

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 033 OF 2016LAB

STATE

V

ATISH CHAND MAHARAJ

Counsels : Ms. A. Vavadakua for State
Mr. A. Sen for Accused

Hearings : 26 and 27 March, 2018

Summing Up : 28 March, 2018

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my 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 fact.

2. State and Defence Counsels 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 Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.
3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest 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 is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that 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 so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. 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, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:
“... [read from the information]...”

D. THE MAIN ISSUES

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:

- (i) On count no. 1, did the accused, on 7 April 2013, at Korovesi, Savusavu in the Northern Division, criminally intimidate a person or persons, with intent to alarm them?
- (ii) On count no. 2, did the accused on 7 April 2013, at Savusavu in the Northern Division, rape the complainant?

E. THE OFFENCE AND THEIR ELEMENTS

9. Since count no. 2 is the more serious offence of the two counts, we will deal with the same first. The accused was charged with "rape", contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009. For the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused had sexual intercourse with the complainant, that is, his penis penetrated the complainant's vagina;
- (ii) without the complainant's consent; and
- (iii) he knew the complainant was not consenting to sex, at the time.

10. In law, the slightest penetration of the complainant's vagina by the accused's penis, is sufficient to constitute "sexual intercourse", and it's irrelevant whether or not the accused ejaculated.

11. Consent is to "agree freely and voluntarily and out of her own free will", and she must have the necessary mental capacity to give her consent. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority over her, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all.

12. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to sex, at the time. You will have to look at the parties' conduct, at the time, and the surrounding circumstances, to decide this issue.

13. Count no. 1 involved the offence of "criminal intimidation", contrary to section 375 (1) (a) (i) and (iv) of the Crimes Act 2009. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused;
 - (ii) without lawful excuse;
 - (iii) threatens another person or persons;
 - (iv) with any injury to their person or persons;
 - (v) with intent;
 - (vi) to cause alarm to that person or those persons.
14. The key word in the above offence is the word "threaten". "Threaten" basically means "to frighten or to try to influence a person by menaces". The threat must consist of an intention to inflict personal injury on the person or persons. The purpose of the threat is to alarm or frighten the person or persons. The physical part of the offence is to "threaten" a person or persons. The fault element was, when doing the above act, he intended to frighten or cause alarm to the person or persons.
15. There are two counts in the information. Please consider them separately, and come to a considered separate decision on each of them, in the light of the total evidence presented at the trial.

F. THE PROSECUTION'S CASE

16. The prosecution's case were as follows. On 17 April 2013, the accused (DW1) was 36 years old. At the age of 23 years, he married the complainant (PW1). PW1 was 18 years old at the time. On 7 April 2013, she was 30 years old. The couple were married for 13 years. They had three children. In 2013, the parties separated because of matrimonial difficulties. The complainant returned to her parents in Korovesi, Savusavu. The accused stayed at Navakasigani, Labasa.
17. According to the prosecution, on 7 April 2013, the complainant was watching movie in the sitting room of her parent's house at Korovesi, Savusavu. Her sister, brother-in-law, Shanil Ajay Ram

(PW3), and their baby, were in the house at the time. According to the prosecution, the accused came into the house drunk and armed with a cane knife. He allegedly hit PW1 on the arm with the flat side of the cane knife. PW3 later took his baby and wife out of the house and fled to their neighbour. They were allegedly alarmed of the accused's behavior.

18. According to the prosecution, the accused allegedly dragged the complainant into a bedroom. He allegedly took off PW1's clothes. PW1 resisted the accused by pushing him away and raised the alarm by screaming. PW1 said, the accused forcefully had sex with her by inserting his penis into her vagina without her consent. The two allegedly had sex on a bed. PW1 said, the accused placed a knife on her throat while having sex with her. According to the prosecution, the two were allegedly disturbed when PW1's father, Rajendra Prasad (PW2), knocked at the door. The accused then stood up and opened the bedroom door. PW2 and the accused allegedly talked to each other. The accused later left.
19. PW2 later reported the matter to police. An investigation was carried out. PW1 was taken for medical examination at Savusavu Hospital. Her statement were taken by police. On 12 April 2013, the accused appeared at the Labasa Magistrates Court charged with "Criminal Intimidation" and the alleged rape of the complainant.
20. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

21. On 26 March 2018, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charges. In other words, he denied the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence in his defence. He called no witness. That was his right.
22. The accused's case was simple. On oath, he denied the complainant's allegations. He admitted he went to PW1's parent's house on 7 April 2013. He said, he was not armed with a cane knife.

He said, he did not intimidate anyone when he was there. He said, he went there to ask his wife to return to him and their children. He said, he and his wife, the complainant, talked. He said, his wife got ready to return with him. He said, he had a few beers with Shanil, his brother-in-law. He said, his wife, the complainant, later cooked him goat curry and rice. He ate the same. He said, they later went into the bedroom. They laid side by side on the bed, but did not have sexual intercourse. He said, the complainant was menstruating. He said, he did not criminally intimidate anyone or rape the complainant on 7 April 2013.

23. Because of the above, the defence is asking you, as assessors and judges of fact, to find the accused not guilty as charged. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

24. In analyzing the evidence, please bear in mind the directions I gave you in paragraph 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the State's case against the accused; then the Accused's case; then lastly, the need to consider all the evidence.

(b) The State's Case Against the Accused:

25. The State's case against the accused was based fundamentally on the complainant's (PW1) verbal evidence given in court. I will summarize the same for you. On count no. 1, she said, the accused came to her parent's house at Korovesi, Savusavu on 7 April 2013. She said, the accused was her husband and they had three young children together. She said, at the time, they were separated and living apart. PW1 said, she was with her sister, her brother-in-law, Shanil Ajay Ram (PW3) and their baby, at the time. She said, the accused arrived sometime after 7pm drunk. She said, the accused entered the house armed with a cane knife. She said, when the accused came into the house, he started to hit her with the blunt side of the cane knife. She said, he hit her back and hand. PW1 said, she was shocked and screamed. She said, they talked, and he later dragged her into a bedroom.

26. PW1 said, in the bedroom, the accused forcefully took off her clothes. PW1 said, the accused pushed her onto a bed. PW1 said, she was lying on the bed. PW1 said, she was pushing him away, screaming and crying. PW1 said, he inserted his penis into her vagina. PW1 said, he had a knife on her throat. PW1 said, the accused had forceful sex with her until they were disturbed by her father, who was knocking on the bedroom door. PW1 said, the accused stood up and opened the door. PW1 said, her father (PW2) came and asked what was happening. PW1 said, the accused told him, "he came to take his wife". The above is a summary of PW1's evidence on the two counts.
27. Having said the above, a disturbing episode happened in this trial. While giving evidence, the complainant (PW1) wanted to withdraw her case from the court. She told the court, nothing much happened in the bedroom. You were then excused from the courtroom to enable the court to talk to counsel for the State and the Defence on the matter. As a matter of law, it is not within the power of a witness or complainant to withdraw a criminal case from the High Court, while a matter was being tried. That power belongs to the Learned Director of Public Prosecution exercising his power under Section 49 of the Criminal Procedure Act 2009 by entering a nolle prosequi at any stage of the proceeding before a conviction or judgment is entered. Later, the court reconvened and the complainant gave her evidence, as summarized above.
28. However, the above behavior does raise the question of why did PW1 want to withdraw her case during the trial? Was she telling the truth? Was she telling the untruth? Or was she confused? You have watched her give evidence in the courtroom. You have observed her demeanour. How you answer the above questions is entirely a matter for you.

(c) **The Accused's Case:**

29. I have summarized the accused's case to you in paragraphs 21, 22 and 23 hereof. He basically denied the allegations against him. You have watched him give evidence in the courtroom. You have observed his demeanour in the courtroom. If you think he was telling the truth, and you accept his evidence, you must find him not guilty as charged. If otherwise, consider the strength of the State's case as a whole, and make a decision accordingly. It is a matter entirely for you.

(d) Considering All the Evidence Together:

30. The prosecution called four witnesses:
- (i) Ms. Vidya Wati (PW1);
 - (ii) Mr. Rajendra Prasad (PW2);
 - (iii) Mr. Shanil Ajay Ram (PW3) and
 - (iv) Mr. John Prasad (PW4).
31. The defence called one witness.
- (i) Mr Atish Chand Maharaj (DW1).
32. You have a total of five witnesses, four from the prosecution and one from the defence, on whose evidence, you will have to make a decision. You must consider all the evidence together. You must compare and analyze them. If I didn't mention a piece of evidence you consider important, please take it on board in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his or her evidence, in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his or her evidence, in your deliberation. You are the judges of fact.

I. SUMMARY

33. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.
34. Your possible opinions are as follows:
- (i) Count No. 1 Criminal Intimidation - Guilty or Not Guilty
 - (ii) Count No. 2 Rape - Guilty or Not Guilty

35. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.



Salesi Temo
JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Labasa**
Solicitor for the Accused : **Office of Maqbool & Company, Barristers & Solicitors, Labasa**