

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No: HAC155 OF 2015

BETWEEN:

THE STATE

AND:

GANGA RAM

Counsel: Mr S Seruvatu for the State
Ms S Veitokiyaki & Mr J Prakashan for the Accused

Date of Hearing: 21-22 May 2018

Date of Summing Up: 22 May 2018

SUMMING UP

[1] Madam and Gentleman Assessors, it is now my duty to sum up the case to you. We have differing roles in this trial. I have to give you directions on the law and you must accept those directions. You are to decide the facts applying those directions and to give me your opinions as to the Accused's guilt or innocence.

[2] In going through the evidence I may express an opinion. If you do not agree with that opinion, you are free to ignore it and to form another view of that piece of evidence. I may omit some evidence which you think significant. Nonetheless you may give that

evidence such weight as you consider appropriate. You are free to form your own opinions.

- [3] At the end of this summing up, and after you have given your individual opinions, the final decision on the facts rests with me. I am not bound to conform to your opinions. However in arriving at my judgment I shall place much reliance upon your opinions.
- [4] The burden of proof rests throughout the trial upon the State. In our system of justice there is a presumption of innocence in favour of an Accused which is enshrined in the Constitution. The State brings the charge against the Accused. Therefore it is for the State to prove the charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.
- [5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty. If you entertain a reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty.
- [6] You must decide this case upon the evidence presented to you. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [7] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state his or her individual opinions orally on the charge against the Accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.
- [8] However it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions.
- [9] Those opinions must be based solely upon the evidence. Evidence consists of sworn testimony of the witnesses, what each witness has told the court in the witness box, as

well as the exhibits tendered in court. In addition, you will consider the evidence that went in by consent of both parties, listed in the paper headed admitted facts. Following correct procedure the two sides have agreed certain issues or facts. These are therefore not in dispute in this trial. Such agreements properly help to shorten the proceedings. Concentrate on the issues that are disputed.

- [10] Neither speculation nor theories of one's own constitute evidence. Media coverage, idle talk, or gossips are similarly not evidence. Put out of your mind when considering your opinions, anything you may have read in the newspapers about this case. Focus solely on the evidence which you have seen, heard, or examined in this court.
- [11] This summing up is not evidence either, nor are counsel's opening or closing addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [12] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness' answer is evidence. If he or she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [13] In arriving at your opinions, use the common sense you bring to bear in your daily lives, at home and at work. Observe and assess the witnesses' evidence and demeanour together with all of the evidence in the case. You can accept part of a witness's testimony 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 be wide of the mark about another.
- [14] If you have formed a moral opinion on the conduct alleged in this case, put that to one side. Consistent with your oath, you should put away both prejudice and sympathy. Approach your assessment of the evidence dispassionately. Bring a cool detachment to your task of examining whether the case against the Accused has been proved before you, proved with evidence on the charge.
- [15] The Accused was charged with two counts. The prosecution led no evidence on count 1. After the close of the prosecution case, I acquitted the Accused on count 1. You are to

consider count 2 only. The fact that he has been acquitted on count 1 is now known to you, but it can have no bearing on your decision on count 2. Count 2 is a representative count. What that means is that the prosecution must prove beyond reasonable doubt that one of the incidents of the alleged rape occurred between the period 1 July 2010 and 31 December 2010. It is not necessary for the prosecution to prove all the alleged incidents of rape that occurred during that period.

- [16] I turn now to deal with what the prosecution must satisfy to prove rape.
- [17] Firstly, it must be proved beyond reasonable doubt that the Accused had unlawful carnal knowledge, that is, unlawful sexual intercourse with the complainant, Jyoti Radhika Mani. I shall refer to her throughout as the complainant. The physical act of intercourse must be proved, that is, that the Accused's penis penetrated the complainant's vagina. The slightest penetration is sufficient. It is not necessary to prove ejaculation. The first issue for you to consider is whether the Accused penetrated the vagina of the complainant with his penis on one occasion between July 2010 and December 2010.
- [18] Secondly, it must be proved that when the Accused had unlawful sexual intercourse with the complainant he did so without her consent. The term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it obtained by force or by threat or intimidation or by fear of bodily harm or by exercise of authority. The second issue for you to consider is whether the complainant did not freely and voluntarily gave consent when the physical act of intercourse occurred.
- [19] Thirdly, it must be proved that the Accused either knew that the complainant did not consent or was reckless as to whether she consented. The Accused was reckless as to whether the complainant consented to sexual intercourse if you are sure that he realised there was a risk that she was not consenting and carried on anyway when in the circumstances known to him it was unreasonable to do so. If you believe the complainant

that the Accused used force and threat to get her consent to sexual intercourse, then you may find that the Accused either knew that the complainant did not consent or was reckless as to whether she consented.

[20] The resolution of all three elements of rape is dependent upon who you believe, bearing in mind the prosecution must satisfy you of the Accused's guilt beyond reasonable doubt.

[21] I turn now to summarise the evidence. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

[22] The first prosecution witness was the complainant, Jyoti Radhika Mani. It is not in dispute that she is also known as Jyoti Radhika Devi. She is now 26 years old. She said the Accused is her uncle, that is, her dad's cousin brother. In 2010 she was in high school. She used to work during the afternoons, weekends and school holidays at the Accused's house doing chores for her bus fares to school. Both lived in the same community in Namata. His house was not too far away from her home. She used to walk to his home. Between July 2010 and December 2010 she said the Accused forced her to have sexual intercourse with him at his home. She described the incidents as follows. The Accused forcefully took off her clothes, came on top of her and inserted his penis into her vagina. She could feel his penis into her vagina. He threatened to kill her if she complained to anyone, but she did not know whether he was serious with his threat. She did not shout because she was scared. He was older than her and she was still a school student and what if her parents would come to know about it. The incidents of sexual intercourse using force occurred about 6 times between July 2010 and December 2010. She did not complain to anyone until her neighbour suspected that she was pregnant and questioned her. She implicated the Accused as the person who made her pregnant.

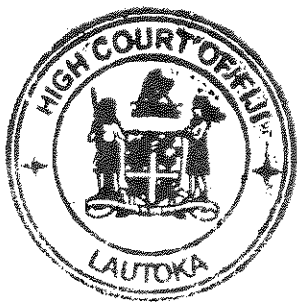
- [23] The complainant was cross examined regarding her police statement dated 28 May 2011 (DE1) to show inconsistency in her evidence and the statement she made to police. In DE1 she only mentioned about one incident of rape that occurred on 22 January 2011. She did not mention about the incidents between July 2010 and December 2010. She said what she told the court is the truth. She cannot recall the incident that occurred on 22 January 2011.
- [24] As a matter of law, I must direct you that what a witness says on oath are evidence. In other words, what the complainant said in DE1 is not evidence. However, previous statements are often used to challenge witnesses' credibility and reliability because a previous inconsistent statement may indicate that a witness has told a different story previously and are therefore not reliable. It is for you to judge the extent and importance of any inconsistency. If you conclude the complainant has been inconsistent on an important matter, you should treat her account with considerable care. If, however, you are sure that the evidence of the complainant is true in whole or in part, then it is evidence you are entitled to consider when deciding your opinions.
- [25] The second witness for the prosecution was Ashika Anjani Devi. She is the neighbour whom the complainant revealed on 22 May 2011 that she was made pregnant by the Accused.
- [26] The third prosecution witness was Raghwa, the complainant's father. He came to know about the complainant's pregnancy in May 2011. The complainant revealed to her father that the Accused was responsible for her pregnancy. He took the complainant to a police station and reported the matter.
- [27] Evidence was led from Ms Devi and Mr Raghwa to show the complaint the complainant made to them. In a case of sexual offence, recent complaint evidence is led to show consistency on the part of the complainant. But you heard from the complainant that she did not make any complains to anyone after the alleged incidents as she was scared of the consequences of reporting the incidents. She revealed that she was pregnant and that the Accused was responsible after prodding by Ms Devi. The complainant did not tell either

Ms Devi or her father that the Accused forced her to have sexual intercourse with him. My direction to you is that while the complaint evidence is before you, very little assistance however can be derived from this particular evidence for the reasons I have given.

- [28] The Accused gave evidence although he was not obliged to give evidence. He does not have to prove his innocence. He does not have to prove anything. However, he has chosen to give evidence and you must take what he has said into account when considering the issues of fact which you have to determine. It is for you to decide whether you believe the evidence of the Accused or whether it may be true. Even if you do not believe his evidence that does not mean that he is guilty. You must be satisfied of guilt based on the evidence led by the prosecution.
- [29] The account given by the Accused is different to what the complainant has said in her evidence. His evidence is that he only had sexual intercourse once with the complainant in January 2011, and that was consensual. His evidence is that he did not have any sexual relationship with the complainant between July 2010 and December 2010, except on one occasion in December when she hugged him. He developed feelings for her afterwards and in January 2011, he had sex with her. They got undressed themselves and she willingly had sex with him. He admits he is the father of her child but he denies having sexual intercourse with the complainant using force and without her consent between July 2010 and December 2010.
- [30] The witnesses called in the trial had to rely on their memory of events of nearly 8 years ago. You should make allowances for the fact that with the passage of time memories fade. Witnesses, whoever they may be, cannot be expected to remember with crystal clarity events which occurred nearly 8 years ago. Sometimes the passage of time even plays tricks on memories.
- [31] The defence case is of denial of the charge. If you believe the complainant's account and if you feel sure that one incident of forced sexual intercourse took place between the complainant and the Accused between July 2010 and December 2010, and the Accused

either knew that she did not consent or was reckless as to whether she consented, you may find the Accused guilty of rape. If you disbelieve the complainant, then you must find the Accused not guilty of the charge. If you have a reasonable doubt you also must find the Accused not guilty.

[32] Your opinion would be either guilty or not guilty. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them. Please now retire to deliberate on your opinions.



Daniel Goundar

JUDGE

At Lautoka

22 May 2018

Solicitors:

Office of the Director of Public Prosecutions for the State

Pillai, Naidu & Associates for the Accused