual intercourse with the consent of the complainant that day.
69. This was the defence case.

ANALYSIS

70. The prosecution alleged that on 24 March, 2015 at about 2pm the accused called the complainant on her mobile phone asking her to accompany him to town so that she could assist him in doing a research assignment for his daughter.
71. After seeking permission from her aunt Mereoni Raitala the complainant walked to the roadside where the accused was waiting for her. The complainant was walking in front and the accused was walking behind her, as the complainant was walking past the cassava patch the accused got hold of both her hands from behind and dragged her back to the cassava patch.
72. At the cassava patch, the accused pushed the complainant on the big grass thereafter he turned her by her chest so that she could face him. The accused then pressed her mouth whilst on his knees removed her panty and also pulled her skirt up to her stomach. The accused removed his $\frac{3}{4}$ pants and lay on top of the complainant and then forced his erected penis into her vagina.
73. The complainant managed to push the accused away, picked her panty and ran home, when she reached home she told her aunty everything the accused had done to her.
74. According to Mereoni Raitala the aunty of the complainant at about 3pm the complainant left home, when the complainant returned half an hour later

she was crying. The witness asked the reason for crying and she was told that at the roadside the accused had grabbed her and dragged her to the cassava patch and did something bad to her. The witness observed that the complainant looked miserable and she could make out that the complainant had gone through something bad.

75. The Doctor who had examined the complainant on 25 March, 2015 was of the opinion that the complainant's hymen was not intact but she was unable to confirm whether the injury was due to penetration by a penis or finger or a foreign object. According to the Doctor the blood seen was recent and there was a cut on the right hand side of the hymen and a forceful penetration of the vagina by a penis could cause a cut to the hymen.
76. The Doctor confirmed her findings to be consistent with the forceful penetration by a penis.
77. The Investigating Officer visited the cassava patch where the alleged incident took place. She noticed that the cassava patch had big grass which had fallen at the spot of the alleged incident as pointed by the complainant. The nearest house was about 40 to 50 meters away from the cassava patch.
78. On the other hand, the position taken by the accused is that the complainant had consented to have sexual intercourse with him that day. The complainant came to meet the accused and both went to the cassava patch. The complainant did not call for help or tell anything to her aunt because she had consensual sex at the cassava patch.
79. The Defence also states that if the complainant was pushed, hit and dragged as she had relayed to the Doctor then there would have been some injuries seen on the complainant's body.

Madam & Gentlemen Assessors

80. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
81. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthwith and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
82. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
83. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

84. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
85. 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 must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
86. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
87. Your possible opinions are:-

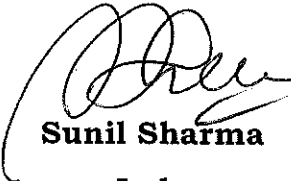
Count One: **RAPE**: GUILTY OR NOT GUILTY

Madam and Gentlemen Assessors

88. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.



89. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.


Sunil Sharma
Judge

At Lautoka
28 March, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.