

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 290 of 2017

[CRIMINAL JURISDICTION]

STATE

V

APENISA RAILEQE

Counsel : Ms. S. Serukai for State
Ms. M. Ratidara for Accused

Hearing on : 26th to 28th March 2018

Summing up on : 28th March 2018

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "LG".)

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room the admitted facts and the exhibit tendered. As I have told you in my opening address, your opinion should be based only on the evidence

presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
6. It is an agreed fact that the complainant was 7 years old at the time of the alleged incident. You may have come across children of this age. You will have an idea of the way a child of a particular age behave, think, talk and the way they describe things.

7. Children can be confused about what has happened to them. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time that what they were doing was wrong. They may be embarrassed because they found that some aspects of the attention they were getting from the individual concerned were enjoyable.
8. I mention these possibilities because experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make.
9. You would also have noted that I did not make the complainant take the usual oath before she gave her evidence. Given her demeanour and her answers to the questions put to her, it is for you to decide whether the complainant was intelligent enough to understand the duty of speaking the truth and whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.
10. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.
11. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions

with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.

12. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
13. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
14. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
15. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable

inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.

16. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
17. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
18. In order to prove that the accused is guilty of an offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
19. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.
20. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
21. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

RAPE: contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

APENISA RAILEQE, between the 12th of August, 2017 and 27th of August, 2017 at Nadaro Village, in the Central Division, had carnal knowledge of LG, who is a child under the age of 13 years old.

22. To prove the offence of rape in this case, the prosecution must prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) penetrated the complainant's (LG) vagina with his penis;
 - c) without the consent of the complainant; or
that the complainant was below the age of 13 years at the time of the incident.
23. The first element of the offence of rape is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.
24. Second element involves penetration. To establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis. A slightest penetration is sufficient to satisfy this element.
25. Law says that 'a child under the age of thirteen years is incapable of giving consent'. It is an admitted fact in this case that LG was 07 years old at the time of the alleged incident. Therefore, you should consider that the third element above is proven beyond reasonable doubt.

Prosecution case

26. The complainant said in her evidence that;
- a) *She was in class 2 at Vugalei District School last year. She said in the month of August last year, the accused oiled his penis and put it inside her vagina. She said the accused is her father's elder brother. When she was asked how many Apenisa Raileqe's she knows, she said 'two'. Then when she was asked to clarify, she said she knows only one Apenisa Raileqe.*
 - b) *She said when she was inside the toilet in her grandmother's house, the accused came inside the toilet and told her to kiss each other. She said 'no'. When she came out of the toilet the accused told her to come to the room. Thereafter, she lay down on the bed and the accused 'pulled up her skirt and pulled down her panty'. Then he unzipped his trousers and pulled out his penis. He then told her to kiss each other. She told him not to kiss or otherwise the police will arrest him. After that the accused told her that he will smack her if she tells anyone.*
 - c) *She said after the accused pulled out his penis he then oiled it and put it inside her vagina. She said when he did this, her vagina was paining and she was crying. She said the accused wiped the blood on her vagina.*
 - d) *When this was happening only the two of them were inside the room. Her mother had gone to sell vegetable and her father was in Ba cutting sugarcane. She was with her grandparents. Her grandmother was in the sitting room when this happened. The grandfather was also at home. After the incident she was feeling sick, she was coughing and her vagina was in pain. She went to a doctor with her mother and the doctor gave her some tablets. She said the incident took place in the morning. She said the accused placed a pillow on her mouth during the incident.*
 - e) *During cross examination she agreed that the accused lives in Kalabu and he comes to the village often to get Tavioca and Roro. She agreed that on the day the alleged incident took place the accused came to the village to get Tavioca and Roro. She agreed that on that day she was playing with her little brother namely Anasa and that she ran inside the room in order to hide from her brother. She agreed that the accused was inside the room when she ran into the room. She agreed that the room was very close to the living room where her grandmother was.*
 - f) *During re-examination she said she was playing with Anasa before the incident.*
 - g) *She identified the accused in court.*

27. The second prosecution witness who is the complainant's mother said that;
- a) *One morning between 12/08/17 and 27/08/17, she saw the accused getting off the 8 o'clock bus and the accused came to her. They discussed about selling cassava and she agreed to sell the cassava for the accused. Thereafter she cooked the cassava and took it to the Suva market. When she left, the accused, the complainant, her younger son and the children's grandparents were at home. She said the complainant was at home because it was school holidays. That day she came home around 9pm and her children were fast asleep when she came home.*
 - b) *She said on 27/08/17 the complainant was sick and she took her to the hospital. Before that day the complainant had told her that the complainant feels pain in the vagina when urinating. When she checked the complainant's vagina on the 27th she saw blood and pus. When she asked the complainant the complainant did not respond. Since that day was a Sunday she decided to take the complainant to the hospital on the next day.*
 - c) *The complainant was examined at the hospital on the next day. When she asked the complainant, the complainant told her that the same day that she took cassava to the market, complainant's 'ta levu' had tried to do something bad to the complainant.*
 - d) *She said the complainant's date of birth is 08/11/09. She said 'ta levu' the complainant was referring to is the only older brother of the complainant's father whose name is Apenisa Raileqe. She said he usually comes 2 to 3 times in a week until the day he had a discussion with her regarding cassava.*
 - e) *After the complainant told her that the accused tried to do something bad she asked the complainant what was meant by saying 'bad thing'. The complainant then told her that the accused wanted to kiss her. When she started questioning the complainant in a slowly the complainant told her that the accused called the complainant inside the room, unzipped the pants, pulled out his penis and oiled it and inserted it in the complainant's vagina. When the complainant was telling this to her she could see that the complainant was scared and frightened.*
 - f) *During cross examination she agreed that the accused told her about selling cassava to pay for the transport of his son's items, before the second term school holidays. She said the accused came to the village on the 16th August which was a Friday.*

28. The third prosecution witness said that;
- a) *She is a medical doctor with twelve years of service at the Ministry of Health. She said she prepared the medical report tendered as PE1.*
 - b) *She said during the vaginal examination she observed abrasions and tenderness on both sides of labia minora and at the introitus, pus discharge, and that the hymen was not present. She said hymen is a thin membrane at the entrance to the vagina and its absence suggested that penetration had taken place. She said the abrasions she noted can be caused by an erected penis. In her opinion she could estimate that the injuries would have occurred within a period of less than one month.*
29. The fourth prosecution witness said that;
- a) *She was the investigating officer of the case. She said she took steps to record the statements of the witnesses and also she interviewed the accused under caution.*
30. That is a summary of the evidence. Please note that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I have not referred to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
31. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose remain silent. It is his right to do so. You must not draw any adverse inference against the accused due to the fact that he decided to exercise his right to remain silent.
32. The complainant gave evidence from the vulnerable witnesses' room. You must not draw any adverse inference against the accused due to that reason as it is a normal procedure adopted in order to make certain witnesses relatively more comfortable when they give evidence.

33. As I have already highlighted, experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, if there is a delay, that may give room to make-up a story, which in turn could affect the 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 to such delay. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.
34. The prosecution says that they are relying on recent complaint evidence. You heard in this case that the complainant had made a complaint sometime after the incident to her mother, the second prosecution witness. In this regard you should consider whether that was a prompt complaint regarding the incident and whether the complainant sufficiently complained of the offence the accused is charged with.
35. Such complaint need not specifically disclose all the ingredients of the offence and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. However, please remember that this evidence of recent complaint is not evidence as to what actually happened between the complainant and the accused. The second prosecution witness cannot confirm whether the content of that complaint is true because she was not there. It may only assist you to decide whether the complainant is consistent and whether or not the complainant has told you the truth. In the end you are deciding whether the complainant has given a truthful account of her encounter with the accused.
36. The third prosecution witness gave her medical opinion based on what she observed and her experience. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just

as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the third prosecution witness. Evaluating her evidence will therefore include a consideration of her expertise, her findings and the quality of the analysis which supports her opinion.

37. When you consider PE 1, you should remember that what is written in A(4) and D(10) are not admissible in considering whether the facts stated therein are true because those parts are filled based on information received and not based on what the respective authors had witnessed. For this reason, the contents of A(4) and D(10) are blotted out.
38. You would remember that the prosecutor decided not to rely on the cautioned interview of the accused as evidence against the accused while the fourth prosecution witness was reading the same. Accordingly the copies of the cautioned interview provided to you were withdrawn. As I have directed you at that point, please remember that you should disregard what was read out from the accused's cautioned interview as the said cautioned interview is not evidence in this case.


Analysis

39. The accused denies the allegation that he penetrated the complainant's vagina with his penis. The defence pointed out that children lie and they make mistakes. The defence says that even though there were elders in the house, the complainant did not complain and she only complained after she was taken to the hospital.
40. The defence says there are inconsistencies in the evidence given by the complainant. It was pointed out that the complainant said in her evidence that she met the accused when she was coming out of the toilet but she admitted during cross-examination that she ran inside the room to hide. You may remember that the complainant said during reexamination that she ran inside

the room to hide before the incident took place. You should deal with inconsistencies according to the directions I have already given you.

41. As it is agreed that the complainant was below the age of 13 years at the material time, consent is not an issue in this case. Therefore, the only issue you should decide in this case is whether the prosecution has proven beyond reasonable doubt that the accused penetrated the complainant's vagina with his penis.
42. Any re-directions?
43. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
44. Your opinion should be whether the accused is guilty or not guilty.




Vincent S. Perera
JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused