

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 176 of 2015

STATE

V

AMIT KRISHNA GOUNDAR

Counsel : Ms. S. Kiran for the State.
: Ms. N. Sharma with Ms. R. Nambainivalu for the
Accused.

Dates of Hearing : 14, 15 May, 2018
Closing Speeches : 16 May, 2018
Date of Summing Up : 17 May, 2018

SUMMING UP

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

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.
8. During the closing speeches the learned Defence Counsel told you that the State had not called any expert to give evidence about the mental impairment of the complainant. I direct you to disregard this submission. It is not for the defence or anyone to suggest how the State should present its case. Furthermore, you also heard the State Counsel in her closing speech make reference to the phrase “mentally impaired”. The evidence was that

the complainant was “intellectually impaired” and not “mentally impaired” as suggested by counsel.

BURDEN OF PROOF AND STANDARD OF PROOF

9. 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.
10. 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.
11. 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.
12. 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.
13. 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.

AMENDED INFORMATION

14. The accused is charged with one count of rape and one count of criminal intimidation. (A copy of the amended information is with you).

COUNT ONE

Statement of Offence

RAPE: Contrary to section 207 (1) & (2) (a) of the Crimes Act 2009.

Particulars of Offence

AMIT KRISHNA GOUNDAR on the 14th day of June, 2015 at Nadi in the Western Division, penetrated the vagina of “SK” with his penis without her consent.

COUNT TWO

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to section 375 (2) (a) of the Crimes Act.

Particulars of Offence

AMIT KRISHNA GOUNDAR on the 14th day of June, 2015 at Nadi in the Western Division without lawful excuse and with intent to cause alarm to “SK” threatened the said “SK” with a cane knife.

15. To prove the first 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 “SK” with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant “SK” was not consenting or didn’t care if she was not consenting at the time.

16. 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.

17. The first element of the offence of rape is concerned with the identity of the person who allegedly committed the offence.

18. The second element is the act of penetration of the complainant's vagina by the accused with his penis.
19. 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.
20. 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.
21. 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.
22. 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.
23. As a matter of law, I have to direct you that an offence of sexual nature as in this case the first count does 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. In this trial the accused has denied all the elements of the offence of rape he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time that is on 14th of June, 2015.
25. To prove the second count the prosecution must prove the following elements of the offence of criminal intimidation beyond reasonable doubt:
- (a) The accused;
 - (b) Without lawful excuse;
 - (c) Threatened to injure "SK" with a cane knife;
 - (d) With intent to cause alarm to her.
26. In respect of the count of criminal intimidation the accused has denied all the elements of the offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had without lawful excuse threatened to injure the complainant with a cane knife with intent to cause alarm to her.
27. If you are satisfied that the prosecution has proved all the elements of the offence of criminal intimidation beyond reasonable doubt, then you must find the accused guilty of the offence of criminal intimidation. However, if you have a reasonable doubt in respect of any elements of the offence of criminal intimidation then you must find the accused not guilty of the second count.
28. In this case, the accused is charged with two offences, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.

29. You must be satisfied that the prosecution has proved all the elements of both the offences beyond reasonable doubt in order for you to find the accused guilty of either or both the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or both the offences, then you must find the accused not guilty.

FINAL ADMITTED FACTS

30. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as Final Admitted Facts.
31. The admitted facts are as follows:
1. *“SK” the victim in this case was 14 years and 7 months old on the 14th of June, 2015, being born on the 2nd of November, 2000.*
 2. *Amit Krishna Goundar is the step father of the victim who was 32 years of age in the year 2015.*
 3. *Amit Krishna Goundar has been in a de-facto relationship with the victim’s mother Muni Kanta since 2012.*
 4. *On the 14th of June, 2015, “SK”, Muni Kanta, Amit Krishna Goundar with one Kavish Krishna and Krish Sidharth resided in the same house at Mulomulo, Nadi.*
 5. *“SK” has been attending the Nadi Special School in June, 2015.*
 6. *On the 14th June 2015, Muni Kanta left the house to work about 7am.*
 7. *On the 14th of June, 2015 Amit Krishna Goundar returned home from work at around 8am.*
 8. *On the 1st of July, 2015 Ram Krishna (“Sk’s father) reported an alleged case of rape against Amit Krishna Goundar at the Nadi Police Station.*
32. From the admitted facts you will have no problems in accepting the above as proven beyond reasonable doubt and you can rely on it.

33. 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 minds. 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

34. The prosecution called three (3) witnesses to prove its case against the accused.
35. The first prosecution witness was the complainant "SK" who informed the court that she was a student of Nadi Special School who lived at Mulomulo, Nadi with her mother, her step father the accused and her two brothers.
36. On 14 June, 2015 the complainant's mother left home for work at 7am and the accused came home from work at about 8am. After a while the accused gave some money to her brothers to go to the shop to buy sweets the complainant was left in the house with the accused.
37. The complainant further stated that the accused had inserted his private part into her private part but was unable to recall the name of the accused's private part. However, she was able to draw on paper which was tendered as prosecution exhibit no. 1. The complainant explained the private part of the accused was from where he urinates. According to the complainant the accused opened her clothes and inserted his penis into her vagina. As a result of what the accused had done she felt bad that she had lost her virginity, the penetration was painful and blood had come out of her vagina.

38. The complainant tried to go out to tell someone about what the accused had done to her but the accused threatened her with a cane knife saying that he will chop her if she told anyone about what he had done to her. The complainant was afraid when she saw the cane knife.
39. The complainant stated that she did not allow the accused to insert his penis in her vagina.
40. Next day she went to school where she told her teacher Ranjini that she had told her mother what the accused had done to her but her mother did not believe her and had hit her with a comb. Upon hearing this, the teacher took her to the Head Teacher Reena.
41. The complainant informed the Head Teacher that the accused had raped her and then she explained what all had happened to her. Thereafter the teacher informed the Social Welfare Department.
42. The complainant's father reported the matter to the police she recognized the accused in court.
43. In cross examination the complainant maintained that the accused had given money to her brothers and had sent them to the shop to buy sweets and that the accused had not slept although he had come home from work.
44. The complainant denied that the accused had scolded her for being noisy on the day of the incident and that she did not tell her brothers upon their return from the shop that she had been raped by the accused. The complainant stated that the landlord was not staying in the same compound with them she had wanted to go and tell the landlord or anyone else about what the accused had done to her but she did not since the accused had threatened her with the knife.

45. The complainant agreed that after her brothers came home the accused was holding the knife and the accused had picked the knife when he saw her brothers coming home.
46. The complainant stated that she was raped in the bedroom when she went to fold the clothes. She could not shout for help because the accused had put a cloth in her mouth. She denied that on one occasion without telling anyone she had gone to meet her biological father. She also denied being slapped by the accused for meeting her biological father without informing the accused or her mother.
47. When the complainant went to school she informed her teacher Ranjini that her mother had hit her but she disagreed telling the teacher that the reason why she was hit by her mother was she did not do the housework.
48. The complainant was referred to the police statement she had given to police on 1 July, 2015 when facts were fresh in her mind she agreed that she had told the police that *"Amit's nunni was hard and he put his nunni inside her nunni"*.
49. The complainant agreed that in her evidence she told the court that she did not know what the accused private part was called and also its name in Hindi.

Madam and Gentlemen Assessors

50. I will give you a direction on how to consider the police statement of the complainant with her evidence given in court a little later (at paragraph 74).
51. When the complainant was folding clothes in the bedroom the accused came and started shutting the door when she asked him why he was doing that the accused did not reply and then raped her.

52. The complainant maintained the accused had raped her and also had threatened her with a cane knife.
53. In re-examination the complainant clarified that when she was giving evidence she could not recall the word "*nunni*".
54. The second prosecution witness was Ranjini Kumar the complainant's Class Teacher. This witness has been teaching at the Nadi Special School for the past 7 years. She informed the court that the complainant was her student for the last 4 years in Vocational Girls Class. The complainant was intellectually impaired and a slow learner academically.
55. On 15 June, 2015 at about 9 am the witness was in school the complainant came late to school. She observed the complainant was in a mess, her hair was untidy and her uniform in particular her top was not tucked in properly.
56. The witness asked the complainant why she came to school like that, she was informed that the complainant had a fight with her mother because she did not do some household chores. The witness further asked her if there was anything else she wanted to tell her but the complainant was not forthcoming so the complainant was referred to Pravin Reena Devi who was the Girl's Counselor. The reason for the referral was that the complainant was changing her story about what had happened.
57. The witness together with the Girls Counselor assured the complainant that whatever she tells them will not be shared with anyone. The complainant then told them that her mother had seen her with her step father that night that is why she had a fight with her mother in the morning.
58. In cross examination the witness stated that at first the complainant told her that she did not do the household chores that is why her mother had

smacked her. Upon further questioning the complainant told the witness that she and her mother had a fight after which the complainant was quiet so the witness took her to the Girl's Counselor. The witness agreed that in the presence of the Counselor the complainant was changing her story that she fought with her mother since household chores were not done, apart from this, the complainant informed the teacher that her mother saw her with her step father the previous night.

59. In re-examination the witness clarified that the complainant was a quiet and reserved child who hardly shared anything with the teachers.
60. The final prosecution witness was Pravin Reena Devi, a School Teacher at Nadi Special School who has 27 years of teaching experience out of which she spent 5 years teaching at the Nadi Special School. The witness was given the responsibility to be in charge of senior girls. On 15 June, 2015 the witness had a meeting with the complainant in the school.
61. The complainant was brought to her by the complainant's Class Teacher Mrs. Ranjini Kumar on that day she noticed the complainant's dressing was a mess not neat, her top was pulled out and her hair was not done properly as well.
62. The witness took the complainant to a separate room it took a long time for the witness to normalize the complainant and to get her to say what had happened to her.
63. The complainant said that her father touches her private part when her mother was asleep and that he would come to her and also on Sunday 14th June while she was having her shower her father saw her naked and also her mother saw her with her father.
64. The complainant was then referred to the Head Teacher of the School.

Madam and Gentlemen Assessors

65. 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 special needs child not to complain to her School Teachers that the accused had raped her. 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.
66. 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 School Teachers that she had been raped by the accused on 14 June, 2015.
67. This is commonly known as recent complaint evidence. The evidence given by Ranjini Kumar and Pravin Reena Devi is not evidence as to what actually happened between the complainant and the accused since both the Teachers were not present and did not see what had happened between the accused and the complainant.
68. 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 who was an intellectually impaired and a slow learner complained to her School Teachers about what the accused had done to her although she did not say that she had been raped by the accused she had complained the next day of 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 brothers when they came home from the shop or to her teachers that she had been raped by the

accused and also when talking to her teachers the complainant was changing her story therefore she should not be believed.

69. 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.
70. In cross examination the witness stated that the complainant did not change her story from what she had told her Class Teacher. The complainant kept quiet for long which prompted the witness to tell the complainant to tell her what had really happened so that the witness could help her.
71. The witness agreed the complainant had told her that she had fought with her mother for not doing her housework. Thereafter the complainant changed her story to say that her mother had seen her with her step father the previous night. The witness also agreed the complainant had again changed her story to say that her step father comes at night and touches her private part when her mother was asleep. Then on Sunday when the complainant was having her shower her step father saw her naked.
72. The witness was referred to her police statement she had given to the police when everything was fresh in her mind. The witness was referred to the last line of the statement which was:
- “also another day her step father saw her having shower he then came to her and touch her body.”*
73. The witness agreed that in her evidence she had stated that her step father had seen the complainant naked on Sunday 14 June but when she gave her

police statement nowhere in the police statement it was stated that it was Sunday, 14 June, 2015.

Madam and Gentlemen Assessors

74. The learned counsel for the accused in this regard was cross examining the complainant and the final prosecution witness about some inconsistencies in the statement they gave to the police immediately after the incident when facts were fresh in their mind with their evidence in court. I will now explain to you the purpose of considering the previously made statement of the witnesses with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witnesses are believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.
75. 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.
76. 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.
77. In re-examination the witness clarified that the complainant was talking in Hindi language so when she translated the word "last day" she thought it was Sunday.

78. In respect of the complainant changing her story the witness clarified that since the complainant was a special needs child she paused and then said something then waited and then said something. Furthermore, the witness stated that the complainant took time to answer, waited for a while, gave a blank look and then answered.
79. This was the prosecution case.

DEFENCE CASE

Madam and Gentlemen Assessors

80. 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.
81. According to the line of cross examination, the accused takes up the position that he did not penetrate the vagina of the complainant with his penis without her consent or threatened to injure her with a cane knife with the intent to cause alarm to the complainant. On 14 June, 2015 when he came home after doing night shift he slept. During the day he was awoken by the noise made by the complainant so he had scolded her. He also did not give any money or had sent the complainant's brothers to the shop to buy sweets they had gone on their own. The allegations were not true the accused had once slapped the complainant for meeting her biological father without informing him or her mother.
82. This was the defence case.

ANALYSIS

83. The prosecution alleges that on 14 June 2015 the complainant was alone at home after the accused had sent her two brothers to the shop to buy sweets. The accused after taking off the clothes of the complainant had inserted his penis into the vagina of the complainant without her consent. The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
84. The complainant suffered pain and she saw blood coming out of her vagina she wanted to tell the landlord who was living in the neighbourhood or someone about what the accused had done to her but she did not because the accused threatened her with the cane knife that he will chop her if she told anyone about what he had done to her. The complainant was afraid when she saw the cane knife. When the accused saw the complainant's brothers coming home he showed the complainant the knife which was in his hand.
85. The next day the complainant went to school the teachers noticed that she was not properly dressed and her hair was messy. Upon questioning by the teachers the complainant told her teachers she had a fight with her mother because she did not do some household chores, also her mother had seen her with her step father that night that is why she had a fight with her mother in the morning. The complainant also said that her father touches her private part when her mother was asleep and while she was having her shower her father saw her naked.
86. The prosecution also states that the complainant was a special needs child who was a quiet and reserved child who hardly shared anything with the teachers. She was also a slow learner with intellectual impairment, however, despite all this she was able to tell her teachers that the accused had done something to her.

87. The defence takes up the position that the accused did not commit the offences as alleged. On 14 June, 2015 the accused came home from night shift and had slept, the complainant was at home and she was noisy so he scolded her. The two brothers of the complainant were not sent by the accused to the shop they had gone on their own. The complainant had once gone to meet her biological father without informing her mother or the accused as a result the accused had slapped the complainant.

Madam & Gentlemen Assessors

88. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
89. 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.
90. 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.

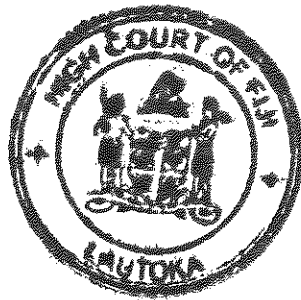
91. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness 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.
92. 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.
93. 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.
94. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
95. In this case, the accused is charged with one (1) count of rape and one (1) count of criminal intimidation, as mentioned earlier you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.
96. Your possible opinions are:-

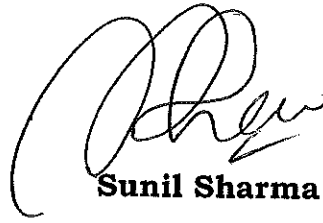
Count One: **RAPE**: GUILTY OR NOT GUILTY

Count Two: **CRIMINAL INTIMIDATION**: GUILTY OR NOT GUILTY

Madam and Gentlemen Assessors

97. 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.
98. 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
17 May, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.